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## **SAFER SCHOOLS? SAFER COMMUNITIES?**

### ***Input into the Ministry of Education Safe Schools Act Review Consultations***

Winter 2005-2006

***“Educational policies and practices must be designed to keep students –  
of all abilities - both safe and in school, learning together.”***

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## Overview

The Ontario Coalition for Inclusive Education is a growing and innovative network of people with disabilities, students, families, educators, administrators, advocates and allies across Ontario. Since 1995, we have led collaborative projects, created communication networks and contributed policy analyses. Our work has connected us with schools and families across the province, and with government, teachers' federations and faculties of education.

We have a great deal to contribute to inform schools and families about effective inclusive practices – to prevent discrimination to students with disabilities (in close accordance with the *Ontario Human Rights Code* and the Commission's *Guidelines for Accessible Education*) and to improve academic learning (as outlined in *Education for ALL: the Report of the Expert Panel Literacy and Numeracy Instruction for Students with Special Education Needs, Kindergarten to Grade 6* ). The Coalition too often hears about forced segregation, and discrimination against students with disabilities. And we too seldom hear about universal curriculum design and differentiated instruction really benefiting "all" students. We find ourselves much too often forced to defend some students against exclusion – from effective pedagogy, from placement in regular classrooms, and even from school altogether. The Coalition never hears about students with disabilities presenting a threat in schools by having weapons like guns and knives, or by engaging in criminal activity. Who can argue if the law prevents such harm? But it is a cruel reality that the Safe Schools Act has made Ontario schools *unsafe* for some very vulnerable students – harming them, their families and their communities. Relevant policies are popularly known as "Zero Tolerance". We fear that this legislation has contributed to a climate of increasing *intolerance*, in our schools and communities. Not only can the Coalition tell the Ministry about the impact of the Act, but we can also suggest what needs to be done to change it.

### Draft Monograph #5 – October 2, 1997

Almost three years prior to the introduction of the *Safe Schools Act*, a Ministry of Education document was drafted, which demonstrates that **the government understood and acknowledged this legislation's potential for discrimination – but enacted it anyway.**

*Special Education Draft Monograph No. 5*,<sup>1</sup> states:

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<sup>1</sup> The Monograph is subtitled "Guidelines for the Implementation of the Ministry of Education and Training's Violence-Free Schools Policy with respect to Exceptional Pupils and Others with Special Needs." (October 2, 1997). Please note a later draft of this document – dated November 20, 1997 – has also been circulated.

[s]ome students who have violent outbursts are not wholly responsible for their behaviour. Some students with severe disabilities have varying levels of understanding and controlling acceptable behaviour. These students may need additional support to understand, change, and demonstrate acceptable behaviour consistently over time. . . .

***The ministry is concerned that if such pupils are suspended or expelled when behavioural episodes occur, these pupils will never have access to the education they require to succeed. If suspensions and expulsions are used before other educational strategies are tried, per the IEP, the student will be denied the very type of educational program which has the potential to reduce or even eliminate the pupil's unacceptable behaviour.***

***Just as we would remediate a pupil who fails a mathematical language test, rather than use suspensions or expulsions, we need to review the remedial strategies which can be used when pupils fail to meet behavioural objectives in their IEP. To do otherwise may potentially be viewed as discrimination toward a child due to disability. . . .***

***Exceptional pupils with behavioural and social goals in their IEP may not be able to make a cause-and-effect connection between their behaviour and the "clear consequences of suspension and expulsion. Furthermore, for some students with severe disabilities, it may not be possible for the individual to control their behaviour. For these students, the behaviour may be a way of communicating, rather than a willful act of malice. In this situation, the standard route of suspension leading to expulsion may not only be unfair, but may result in denying pupils who have disabilities access to education to which they are entitled under human rights legislation [emphasis added].<sup>2</sup>***

### **Our attempts to communicate and stop the harm**

There has been much concern expressed ever since the Ministry's own predictions about this legislation came true.<sup>3</sup> The problems have persisted but no changes were made and no remedies found. Eight years have passed since the Ministry of Education outlined the implications in the Monograph. It seems to us that "Safe Schools" was a misunderstood political slogan, with dire consequences.

On November 8<sup>th</sup> 2005, a "consultation" was announced – less than 2 weeks before people in Eastern Ontario were to meet. A Discussion Guide was not provided until after the process was underway. Participants learned on November 19<sup>th</sup> that they would not have the opportunity to make presentations but could provide input through a series of round table discussions." People have told us they felt their voices were drowned out by others, such as the many teachers who sometimes attended sessions. They have expressed concern that the format for discussion did not allow them to contribute their experiences and ideas about issues affecting students with disabilities, in particular. This Consultation process seems to have been re-named "Safer Schools; Safer Communities", since it was first announced. The Coalition for Inclusive Education very

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<sup>2</sup> *Special Education Monograph No. 5* (October 2, 1997) at pp. 3 and 5. Please note that many changes in this document were made in a later version, dated November 20, 1997.

<sup>3</sup> The sections we have quoted above in bold italics make reference to Human Rights implications and must have been removed from Draft Monograph No. 5 between October 2, 1997 and November 20, 1997.

deeply understands that our schools must themselves be respectful communities if the communities they serve are to be worth living in – now and into the future. This means that real reform must occur, at last.

The Coalition has been communicating with the Ministry of Education, MPPs, civil servants, the Ontario Human Rights Commission, and school boards about the problems, ever since the legislation was introduced. On December 4, 2003 we met with Minister of Education, Gerard Kennedy, to ask that the new government change the law. We outlined the problems; the numbers, names and stories of students affected; factors increasing that risk; and with ARCH, we presented him with **A No-Cost Law Reform Proposal** (see pp. 6 - 10). Our requests for meetings with government and action on this issue have been denied.

The Coalition – and many other participants - raised concerns about Safe Schools policies during the **Ontario Human Rights Commission (OHRC) consultation concerning *Educational Accommodation and Disability***. Clarification about the duty to accommodate is available in the **OHRC Guidelines for Accessible Education**.

The Commission itself conducted research concerning possible disproportionate impact of the Safe Schools Act upon students who have a disability or are members of a racial minority.

This summer, the OHRC itself instigated a complaint against both the Toronto District School Board and the Ministry of Education. Terms of a recent settlement with that Board require changes to its “safe schools policies” and students with disabilities. We are very interested in the outcome of the complaint against the Ministry – to see if legislative change will finally be forced.

### **How does this affect the people of Ontario?**

- The Coalition does not hear about expulsions of students who have disabilities. But if they are expelled, we wonder what alternative schooling they can access and what accommodations those settings provide?
- We do hear about students with disabilities being suspended because they exhibit behaviour – for which they have been identified - that is beyond their control and preventable with proper accommodations. Such accommodations may even be promised in the students’ IEPs, but not provided. It is often the families who suffer the consequences, even for a limited number of days – the added stress of having sons and daughters at home, the possible threat to parents’ employment and family finances, the lack of trust in and diminished teamwork with schools, etc.
- Appeals of suspensions often seem pointless, where they are even offered, because they occur after the suspension is already underway. Where the student’s behaviour is serious enough to justify a mandatory suspension, the school board can always say they *chose not to* take the disability into consideration. Where suspension is classed as discretionary, schools *do not have to* consider disability anyway.

- The number of actual expulsions and suspensions is only the proverbial tip of the iceberg. Much more commonly, the Coalition hears about Exclusions, “informal suspensions” and threats.
- Lawyers have provided books, newsletters and training to advise school boards on ways avoid appeals of suspensions and expulsions, with *total exclusions* instead. Jennifer Trepanier, in *Student Discipline: A Guide to the Safe Schools Act* (Toronto: Butterworths, 2003) advises on page 42 that the regulatory exclusion is “an effective tool [for] educators.” John Bell and Jennifer Tremblay, “The *Safe Schools Act* of Ontario” (unpublished) state on page 8: “The advantage now to Boards is that they may deny students access to school property without having to sit as an appellate body to determine the denial to access issues. These provisions will provide a valuable tool for a principal to ‘exclude’ pupils.”
- Exclusions are vastly more devastating for parents than suspensions. Unbearable stress, job loss, economic hardship, institutional placement of the child, and family break-up are some of the consequences of this denial of all access to school – which can last as long as a Principal wishes, perhaps forever, with no chance of appeal. The child may never even set foot on school grounds again.
- Parents are devastated that they be denied access to their children’s school – again at the Principal’s discretion. This may be more likely where there has been disagreement about placement or the provision of accommodations. It makes children who cannot speak for themselves especially vulnerable; who will speak for them about what happens at school?
- The Coalition hears frequently that parents are *threatened* with total exclusion from the school – especially of their child, but also of themselves. **Schools can exert immense control over families by threatening total exclusion of the parent, and especially of the student.** Horror stories abound, among parents, their organizations and networks. The Coalition knows about a teenager who missed high school education altogether; attendance counsellors did not come looking for him. It is a parent’s worse nightmare that their child might be tied to a gurney and taken away from school, as a Windsor student was. Parents have been told they must keep their child at home – for example, when schools delay putting supports in place, because the school cannot protect the student from schoolyard bullies, lest other students will be harmed, when an educational assistant is sick, or when the class is going on a school trip – or else. Parents have been told that the school staff will walk off work if their child even arrives at school – or else. Parents are told that their other children will be pulled out of class because of their brother or sister’s problems – or else. Parents are told they must pick up their child whenever the school has a problem, that they will be interrupted at work, they must buy a cell phone, they must remain home by the phone at all times, and even that the Children’s Aid will be called – or else. Parents can be told they must agree to a segregated placement of their child – or else. It can seem better to comply – even when demands are unreasonable – or else the student will be deemed a danger and be *forever* excluded from school.

- The Coalition is aware that families can face great **pressure to segregate students with disabilities**. Ontario’s educational policy has been that regular class is to be the placement of first resort for exceptional students since 1994. But parents who ask that their children receive support to learn in regular classrooms may be particularly vulnerable to Safe Schools Act threats. Regulation 181 states that regular class placement should be considered at every annual review - but schools use their power to define student needs and to shape parental expectations concerning the system. If the teacher doesn’t care; if the school fails to accommodate; if the principal threatens; if the parents can be intimidated... in practice, it is all too easy to send the student away. Students with developmental disabilities are segregated more than any other exceptional students in Ontario, regardless of the law. For the same reason French immersion works, it is counter-productive to place groups of “problem” students together without role models! Of course, boards can say they are keeping those segregated classrooms and schools “safe” by suspending the very students for whom they were intended.
- When schools send students home, they free themselves of any obligation to either educate or accommodate that student.
- Until last year, Ontario rewarded school boards with thousands of dollars in extra special education funding called **Intensive Support Amount (ISA)** – for every student documented as having high needs. Schools did not need to spend this money on those students; ironically, with proper support, the student might become ineligible for the very funding that paid for it. What’s more, schools may keep the money even when they banish the student from school altogether. The Ministry actually found that millions of dollars of this money were not spent, but put into school board reserves. To receive ISA money for students labeled with autism, learning disabilities, behavioural exceptionalities and developmental disabilities, schools had to document lack of impulse control, which can also justify expulsion, suspension and exclusion under the Safe Schools policies. Almost 47,000 Ontario students were made vulnerable by the time this process ended in 2004 – an increase of over 32,000 in two years. The Minister stopped this funding process, but the documentation may remain in student files, continuing to limit their educational opportunities. Who knows what has become of these students?

Students validated for ISA 2 and 3	2001-02	2003-04
Total #	23,126 students	54,084 students
Autism	12.1%	12.6%
Learning Disability	11.8%	19.7%
Behaviour	17.2%	25.7%
Developmental Disability	22.1%	28.3%
Total of these 4 ISA Profiles	63.2%	86.3%
<b>TOTAL NUMBER “at risk”</b>	<b>14,616 students</b>	<b>46,674 students</b>

- **Special Incidence Portion (SIP)** remains a part of special education funding. It relies on similar documentation of dangerous behaviour, for which the Safe Schools Act may apply. Last school year, the Ministry paid school boards

\$10,456,934.50, affecting potentially 387 students deemed to need at least two adults with them at all times, to protect themselves and others. This amount has risen from \$4,418,469 in 2003-04, and from \$2,261,124 in 2001-02. We wonder if the ministry tracks these students, and whether boards still get SIP funding even if they are excluded or suspended from school.

- Parents are still frequently told “there is no money” to accommodate students and prevent behaviour problems.
- The Coalition knows how enriched learning can be, when schools accommodate and celebrate students of all abilities. Of course, parents do not want their children or other students harmed at school. It is devastating to know that others might see your child acting out aggressively. What explanation is given to other children and their parents when a child with a disability is suspended or excluded unfairly? Parents find it difficult to explain to their school community that such problems might have been prevented altogether. It has been our experience that other students become more vulnerable – even to bullying and being bullied – when they see students with disabilities treated unfairly by adults. This will only serve to increase the potential for inequity and violence in schools.

**The ARCH “No-Cost Law Reform Proposal” Analysis  
(Presented to Education Minister Gerard Kennedy December 4<sup>th</sup>. 2003)**

**Overview:**

The *Safe Schools Act* made five amendments to the *Education Act*<sup>4</sup> that are causing exclusion and segregation for students with disabilities, contrary to modern public policy in Ontario.

The amendments are found in Part XIII of the *Education Act*. The Part is titled “Behaviour, Discipline and Safety.” The five provisions of the *Education Act* that were amended by the *Safe Schools Act* that are having a discriminatory impact upon students with disabilities are the following: ss. 305, 306, 307, 309, and 310. The sections will be examined in greater detail below.

**Mandatory suspensions:**

Section 306 of the *Education Act* concerns mandatory suspensions. Suspensions are considered mandatory in certain circumstances set out in the statute,<sup>5</sup> but a regulation provides an exception:

The suspension of a pupil is not mandatory if,

- a) the pupil does not have the ability to control his or her behaviour;
- b) the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or
- c) the pupil’s continuing presence in the school does not create an unacceptable risk to the safety or well being of any person.<sup>6</sup>

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<sup>4</sup> R.S.O. 1990, c. E. 2, as amended.

<sup>5</sup> *Education Act* at s. 306(1).

By operation of the regulation, it is a defense to a mandatory suspension (under s. 306) for a parent to show that the student lives with a disability and is not responsible for their behaviour.

It makes sense, of course, for the government to ensure that punishment is not visited upon students whose disability-related behaviour is not within their control. Punishment in such circumstances would be gratuitous; such students cannot learn anything through punishment, and they cannot have their behaviour controlled through punishment. **Our entire legal system is founded upon the principle that persons should only be punished for acts for which they are responsible.**<sup>7</sup> **Persons with intellectual disabilities who violate the criminal law cannot be found criminally responsible for their acts and made subject to criminal punishment.**<sup>8</sup> **Students with disabilities, similarly, should not be punished for school-related acts for which they are not responsible.**

### **Discretionary Suspensions:**

At s. 307, the *Education Act* sets out the circumstances in which teachers and principals have the discretion to suspend students, up to a maximum of 20 days. For discretionary suspensions, there is no defense available to students, like there exists with mandatory suspensions, to avoid punishment for disability-related behaviours that are not within their control.

The effect of not having a defense provision for discretionary suspensions is that students with disabilities may be suspended for disability-related behaviours.

Mr. Justice Marvin Zuker has written that the defense provisions in the *Education Act* exist to ensure that students with disabilities are not discriminated against through disciplinary actions taken against them:

[T]he purpose of these mitigating factors is to ameliorate the effects of zero tolerance **and enable a board to avoid discriminating against pupils who cannot control their behaviour or do not appreciate the consequences of their actions** [emphasis added].<sup>9</sup>

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<sup>6</sup> O. Reg. 106/01, s. 1.

<sup>7</sup> Not just our legal system is founded on this principle. Refer to H.L.A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968) at 114, where he states “All civilized penal systems make liability to punishment for at any rate serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain frame of mind or will. These mental or intellectual elements are many and various and are collected together in the terminology of English jurists under the simple sounding description of *mens rea*, a guilty mind.”

<sup>8</sup> The *Criminal Code*, R.S.C. 1985, c. C-46, as amended, at s. 16(1) provides as follows: “No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.” At s. 2, “mental disorder” is defined as a “disease of the mind.” Judicial interpretation has concluded that persons living with intellectual disabilities are protected from criminal responsibility through these provisions. Refer to *R. v. R. (M.S.)* (1996) 112 C.C.C. (3d) 406 (Ont. Gen. Div.).

<sup>9</sup> Marvin Zuker and Anthony Brown, *Education Law*, 3d Ed. (Toronto: Carswell, 2002) at 294.

**Being suspended from school because of one's disability is discriminatory. Being punished, effectively for having a disability and consequently exhibiting disability-related behaviour, is discriminatory.**

Sections 309 and 310 of the *Education Act*, amended through the operation of the *Safe Schools Act*, were proclaimed in force on 1 September 2001.

**Expulsions:**

Section 309 of the *Education Act* concerns mandatory expulsions. Expulsions are considered mandatory in certain circumstances set out in the statute,<sup>10</sup> but a regulation provides an exception:

The expulsion of a pupil is not mandatory if,

- a) the pupil does not have the ability to control his or her behaviour;
- b) the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or
- c) the pupil's continuing presence in the school does not create an unacceptable risk to the safety or well being of any person.<sup>11</sup>

By operation of the regulation, it is a defense to a mandatory expulsion (under s. 309) for a parent to show that the student lives with a disability and is not responsible for their behaviour.

**Once again, it makes sense for the government to ensure that punishment is not visited upon students whose disability-related behaviour is not within their control.**

In the United States of America, it is recognized that disability-related behaviour should not be punished. In the landmark decision of *Honig v. Doe*,<sup>12</sup> the U.S. Supreme Court intervened in the circumstance of school boards excluding "one out of every eight disabled children from classes."<sup>13</sup> The Court "made it clear that students with disabilities could not be expelled for misbehaviour that was related to their disabilities."<sup>14</sup> The *Individuals with Disabilities Education Act*<sup>15</sup> provides that, before a disciplinary decision is made regarding a student with a disability, a review must be conducted and a determination made regarding "the relationship between the child's disability and the behavior subject to the disciplinary action."<sup>16</sup>

The law in the United States requires that School Boards ensure that they are not disciplining a student with respect to a manifestation of their disability.

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<sup>10</sup> *Education Act* at s. 309(1).

<sup>11</sup> O. Reg. 37/01, s. 2.

<sup>12</sup> (1988), 484 U.S. 305 (U.S.S.C.).

<sup>13</sup> *Ibid.*

<sup>14</sup> Allan Osborne and Charles Russo, *Special Education and the Law: A Guide for Practitioners* (Thousand Oaks, California: Corwin Press, 2003) at 107.

<sup>15</sup> 20 U.S.C. § 1400 *et seq.* (1997).

<sup>16</sup> *Ibid* at s. 1415(k)(4)(A)(ii).

Ontario's *Education Act* is also concerned about disciplining children with respect to manifestations of their disabilities. That is why the *Act* recognizes mitigating factors with respect to, for example, mandatory expulsions.

The problem with the *Education Act*, as it concerns expulsions, however, is that at s. 310, there is no similar defense for *discretionary* expulsions.

### **Discretionary Expulsions:**

At s. 310, the *Education Act* sets out the circumstances in which principals have the discretion to expel students. For discretionary expulsions, there is no defense available to students, like there exists with mandatory expulsions, to avoid punishment for disability-related behaviours that are not within their control.

**The effect of not having a defense provision for discretionary expulsions is that students with disabilities may be expelled for disability-related behaviours. Being expelled from school because of one's disability is discriminatory. Being punished, effectively for having a disability and consequently exhibiting disability-related behaviour, is discriminatory**

### **Regulatory Exclusions:**

Section 305 was proclaimed in force on 1 September 2000.

Section 305, together with a corresponding regulation, provide principals and vice-principals — and any other person authorized by a school board — to exclude a person from school premises if, in their judgment,

[the person's] presence is detrimental to the safety or well being of a person on the premises.<sup>17</sup>

The purpose of this section is to “help prevent unwanted visitors from coming onto school property.”<sup>18</sup>

Section 305 not only provides exclusion power to school officials, but it makes it a provincial offence to contravene a regulatory exclusion, punishable by a fine of up to \$5000.<sup>19</sup> There is no appeal mechanism for a regulatory exclusion.<sup>20</sup> Once a student with a disability is subjected to a regulatory exclusion, they may find themselves forever unable to access public education, and without any means to challenge the exclusion.

Even more than discretionary suspensions and expulsions, students with disabilities are being adversely affected by the use of this mechanism of regulatory exclusion. Counsel

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<sup>17</sup> O. Reg. 474/00, s. 3(1).

<sup>18</sup> Ontario Ministry of Education, “Making Our Schools Safer: Improving Learning and Teaching Environments.”

<sup>19</sup> Prosecution is through the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended.

<sup>20</sup> Section 305, which provides the power of regulatory exclusion, is similar to the power granted to principals at s. 265(1)(m) of the *Education Act*, which is to refuse admission to a person who “would in the principal's judgment be detrimental to the physical or mental well-being of pupils.” We have concerns regarding this general power given to principals, because it could potentially be used with respect to disability-related behaviours, but at least the exercise of this power is “subject to an appeal to the board.”

for school boards actively encourage principals to use this power against students,<sup>21</sup> despite the fact that the section was never intended to be used to keep students with disabilities out of school.

At ARCH, we receive many telephone calls from parents concerning the operation of s. 305. Typically, principals will contact parents and tell them in advance that they intend to impose a regulatory exclusion on their children due to concerns about anticipated disability-related behaviours. The parents will be given the option of withdrawing their children instead of being excluded, and some parents choose this option, in order to avoid what they fear would be a black mark on their child's record.

Whether a child is withdrawn in the face of a threatened regulatory exclusion or has a regulatory exclusion imposed upon them, the effect is the same. Students with disabilities are prevented from attending school, without any mechanism of redress, without the ability to secure any educational programming. Some students return to school several months later, but some students never return to school.

There is no way to appeal a regulatory exclusion, and there is no defense available to regulatory exclusions.

### **Understanding behaviour and accommodations for some students with disabilities**

Behaviour can be analyzed rationally as an “**A-B-C**” sequence. First comes “A” for “antecedent” – whatever happens beforehand, or more broadly what is going on in the environment at that time. What we observe is the “B” or “behaviour”. What happens afterward is the “C” for “consequences”.

Schools often put a great deal of energy into finding **consequences** to discourage or punish students. But if the consequences do not closely follow the behaviour, students might not make the connection – particularly those students who have cognitive difficulties. Students who enjoy school are more likely to follow the rules. And students who are unhappy at school might not feel disadvantaged about staying home. It may be their parents who suffer most – sometimes scrambling to find childcare or even being at risk of losing their livelihoods. Families rarely get support at home at all for children with disabilities; having them home all day presents a crisis that can be their breaking point. Some students behaving aggressively at school may be vulnerable to abuse once they get home, especially because they have been sent home from school – and who will know? Where are their safeguards? The law's emphasis is misplaced - on punishment rather than rehabilitation.

It would be more productive to prevent problem behaviour from occurring by understanding the **antecedents** that give rise to it. For students with disabilities, these

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<sup>21</sup> Refer, e.g., to Jennifer Trepanier, *Student Discipline: A Guide to the Safe Schools Act* (Toronto: Butterworths, 2003) at 42, where the author advises that the regulatory exclusion is “an effective tool [for] educators.” Refer also to John Bell and Jennifer Tremblay, “The *Safe Schools Act* of Ontario” (unpublished) at 8 where they state “The advantage now to Boards is that they may deny students access to school property without having to sit as an appellate body to determine the denial to access issues. These provisions will provide a valuable tool for a principal to ‘exclude’ pupils.”

circumstances are often well-documented – e.g. bright lights, loud or sudden noises, invasion of personal space may be known to lower their thresholds for frustration. Sometimes, teachers do not notice that a student might be reacting to being first teased, bullied or abused by someone else. And students with disabilities may be additionally burdened because problem behaviour – for which they are not responsible – makes them further ostracized by their classmates.

Exceptional students are entitled by law to **Individual Education Plans (IEPs)** which commit the supports and services to be provided, and are designed to respect individuals, and in consultation with parents. A well-designed IEP clearly prescribes how accommodations need to be made in order that antecedents can usually be avoided. **Students should not be removed from school because they have demonstrated a problem for which they have been identified as exceptional, and about which they are thus entitled to IEP accommodations.**

### **How might schools fail to understand and accommodate students, exacerbating behaviour difficulties?**

We see such situations involving students with disabilities as both **direct and systemic discrimination**:

- **Communication** – some students cannot use words to express their ideas, thoughts, wishes and feelings. They may have to rely on gestures, and on people knowing them well enough to interpret the communicative intent of their actions. It can be very frustrating if you cannot speak, and if people around you misinterpret your actions. Schools must get to know such students in order to design appropriate accommodations. Schools must be willing to collaborate – to respect the expertise of parents and listen to the people who know the student best. Many of the students considered eligible for ISA funding were described as both lacking verbal communication skills, and impulse control.
- **Escalation** - if you cannot make yourself understood, and if people around you do not respond at first, it may be necessary to “step up” your communicative behaviour. e.g. a student may not be able to say that he would like to change activities; another might not be able to ask for alternate materials, etc. So he might push his book away from him, or she might sit back in her chair. If the teacher or support person persists in making demands, the student may move more forcefully. His book may fall; her chair may move suddenly. If no one understands or respects this message, the book might be thrown or the desk pushed over. This action can escalate – until someone might be hurt. However, the problem was quite preventable, if only someone had “listened” earlier. Someone has to know the student, and care.
- **Proximity** - some students are known to find close physical contact uncomfortable, but lack the means to say “no”. These same students may receive more than the average amount of physical prompting and bodily assistance in school. So they are particularly vulnerable. They may push someone away. If misunderstood, ignored or resisted, a push can escalate into a shove. Who is to blame? The Coalition does hear about teachers and support staff being injured in this way, but almost never do we hear that other students are harmed. It may be well known that a student does not like being really close to other people, and his classmates understand and respect this, while the adults do not. We know students with visual impairments who must

reach out to navigate their environment – who have thus been accused of sexual touching.

- **Transitions** – We often hear about students getting into trouble at the time when classroom activities change. Students who have cognitive difficulties may not understand and may not be prepared for such changes. They may not be able to read a schedule of activities, or to ask questions about what comes next. The ways known to resolve such confusion should be clarified and communicated, but there is no guarantee that such accommodations will be provided.
- **Prevention** – It is considered important for all young children to have a break for physical activity and fresh air at recess. If students are punished by being denied recess, they may be at risk of behavioural difficulties later in the school day. It may be that problems could be prevented by providing adult supervision at recess, or by organizing co-operative play activities on the playground.

### **Restraint, Aversive Interventions, and Seclusion**

TASH (an international association of people with disabilities, their family members, other advocates, and professionals) has prepared ***In the Name of Treatment: A Parent's Guide to Protecting Your Child From the Use of Restraint, Aversive Interventions, and Seclusion***. This defines the various ways that educational and other treatment can make children with disabilities unsafe. The paper can be accessed at [www.tash.org/publications/parentguide/inthenameoftreatment.pdf](http://www.tash.org/publications/parentguide/inthenameoftreatment.pdf) :

- **Aversive Interventions** “involve the deliberate infliction of physical or emotional pain and suffering, for the purpose of changing or controlling a child’s behavior”. In school this may involve direct physical or corporal punishment, sensory deprivation, denial of basic necessities such as food or access to a washroom, loss of contact with peers. Although such treatment might be part of a student’s educational programming, it “deliberately disrupts a child’s basic emotional well-being and sense of safety”. One parent has told us her child refused to attend school after one educational assistant arbitrarily decided to “cure” - through forced over-exposure - a known aversion to animals. One school calls home and demands that a mother withdraw privileges at home, as punishment for a student who refuses to take part in school activities.
- **Restraint** involves “the forced restriction or immobilization of the child’s body or parts of the body, contingent on the designated behavior”. This may be Chemical (using medication), Mechanical (with straps, arm splints, helmets), or Manual (being held down by another person’s body). Legal action in Nova Scotia in recent years revealed that a teacher had involved other students in such restraint of a child with a disability. One student was traumatized because school staff unplugged the power to his wheelchair; another’s mother was told she must not send his power wheelchair to school at all. A student who could walk was tied into another student’s wheelchair.
- **Seclusion** “involves forced isolation in a room or space from which the child cannot escape”. “Time out” can be a useful accommodation to help some students with disabilities who need a quiet place to work from time to time – but must not become confused with punishment. And the reality is that students who resist leaving class may suffer further, from Manual restraint, in the process.

TASH shows how “unsafe” this can make schools - causing students to fear and avoid school, preventing trust in adults, teaching “might makes right”, failing to detect and resolve the issues underlying the behaviour, making positive learning experiences unlikely, making students vulnerable to further abuse by teaching compliance at all costs, etc.

TASH proposes alternatives - the key elements of Positive Behavioral Support - and helps parents evaluate their children’s program, be aware of warning signs of abuse, and act promptly to stop it.

TASH reports that the Harvard Center for Risk Analysis estimates that between 50 and 150 children and youth die each year in the United States from the use of restraint. One is too many. Children with special needs have died in Ontario group homes under circumstances involving the use of prone/floor and mechanical restraints. The Ministry of Community and Social Services has implemented Policy on the Use of Physical Restraints, which includes a policy statement, definition of physical restraint, service-provider protocol, consent issues, training, reviewing and reporting. The Ministry of Education has not addressed these problems in schools; school boards may have established policies.

### **Human Rights Code Implications**

**The Ontario Human Rights Code supersedes all other legislation in the province, but there are few legal precedents to challenge the harm of Ontario’s Safe School policies.**

It is nevertheless important to consider how the Ontario Human Rights Code *should* protect students – and their families. There is clarification in the OHRC’s *Policy and Guidelines on Disability and the Duty to Accommodate*:

- **Policy Section 3.1.2 Lack of Individualized Accommodation:** Students are often victims of “premature assessment of risk” as they are deemed a risk before accommodation up to the point of undue hardship is fully explored.
- **Policy Section 3.2 Legal Principles and “adverse effect” or “constructive discrimination”:** Behavioural expectations and requirements (e.g. standing in line quietly, being in close proximity to others) that lead to perceived infractions of the *Safe Schools Act* can have an adverse effect on students with disabilities.
- **Policy Section 3.4 Duties and Responsibilities in the Accommodation Process:** Before sanctioning a student for “unacceptable behaviour”, an educator must first consider whether the actions of the student are caused by a disability, especially where an educator is aware or perceives that the student has a disability.

**In November 2004, OHRC released its Guidelines on Accessible Education (quoted below) which further clarify what is required of schools both to **prevent and remove barriers** involving education for students with disabilities.**

The Ontario Human Rights Code sets out a high standard which school boards would have to meet in order to prove **undue hardship** and thus ever rightfully deny a student accommodation (pp. 34-40). The Code looks at 3 things - cost, outside sources of funding, and health and safety requirements - in assessing whether a cost presents too great a hardship.

School Boards bear the **burden of proof**. It is not up to the student/parent to prove that the accommodation required is affordable. An accommodation cannot be denied unless

the school board proves it cannot afford it - with "*objective, real, direct and quantifiable*" evidence. Boards cannot just claim they do not have enough special education money. No single school or department should bear the cost alone. They would have to consider their global budget, other funding sources, phasing in costs over time, and to alert the provincial government funding source.

Sometimes we hear that accommodations and learning opportunities are denied to students because the school determines there is a **health and safety risk**. The *Guidelines* set out how all the factors concerning risk must be evaluated - ways to assess its nature, severity, probability and scope. Even "*when a student with a disability engages in behaviour that impacts upon the well-being of others*", schools are obliged to provide accommodations first and to try to reduce risks, before they can argue that the accommodation "*would pose a risk to public safety*" (pp.37-40). There must be no rushed decisions about risk, which could further harm the student with a disability. OHRC staff has told the Coalition that students' human rights take precedence over union collective agreements.

**Accommodation** must respond to the unique circumstances of students – and involves 3 principles: **dignity, individualization and inclusion**.

*"The most appropriate accommodation is one that most respects the dignity of the student with a disability, meets individual needs, best promotes inclusion and full participation, and maximizes confidentiality. An accommodation will be considered appropriate if it will result in equal opportunity ..."* (p. 25)

The OHRC *Guidelines* look at a variety of ways in which students' rights must be protected - against direct and "adverse effect" discrimination, for both evident and non-evident disabilities, etc.

Schools must create "*a welcoming environment*" by **preventing and stopping bullying and harassment** (pp. 14-19), and **ensure that discipline or safe schools policies and practices take into account the student's individual circumstances and accommodation needs - and don't create additional disadvantages**.

***The Guidelines say schools must attempt accommodation and prove undue hardship, before students with disabilities can be removed from school because their behaviour is deemed to be unsafe.***

### What is at stake?

- The student's education – time is lost; continuity is broken; objectives are altered; segregation occurs.
- Students become disconnected from school – a major agent for socialization. Alienated students are vulnerable to criminal activity.
- Students lose their sense of belonging – which Maslow saw as a pre-requisite for all learning
- Students are incorrectly seen as the source of the school system's problems
- Imagine the impact on the child who is misunderstood, not accommodated, and suspended in kindergarten
- Who knows and who cares whether students sent home may be vulnerable to additional abuse there?

- Parents miss work and may lose their jobs
- Families break up. Families cannot get enough support at home; so children with disabilities may be placed in group and foster homes, at much greater expense to taxpayers.
- It is the Coalition's experience that other students – even very young children - often understand better than adults how to respect and support classmates who have disabilities. It can make them feel vulnerable too, to see vulnerable classmates misunderstood, put at further risk and sent away from school. This has a harmful effect on their school experience and education too.

### **Ontario's "Safe Schools" legislation must be changed – Here's how**

Two years ago, with the Coalition, ARCH made the following recommendations with respect to changing the law, in order to ensure that there is no discriminatory effect for students with disabilities. These recommendations are simple and will not cost the government any money.

1. Amend the *Education Act* so that, as in the case of mandatory suspensions, mitigating factors related to disability will be considered with respect to discretionary suspensions. For example, the following amendment could be made (mirroring the language used at s. 306(5) of the *Act*):
 

307(6.1) Despite subsection (1), suspension of a pupil is not permitted in such circumstances as may be prescribed by regulation.
2. Amend Ontario Regulation 106/01 such that s. 1 is available as a defense to either a mandatory or a discretionary suspension.
3. Amend the *Education Act* so that, as in the case of mandatory expulsions, mitigating factors related to disability will be considered with respect to discretionary expulsions. For example, the following amendment could be made (mirroring the language used at s. 309(3) of the *Act*):
 

310(2.1) Despite subsection (1), expulsion of a pupil is not permitted in such circumstances as may be prescribed by regulation.
4. Amend Ontario Regulation 37/01 such that s. 2 is available as a defense to either a mandatory or a discretionary expulsion.
5. Amend Ontario Regulation 474/00 so that it is clear that it has no application to students (including students with disabilities). The Regulation was not intended to be used against students, whose behaviour is governable through the application of the suspension and expulsion provisions, both of which have corresponding appeal mechanisms. For example, the following amendment could be made to Regulation 474/00:
 

3(3) a "person" under this section does not include a person as defined under s. 2(1)1.

***Educational policies and practices must be designed to keep students – of all abilities - both safe and in school, learning together.***

**What else needs to be done?**

- Expulsions, suspensions and other discretionary absences from school should be clearly **documented**. **Data** should be available about how often students with disabilities are expelled, suspended and forced to stay away from school.
- Students and their parents should have **information about their rights**, access to **mediation and advocacy**, and **independent and fair appeal processes**
- The Ministry has just announced additional funding for a helpline for students to speak up against bullying. The Ministry should fund a **helpline and source of advocacy assistance for parents** to call when they or their children are threatened with aversive interventions and exclusion from school.
- Students and their families need to receive compensation for harm done by both the Ministry of Education and school boards to students with disabilities.
- **Special education funding** should never be tied to the documentation of students' disabilities and behaviour problems.
- The **SIP funding** process should be stopped.
- Boards should never receive funding for students who have been denied school attendance.
- Parents should have an opportunity to **remove harmful documentation** from students' school files that was collected for the purpose of ISA and SIP funding,
- Students with disabilities should have access to the **educational accommodations** they require.
- The Ministry of Education's **IEP Standards** should be monitored and enforced.
- Students' IEPs should not depend upon school boards' perceptions as to the availability of resources – unless there is a fair process to **determine “undue hardship”** in accordance with the Ontario Human Rights Code.
- No one individual teacher or principal should ever have the power to decide whether students with disabilities should be denied an education.
- The Ministry of Education could develop appropriate policies and guidelines that school boards must implement when using restraints with any student, but particularly when a student has special needs. But this will not make schools safe – for either students or their teachers. The Ministry of Education must immediately take steps to ensure that schools understand and apply Positive Behaviour Support to prevent the use of Aversive Interventions, Restraint and Seclusion. This may require legislation, audits, professional development, financial incentives, and conflict resolution.