

Risk Management in Canadian Education

General Editors: James P. Carwana, B.A., LL.B., and Bruce Hutchison, B.A., LL.B.
Consulting Editor: Justice Marvin A. Zuker, Ontario Court of Justice

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• ONTARIO EDUCATION ACT AMENDMENTS TARGET CYBER-BULLIES BEYOND THE SCHOOLYARD •

Robert H. Brent
Thomson, Rogers, Toronto

Amid growing concern over incidents of cyber-bullying that have victimized both students and educators, Ontario's Government has introduced amendments to the province's *Education Act* to make bullying an express ground for possible student discipline.

At the same time, the proposed amendments contained in Bill 212 (*Education Amendment Act (Progressive Discipline and School Safety)*, 2007) are intended to shift Ontario School Boards' focus from "zero tolerance" to "progressive discipline" in applying disciplinary measures first introduced as part of the province's *Safe Schools Act*.

Since its inception in 2000, the *Safe Schools Act*, S.O. 2000, c. 12 (reflected as Part XIII of the *Education Act*, R.S.O. 1990, c. E.2, as amended) has been a lightning rod for criticism and apparent confusion throughout the province, culminating in a 2005 Ontario Human Rights Commission complaint, against both the Ontario Ministry of Education and Toronto District School Board, alleging that the *Education Act* and school board policies discriminated against students with disabilities and from racial minorities.

The Province struck a Safe Schools Action Team with a mandate to implement a comprehensive safe schools plan, including a complete review of the *Safe Schools Act* and anti-bullying initiatives.

This all comes at a time when educators are facing a host of new challenges to maintaining safe schools. Cell phones, Internet chat rooms and text messaging have become new weapons in the hands of bullies, used to swarm and torment their victims. Facilitated by these new technologies, "fight clubs" have sprung up at schools in several well-publicized instances across North America, with video of the

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Please address all editorial inquiries to:

Verna Milner, Journals Editor
LexisNexis Canada Inc.
Tel. (905) 479-2665; Toll-Free Tel. 1-800-668-6481
Fax (905) 479-2826; Toll-Free Fax 1-800-461-3275
Internet e-mail: rmce@lexisnexis.ca.

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brawls immediately posted online for all to see. Of course, such cyber-bullying only magnifies the face-to-face presence of bullies in Ontario's schoolyards, where one in three students reports being victimized.

Ontario Education Minister Kathleen Wynne acknowledged the challenge posed by bullying of all types, in introducing Bill 212 for second reading on April 25, 2007, stating:

One of the issues that came up most often after I introduced this legislation in the House was cyber-bullying, and the changes to the legislation would include the possibility for schools to respond to behaviours that may not technically take place in school but that would have an adverse effect on school climate. This is a reality our students are dealing with... bullying is not currently listed as an infraction, and I believe it's about time we recognize the seriousness of these behaviours.

Beyond its review of the *Safe Schools Act*, the mandate of the Safe Schools Action Team included development of a province-wide bullying prevention plan. In November 2005, the Action Team released *Shaping safer schools: A bullying prevention action plan* (Toronto: Queen's Printer for Ontario, 2005) (the "Prevention Plan").

The Prevention Plan broadly defined the term "bullying" to mean (at p. 12):

...a dynamic of unhealthy interaction. It is a form of repeated aggression used from a position of power. It can be physical, verbal, or social.

This last aspect, social bullying, includes the emerging area of cyber-bullying, as technology tests the limits of educators to respond to — and even detect — the use by students of an array of new media to harass and intimidate their peers, *both at school and after school hours*.

The *Safe Schools Act* provided for "mandatory" suspension or expulsion of a student who committed specified acts "while he or she is at school or engaged in a school-related activity". This called into question how the phrase "school-related activity" might be interpreted for the purposes of imposing discipline under the *Education Act*, in response to cyber-bullying that occurs off school property and outside school hours.

In a subtle but significant amendment, beyond expressly targeting bullying as a ground for suspension, Bill 212 would permit a principal to consider suspending and/or recommending expulsion of a student in relation to a student's activities "while at school, at a school-related activity or in other

circumstances where engaging in the activity will have an impact on the school climate" [emphasis added]. (The amendments under Bill 212 also retain a School Board's ability to establish its own policies identifying conduct that can lead to discipline.)

This clearly opens the door for a student to be disciplined for conduct that occurs off school property or outside school hours, such as cyber-bullying from a cell phone or home computer, where that activity will have an impact on the school climate.

The reference to "activity that will impact on the school climate" appears to follow U.S. judicial precedent, weighing the competing interests of student free speech and school discipline, which has upheld the ability of School Boards to discipline students for off-school cyber-bullying where the student's conduct "substantially disrupts school operations or interferes with the rights of others" (see, for example, *Layshock v. Hermitage Sch. Dist.*, 2006 U.S. Dist. LEXIS 3602 (W.D. Pa.), upholding discipline for a student's online parody of a principal).

To date, there does not appear to be any comparable Canadian legal precedent involving cyber-bullying. That would seem to be only a matter of time, given the clear prevalence and impact of bullying in Ontario schools. School Boards across the Greater Toronto Area have made headlines in recent months for suspending students that posted sexually explicit, derogatory and demeaning remarks about principals and teachers. In another noteworthy incident, a group of elementary students were forced to apologize after videotaping the tripping and taunting of a disabled student and posting it online.

The Prevention Plan paints a stark picture of the impact that bullying of any sort has in Ontario's schools, noting that in a recent survey approximately one in three students in Grades seven to 12 reported having been bullied in school. More recent statistics, drawn from the 2005 OSDUS (*Ontario Student Drug Use Survey*) *Mental Health and Well-Being Report* (Toronto: Centre for Addiction and Mental Health, 2006), a province-wide survey of Grade seven to 12 students conducted by the Centre for Addiction and Mental Health, include:

- among all students, 31 per cent (representing about 310,000 students in Ontario) reported being bullied at school since the previous September;
- 27 per cent of students reported bullying others at school;
- the most common form of bullying was verbal (25 per cent), while four per cent of students said they had been physically bullied and 2.5 per cent said they were victims of theft or vandalism;

- about ten per cent of students reported being bullied on a daily or weekly basis, and about 20 per cent said they were bullied monthly or less often;
- among all students, about two per cent (representing about 18,200 students across Ontario) reported using a crisis helpline to discuss a problem during the previous year;
- generally, 36 per cent of students reported a feeling of constantly being under stress.

While the foregoing statistics relate to traditional bullying in the schoolyard, a new and complicated challenge has emerged to face parents and educators in the form of cyber-bullying. One cannot underestimate the role that technology plays today in the lives of students in the Ontario school system. As stated in an article posted in *AboutKidsHealth*, an online newsletter of The Hospital for Sick Children:

The Internet has taken on a central role in teenage culture, creating a new landscape for social interaction. Lunchroom and after-school cliques have been supplemented or replaced with on-line chat rooms, instant messaging (IM), bulletin boards, e-mail, cell phone text messages and digital photographs, personal Web sites and blogging (Web logs or personal diaries on a Web site).

According to the same article, a 2002 Environics survey reported that 99 per cent of Canadian students had used the Internet, while a study by the Media Awareness Network found that nearly 60 per cent of Canadians aged nine to 17 had used IM and chat rooms. At the same time, the Media Awareness Study found that 25 per cent of young Canadian Internet users had received e-mails with hateful messages about others. According to the Sick Kids article, about half of children who report being bullied at school also report being harassed online.

The most extreme examples of cyber-bullying have in some cases become part of our popular culture or have received wide exposure in the press, in themselves demonstrating the power of the Internet. In perhaps the best-known case, an otherwise ordinary teen in Trois-Rivières, Québec, Ghyslain Raza filmed himself (for his own entertainment) in his school's audio-visual (AV) lab, fighting invisible enemies with a "light sabre" fashioned out of a broomstick, complete with his own sound effects. A few days later, in April 2003, some other students found the video and posted a clip on the Internet. Within weeks, more than 15 million people had downloaded the two-minute clip of Raza — now internationally dubbed and ridiculed as the "Star Wars Kid" — including most of the student body at his school. A Web site dedicated to the clip received more

than 76 million hits. As reported in *The Globe and Mail*, Raza said the experience left him unable to attend school and he was later diagnosed with depression. He eventually settled a lawsuit against the students who posted the clip, for an undisclosed amount.

Experts say such cyber-bullying in many ways is worse than traditional face-to-face schoolyard bullying. The authors of the Sick Kids article explained that the impact of such harassment is two-fold, because of both the inescapable nature and intensity of the attacks:

...Cyber bullying does not end when the child arrives home. Because kids spend so much time on cell phones and the Internet, they are easy targets for cyber-abuse. Bullying can continue even in the privacy of a teen's bedroom, with messages suddenly appearing on the computer or cell phone screen. It can happen at anytime and can be so intrusive that a child or teen feels trapped and helpless. Cyber bullies are like stalkers who don't let up....

The advent of technology has taken bullying to new heights. Cyber bullies are often more vicious and hurtful than in-person bullies, saying things on-line they would never say face to face. The anonymity of on-line harassment gives bullies the power to attack others with little risk of being caught. Using cyber technology to harass also shields bullies from the consequences of their actions. Having no actual physical contact with their victims, the cyber-bully's feelings of empathy and remorse are minimized.

The Ontario Action Team's Prevention Plan acknowledges the emergence of cyber-bullying and recognizes the role that parents have to play in combating this new form of harassment (at p. 20):

Because bullying takes place both on and off school grounds, it is important for parents to understand how to identify potential bullying situations, and to know what courses of action are available to them in those situations. Internet bullying, for example, is on the increase, and parents need the skills and support to recognize it and deal with it appropriately.

However, the Sick Kids article refers to research finding that cyber-bullies tend to have poor relationships and minimal supervision by parents. As a result, the authors conclude, "[t]he role of teachers in combating Internet harassment may be even more critical than that of parents". At the same time, children who are bullied online may not tell their parents, teachers or other adults because they are afraid of losing their computer privileges.

The Prevention Plan stresses the importance in a successful anti-bullying plan of sending a message to the broader school population that bullying will not be ignored, by demonstrating consequences, both as a deterrent to bullies and to instill confidence in other students, who must perceive that action will be taken.

On this basis, the Prevention Plan's overarching recommendation is (at p. 8):

Bullying prevention should be identified as a **priority** for every school board and every school. Every school board in the province should adopt a bullying prevention **policy** and, flowing from that policy, each school in the province should, as a priority, implement an effective bullying prevention **program**. [Emphasis in original.]

The Prevention Plan identifies principals as "the most important person in the school for bullying prevention" (at p. 17) stating that it is essential that every principal identify bullying prevention as a priority and recognize that a "code of silence" often surrounds bullying. For that reason, the Prevention Plan urges that an environment must be established where students are encouraged to identify incidents to educators and view this as "reporting" rather than "tattling" or "ratting" on other students.

The Safe Schools Action Team has built upon those recommendations in its more recent June 2006 report on the *Safe Schools Act*, calling upon Boards to:

- provide support to students and families affected by bullying or acts of violence (*e.g.*, restorative practice, healing circles);
- develop policies to support and protect students who have been bullied or affected by violence including the implementation of safe reporting processes and initiatives that result in students being safe from reprisal; and
- actively engage parents in this process.

Of course, from a risk management perspective, this places an increased onus on School Boards to take such proactive steps, to deal both with the broader issue of bullying and the more narrow and emerging trend toward cyber-bullying. To do otherwise is to invite potential liability in circumstances where students or educators are targeted by cyber-bullies.

[*Editors' note:* Robert H. Brent practises civil and commercial litigation, with an emphasis on disputes involving education, employment law and defamation with the law firm Thomson, Rogers in Toronto.]