

ONTARIO JUDGE RULES THAT PUNCHING A BULLY CAN BE JUSTIFIED IN SELF-DEFENCE

On November 24, 2010, a high school student, W.R., was acquitted of the assault and bodily harm of another student, M.R., despite admitting that he had, in fact, punched M.R.

At the relevant time, W.R. was a fifteen year old, grade 10 student. He weighed 125 pounds and he was soft spoken. W.R. also had a black belt in the martial art of jiu-jitsu. His mother noted that W.R. had suffered from stage 4 lymphoma at the age of nine.

M.R. was an older, larger student at the same school. M.R. and W.R. had never spoken. M.R. admitted to bullying students in the past, although not W.R. He admitted to making fun of people on the school bus by calling them degrading names. He justified his behaviour by claiming that everybody did it or perhaps the kids he made fun of had looked at him funny or “gotten under his skin.”

Approximately one month before the assault, M.R. had started bullying W.R. by bumping him in the shoulder or chest, staring him down and calling him names. M.R. would make fun of W.R.’s clothes, embarrassing W.R. in front of other students. M.R. would mutter things under his breath to his friends when W.R. was walking down the hallway. The bullying occurred at least twice per week, initially, and then escalated to the point that M.R. would bump, push, intimidate, or make fun of W.R. almost every time he passed through the hallway. W.R. described feeling frustrated, being “kind of stressed out” and getting headaches.

During the time that W.R. was being bullied, his parents noticed changes in his demeanour: he was quieter than usual and did not partake in dinner conversations. He was not eating well, he suffered from headaches and was more tired than usual, going to bed at 7:30 p.m. each night. He had even contacted his mother at work to ask her if he could take Tylenol for his headaches.

W.R. eventually told his parents what had been happening at school and they attempted to assist him by providing him with coping strategies, such as avoiding M.R., leaving earlier from school or taking different routes within the school. W.R. begged his parents not to alert school authorities because he did not want any pushback from his peers, or to be known as a tattler.

1
Ontario Judge Rules that Punching a Bully can be Justified in Self-Defence

Sarah Stiner

3
The Importance of Accuracy in Letters of Discipline

Sharon Silbert

6
A Special Briefing on School Board Governance

Eric M. Roher

9
Supporting Students' Mental Health

*Eric M. Roher
James Fu*

12
Bill C-36: *Canada Consumer Product Safety Act* - Why is it Applicable?

Eva Chan

13
Bill C-28: Canada's Anti-Spam Legislation Passes

Eva Chan

Canadian research consistently shows that bullying is linked to depression, poor school performance and anxiety, for both the victim and perpetrator.

On the day of the assault, W.R. started thinking about being bullied by M.R. and told his friend that he was going to stand up for himself. Neither W.R. nor M.R. knew the other's name at that point in time, but W.R. knew what the individual who had been bullying him looked like. That day, when M.R. appeared in the hallway, W.R. anticipated the usual shoulder-bumping or other taunting. M.R. was walking down the hallway, challenging W.R. with an intimidating stare. As soon as M.R. got close enough, W.R. punched him in the face once, splitting M.R.'s lip. W.R. then jumped on M.R. to stop M.R. from hitting him back, at which point M.R. flipped him over and started punching him in the ribs, approximately 15 times.

W.R. was taken to the principal's office, where he gave an inculpatory statement and was suspended. The statement was not admitted as evidence in youth court because the school had not ensured that W.R. was properly advised of his rights or permitted to have his parents present prior to giving a statement.

On the first day back at school after the suspension, other students at the school applauded W.R. The bullying stopped completely. It was noted by the youth court judge that while W.R. felt good about the applause of his peers, he was sick and felt bad when he heard that M.R. required stitches to his lip. W.R. lost 10 pounds from not eating in the weeks following the incident.

SELF-DEFENCE

Sections 34 and 37 of the *Criminal Code* set out the parameters of the justification of self-defence to a charge of assault. Section 37 states that everyone is justified in using force to defend himself if he uses no more force than is necessary to prevent the assault or to avoid its repetition. Subsection 34(1) provides that an individual may only rely on section 37 where the force used is proportionate, or no more than is necessary to prevent an assault or avoid its repetition. The proportionality approach looks at whether the force used was reasonable in all the circumstances, including the accused's subjective belief as to the nature of the danger or harm. Thus, the proportionality analysis involves both an objective component and a subjective component.

The Crown argued that W.R. was not entitled to rely on self-defence because M.R. had never punched him, and therefore the force used by W.R. was excessive. However, the judge found that W.R. had been assaulted repeatedly in the hallway at

school by M.R. W.R. testified that he hit M.R. hard, and did not know how hard because he had never hit anyone in his life. He had not retaliated in the past, despite being bumped and pushed numerous times. W.R. was being bullied to the point that it was affecting his health, as evidenced by his parents' observations in the changes in his eating and sleeping habits, as well as headaches.

Since the judge found, as a fact, that M.R. had repeatedly bullied W.R. and continued to do so at the time of the punch, satisfying the requirement that W.R. used force to defend himself, the only question was whether W.R.'s actions were proportional. In finding that W.R. acted in self-defence, by delivering a pre-emptive strike to prevent further abuse by M.R., the judge emphasized the totality of the abuse inflicted by M.R., including emotional and psychological harm.

The Court ruled that W.R., a soft-spoken youth and small in stature, had been subjected for months by blows and humiliating comments from M.R. Witnesses confirmed that W.R. told them that he was finally going to stand up for himself in order to prevent further blows. The judge stated that W.R. was entitled to do so. The Court concluded, "The one punch he threw was proportionate and reasonable in the circumstances."

In the W.R. decision, Justice Nicholas noted that he frequently presides in youth court and has, in recent years, seen a significant increase in cases involving bullying, threats and violence on school property. He went so far as to conclude that bullying "is a growing social problem."

The W.R. decision does not condone the use of violence against a bully. However, the circumstances of that case should alert educators to the fact that bullying may result, not only in psychological and emotional harm to the victim, but it may also lead to an otherwise law-abiding student turning to violence. While Justice Nicholas found that, in W.R.'s case, such use of violence was justified in self-defence, the possibility that this type of situation could escalate quickly, creating a dangerous situation, is a very real concern.

CANADIAN RESEARCH

Canadian research consistently shows that bullying is linked to depression, poor school performance and anxiety, for both the victim and perpetrator. Experts advocate for anti-bullying programs customized to the particular characteristics and needs of the student population at the school.

Such programs must be adapted to the age and gender of children, as well as the circumstances around specific incidents, while involving parents, students and teachers.

Researchers suggest that the mistake that schools often make is to apply one solution to all situations, without adapting their methods to specific cases or unique school environments. Anti-bullying programs often speak vaguely about respect and diversity, without addressing the most common motivations, such as race and homophobia.

In addition, recent research suggests that educating bystanders to change their behaviour helps to reduce bullying. For example, teaching students to simply walk away rather than intervening or supporting the alleged perpetrator removes the audience and often stops the bully.

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THE IMPORTANCE OF ACCURACY IN LETTERS OF DISCIPLINE

Letters of discipline are a form of penalty that can be used by an employer such as a school board, to reprimand employees for unacceptable conduct or breach of professional standards. The recent decision of Arbitrator Ian Springate in *Toronto District School Board and E.T.F.O (Bandurak)*, highlights some of the unique features of this form of discipline in the educational context, and emphasizes the importance of ensuring the contents of the letter accurately reflect the misconduct at issue.

A disciplinary letter in a teacher's personnel file can impact his or her professional reputation.

THE FACTS OF THE CASE

The grievor was an elementary school teacher who taught a split class of students in grades four and five. One day, she took her students on a field trip to York University, which was a short walk away from their school. She was accompanied by a volunteer, who was there to assist her with supervision. The group walked to the University shortly after 9:00 a.m., with the teacher at the lead, her students in a line behind her, and the volunteer following at the rear. On the way there, the teacher looked over her shoulder frequently and, at certain points, stopped to allow slower students to catch up.

The day's programming at the University went off without a hitch and the class got ready to head back to the school. The teacher once again lined

the students up, and started walking back. At first, everyone appeared to be following her, but a few minutes into the return trip, the teacher could no longer see all of her students, nor could she see the volunteer. Since they were in the middle of a busy campus, the teacher assumed she couldn't see the rest of the group because of the crowds, and thought they could not have been far behind. Shortly afterwards, she decided to pause for a few minutes and when she still could not see them, she sent her most responsible student back to look for them. The student was unable to locate the missing group. The teacher was surprised, but assumed that the missing students had taken a different route back to school with the volunteer. She continued to lead her group back towards the school and stopped to wait where she knew their paths would have to cross. However, the missing group never appeared.

Ensure that the description of the facts set out in the letter of discipline accurately reflects the incident in question.

Back at the University, a group of the elementary students had left the line shortly after the class started walking back towards the school, and started talking to one of the graduate students who had been involved in the day's programming. They asked the graduate student questions and chatted for about fifteen minutes. The volunteer felt she had to wait for the students to finish their discussion, and assumed that the teacher had realized they had been held up and would be waiting for them. However, when the students finished chatting, the volunteer saw that the rest of the class was long gone. She started to lead the students that were with her back to the school by a different route. At one point, two of the boys left the group and ran over to some parked motorcycles. The volunteer unsuccessfully tried to stop them, but they started playing with the motorcycles. One motorcycle fell over, resulting in a student being bruised and some minor damage to the motorcycle. The volunteer was upset and concerned and asked a York student to call the school's principal.

Meanwhile, the teacher still did not know what had happened to her missing students. She decided to take the rest of the group back to the school and then return to the York campus to look for them. As she was running back towards the campus, she saw three of the students who had been with the volunteer walking back to the school unsupervised. She started to accompany them back to the school, and then ran into the principal and vice principal who were headed to the campus by car to deal with the motorcycle incident. When they asked the teacher about the incident, she knew nothing about it. The teacher took the three students in her charge back to the school, and then headed back to the university campus, but, unable to locate the principal, vice-principal, volunteer, or the rest of her students, she returned to the school to wait. Eventually the rest of the missing group returned with the principal and vice-principal.

The principal of the school wrote a disciplinary letter reprimanding the teacher for what occurred on the field trip. The teacher grieved the letter. In particular, the union took issue with the wording of the letter, which it argued was inaccurate and amounted to an excessive response to the incident. Arbitrator Springate agreed with the Board that the teacher failed to properly supervise her

students, and that the lack of proper care justified a disciplinary response. However, he also agreed with some of the union's arguments regarding deficiencies with the letter itself.

THE ARBITRATOR'S DECISION

Although a letter of discipline is generally viewed as among the least serious forms of discipline, Arbitrator Springate noted that this seemingly mild form of discipline is actually a serious matter going to the teacher's fitness to practice and live up to the accepted standards of his or her profession. Indeed, a disciplinary letter in a teacher's personnel file can impact his or her professional reputation and future employment opportunities.

When an arbitrator reviews an employee's prior disciplinary record in the context of a grievance arbitration, the union is generally not permitted to try to explain away the wording of any disciplinary letters that were not successfully challenged when issued. In other words, the arbitrator is permitted to take what is in the disciplinary record at face value. As Arbitrator Springate explained, this is the 'flip side' of the general arbitral practice of not allowing an employer to rely on alleged prior misconduct that did not result in discipline at the time. With these considerations in mind, Arbitrator Springate stated that it is vital for a letter of discipline to accurately reflect the events that actually occurred, and not mischaracterize the teacher's conduct, either directly or by implication. Applying these principles to the case at hand, Arbitrator Springate held that the teacher had an important stake in preserving her professional reputation, which was brought into disrepute by the letter of discipline because it was inaccurate and needed to be corrected.

In particular, the letter described the teacher as having left the volunteer alone to supervise nine students, which suggested that the teacher had done so deliberately, when the reality was that she had inadvertently lost contact with the group. Further, the letter inaccurately claimed the teacher had acted contrary to the excursion forms she had signed, which simply wasn't the case. In addition, the letter contained a lengthy description of a teacher's duties as established in the *Education Act* and its regulations, and the *Teaching Profession Act*.

The way these duties were set out in the letter suggested that the Board viewed the teacher as having failed to live up to each of the listed requirements. Arbitrator Springate held that, while the teacher may have failed to fulfill *some* of the duties and responsibilities set out in the letter, the evidence did not suggest that her actions were deficient in respect of *all* of them; several of the statutory requirements that were listed in the letter had, in fact, been fulfilled.

Arbitrator Springate noted that it is relatively common for arbitrators to direct employers to amend an employee's personnel file when it is determined that a disciplinary penalty imposed on the employee was too severe, and held that the same logic applies with respect to letters of discipline. In this case, the misleading nature of some of the letter's language meant that it should be removed from the file. While acknowledging that the Board did have just cause to issue a letter of discipline, Arbitrator Springate held that it did not have just cause for many of the specific reprimands in the letter as originally drafted. Accordingly, he directed the Board to amend the teacher's file to reflect that she "received a letter of discipline for having become separated from a volunteer and a group of students while on a field trip to York University".

WRITING EFFECTIVE LETTERS OF DISCIPLINE

The principles set out by Arbitrator Springate in this decision should be kept in mind by all principals and other school board administrators when writing letters of reprimand or other disciplinary letters. In particular, individuals writing these kinds of letters should:

- keep in mind the letter's potential impact on an employee's reputation and future employment prospects, and the board's obligation to justify its contents;
- ensure that the description of the facts set out in the letter accurately reflects the incident in question;
- ensure that the relevant duties and responsibilities set out in the letter directly relate to the incident or misconduct in question;
- ensure that accurate provisions of relevant legislation cited in the letter directly relate to the incident in question;
- use accurate wording to describe the act(s) for which the employee is being disciplined; and
- not use language that is overly broad, vague, or misleading.

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Ensure that accurate provisions of relevant legislation cited in the letter directly relate to the incident in question.

A SPECIAL BRIEFING ON SCHOOL BOARD GOVERNANCE

School boards in Ontario operate within a legal context largely set out in the *Education Act*. Since publicly-funded education came into existence in Ontario in 1841, it has been recognized that a school board has the power to do only what is authorized by legislation.

In recent years, several issues have emerged with respect to governance in the school board sector. Concerns were raised that the governance provisions in the *Education Act* were outdated. There was no reference in the *Education Act* about responsibility for student achievement and well-being. Furthermore, there was emerging consensus in the education sector for the need to clarify the roles and responsibilities of school boards, individual trustees and directors of education.

In response to the concerns raised, the Ontario government introduced Bill 177, the *Student Achievement and School Board Governance Act, 2009*. Bill 177 came into force on December 15, 2009.

Bill 177 provides, among other things, that the purpose of education is to “provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society.” It is recognized that good governance requires clarity and a shared understanding of roles, responsibilities and rules.

Bill 177 addresses and raises a number of salient questions. What are the roles and responsibilities of trustees under the *Education Act*? What are the duties of the director of education? What is the purpose and nature of a board’s multi-year plan? What role do trustees play in the selection of principals and vice-principals under Bill 177? This article will provide an overview of the new school board governance legislation with an emphasis on the impact of Bill 177 on the role of principals and vice-principals.

RELATIONSHIP BETWEEN THE BOARD, TRUSTEES AND DIRECTOR OF EDUCATION

The *Education Act* establishes accountabilities that are hierarchical in nature. School boards are corporations pursuant to subsection 58.5(1) of the *Education Act*, which provides:

Every district school board is a corporation and has all the powers and shall perform all the duties that are conferred on or imposed on it under this or any other Act.

It is clear from subsection 58.5(1) that the *Education Act* confers powers and duties on the corporate board.

The board is accountable to the provincial government for matters expressly referred to in the *Education Act*, including the financial affairs of the school board, the delivery of the provincial curriculum and ensuring class sizes comply with the law.

In turn, the *Education Act* establishes the director of education as the chief executive officer of the corporation, and provides that the director of education is accountable to the board of trustees. The position of the director of education is established by section 279 of the *Education Act*, which provides:

Every district school board shall, subject to the regulations, employ a supervisory officer as director of education and such other supervisory officers as it considers necessary to supervise all aspects of the programs under its jurisdiction.

In addition to his or her duties as a supervisory officer, subsections 283(1.1) and 283(2) further establish the role of the director of education. These sections provide:

A director of education is the chief education officer and the chief executive officer of the board by which he or she is employed.

The chief executive officer of a board shall, within policies established by the board, develop and maintain an effective organization and the programs required to implement such policies.

As the chief executive officer and chief education officer for the board, the director of education has a statutory duty to develop and maintain an effective organization and the programs required to implement the board’s policies.

School boards may only act through resolutions passed at duly constituted school board meetings.

Under section 218.1 of the *Education Act*, a board member is required to entrust the day-to-day management of the corporate board to its staff through the director of education.

The hierarchical accountabilities in the *Education Act* mean that the board of trustees holds the director of education accountable for ensuring policies and processes are in place that are consistent with legislation and board policies and priorities. The board of trustees exercises its responsibility for the management of the corporate board and the engagement of school board personnel through the director of education.

As a group, trustees are responsible for ensuring that all the duties of the board and its staff, as established in the *Education Act*, are carried out. For example, the duties of the board of trustees include:

- promoting student achievement and well-being;
- ensuring effective stewardship of the board's resources;
- delivering effective and appropriate education programs to its pupils;
- developing a multi-year plan; and
- monitoring and evaluating the performance of the board's director of education.

The board of trustees carries out its duties and responsibilities by:

- setting policy;
- providing direction for allocating board resources; and
- hiring a director of education and holding him or her accountable for operating the board in a way that is consistent with legislation and board policy.

It should be recognized that individual trustees of a school board have only the authority, powers or duties prescribed by the *Education Act*. Powers and duties of school boards are also prescribed under the *Education Act*. School boards may only act through resolutions passed at duly constituted school board meetings. A school board may only pass resolutions that are within its jurisdiction under the *Education Act*.

Individual trustees have no independent decision making authority over the school board or its

employees. In this regard, the Ministry of Education has taken the position that an individual trustee should not sit on a hiring panel for a principal or vice-principal.

THE MULTI-YEAR PLAN

As part of its responsibilities, the board of trustees is required to develop a multi-year plan. The plan, which is to have a duration of at least three years, is to be reviewed annually with the director of education. The board of trustees is required to bring the plan to the attention of its supporters and employees and report to them on progress in implementing the plan.

The multi-year plan is intended to be a road map for the school board's vision and goals. With a focus on student achievement, the plan is intended to set out what the board intends to achieve, what its priorities are and how it plans to achieve its goals.

Bill 177 requires the director of education to implement, monitor and report periodically to the board on the implementation of the multi-year plan. In this regard, the director will develop an operational plan which sets annual objectives in relation to the multi-year plan, which is supported by the board's budget. The director will ensure that the plan sets out the board's priorities and identifies specific measures and resources to achieve the goals set out in the plan.

DUTIES OF TRUSTEES

Bill 177 establishes duties of individual trustees, which include:

- acting in a manner that assists the board in fulfilling its obligations under the *Education Act*;
- attending and participating in board and committee meetings;
- bringing the concerns of their constituents to the attention of the board;
- consulting with parents, students and supporters of the board about the board's multi-year plan;
- entrusting the day to day management of the board to its staff through the director of education;
- maintaining focus on student achievement and well-being;

Bill 177 requires trustees to entrust the day-to-day management of the board to its staff through the director of education.

Trustees hold the director of education accountable for ensuring that the policies and processes in place are consistent with the *Education Act* and school board priorities.

- complying with the board's code of conduct; and
- upholding the implementation of any board resolution after it is passed by the board.

Bill 177 requires trustees to entrust the day to day management of the board to its staff through the director of education. In accordance with the *Education Act*, the director of education is the only board official who reports directly to the board of trustees. All other board staff, including principals and supervisory officers, report to the director of education. The board exercises its responsibility for the management of the board and the engagement of its staff through its employment agreement with the director.

The Ministry of Education has stated that the involvement of elected officials in operational matters can give the appearance of politics driving the operation of the board. The Ministry has confirmed that, consistent with the board chair's responsibility to communicate decisions of the board to the director and the director's duty to manage operations, individual trustees may not give direction to a principal.

Where, for example, a parent raises an operational issue directly with a trustee, the responsibility of the trustee is to guide the parent to the staff person whose job it is to address the concern. Trustees wishing to follow up on a concern that was brought to them should do so through the director's office. Any decision which may have a broader impact on the school community should be communicated to the board of trustees and all concerned parties in a timely way.

SELECTION OF A PRINCIPAL OR VICE-PRINCIPAL

With respect to the selection and/or hiring of a principal or vice-principal, the provisions of the *Education Act* hold the director of education accountable for ensuring policies and processes are in place that are consistent with legislation and school board priorities.

It is the role of the director of education to hire, monitor, evaluate and assign school board personnel, either directly or indirectly, through a designate or designates, including the responsibility to determine what positions are required. In this regard, the director may establish the hiring panel for a principal or vice-principal. The director may decide to sit on the hiring panel or delegate responsibility to the appropriate associate director, supervisory officer or manager. The director is also responsible for ensuring the

performance management of the board's principals or vice-principals. It is the director's role to report on the progress and performance of new staff to the board of trustees.

It is the role of the board of trustees to hold the director of education accountable for ensuring that operational policies and processes are consistent with the *Education Act*, its regulations and the school board's policies and priorities. Furthermore, the board of trustees can provide important advice to the director about the key skills a new principal or vice-principal can bring to the board or school community. The director may decide, as a matter of best practice, to collaborate with the board of trustees in setting the criteria and establishing the process for the appointment of principals and/or vice-principals. The criteria used in the selection of principals or vice-principals should reflect the board's values and vision.

CONCLUSION

Management guru Stephen Covey has said, "Interdependent people combine their own efforts with the efforts of others to achieve their greatest success."

In an education context, school board trustees will combine their own efforts with the efforts of other members of the school community to enhance student achievement and well-being and maintain confidence in Ontario's publicly-funded school system.

Good governance requires clarity and a shared understanding of leadership roles and responsibilities. Bill 177 has made a significant contribution to delineating the roles and respective duties of the board of trustees, individual trustees, board chair and director of education. It has also clarified the roles and responsibilities of relevant stakeholders regarding closing gaps in student achievement.

The intent of Bill 177 is to support trustees as system leaders of publicly-funded education in their communities and the Province. Among other things, the new legislation supports the role of trustees as advocates for excellence in education. Trustees are encouraged to act as role models by working collaboratively with their community to shape a vision for their school board that reflects the input of parents, students and community members.

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SUPPORTING STUDENTS' MENTAL HEALTH

INTRODUCTION

Recent studies indicate that 15 to 21 percent of Canadian children and youth are affected by mental health disorders that cause some significant symptoms or impairment. A 2010 Ontario study reported that one in five Ontarians, 20 percent of the population, will experience a serious mental illness or have substance abuse issues in their lifetime.

In its 2010 report entitled *Caring and Safe Schools in Ontario*, the Ministry of Education noted that more than 500,000 young people in Ontario suffer from a diagnosable mental health problem, such as anxiety that may manifest itself in behaviour, such as bullying or an eating disorder.

According to Statistics Canada, teenagers and young adults aged 15 to 24 experience the highest incidence of mental disorders of any age group in Canada.

In a school context, mental health problems can significantly interfere with learning, thinking, analytical skills and communicating. System and school leaders need to be able to identify students with mental health needs and to work collaboratively with parents and school staff to identify the resources and expertise that might contribute in supporting these students. A number of questions arise. What is the role of school administration and system leaders in providing support and assistance to students with mental health needs? What strategies can be used to identify the capabilities and knowledge among school staff and outside agencies to support these students? What steps can be taken in working with parents and families to identify community structures and resources that can complement the school supports provided to the student? What steps can be taken in circumstances where parents or students are not co-operative in supporting recommended treatment or counselling?

The purpose of this article is to provide a framework for educators in assessing the capacity in the school, home and the community to respond appropriately to mental health issues and to create a school culture that is responsive and supportive of students with special education needs.

MENTAL HEALTH PROBLEMS

Mental health problems affect a person's ability to enjoy life and deal with everyday challenges. They range from common, everyday struggles to serious mental illness.

The term "mental illness" refers to a diagnosable condition that usually requires medical treatment and emotional problems of varying degrees of intensity and duration and may recur from time-to-time. Major mental illnesses include, mood, psychotic and anxiety disorders. The Ontario Ministry of Health and Long Term Care reports that the most common mental illnesses among children and youth (to age 17) are anxiety disorder, attention deficit/hyperactivity, conduct disorder, depression and substance abuse.

Although mental illness can occur at any age, it often strikes children and youth from late adolescence to early adulthood. The Canadian Mental Health Association has set out certain warning signs in recognizing when there is a problem. The challenges that students with mental illness face include the following:

- problems concentrating, making decisions or remembering things;
- missed deadlines, delays in completing assignments, poor quality work, poor exam grades;
- low morale;
- disorganization in completing school work;
- frequent complaints or evidence of fatigue or unexplained pains;

In a school context, mental health problems can significantly interfere with learning, thinking, analytical skills and communicating.

Educators should take steps to be informed about mental illness and the impact that mental health problems can have on learning.

- decreased interest or involvement in class topics or academic endeavours in general; and
- frequent absences or consistent late arrivals.

The Canadian Mental Health Association also has undertaken research on the common signs of mental illness, which include:

- marked changes in personality;
- confused thinking;
- inability to cope with problems and daily activities;
- strange ideas or delusions;
- excessive fears, worries and anxiety;
- prolonged feelings of irritability or sadness;
- significant changes in eating or sleeping patterns;
- suicidal thoughts or remarks;
- extreme highs and lows in mood;
- abuse of alcohol or drugs; and
- excessive anger or hostility.

ACCOMMODATION OF STUDENTS

Under section 265(1)(j) of the *Education Act*, the principal has a duty to give assiduous attention to the health and comfort of pupils under his/her care.

The *Education Act* and its regulations set out a structure for the identification and accommodation of special education students in Ontario's publicly funded elementary and secondary school system.

Under the *Education Act*, the Ministry of Education is responsible for ensuring that all exceptional children in Ontario have access to appropriate special education programs and special education services without the payment of fees. In this regard, the Ministry is responsible for requiring school boards to implement procedures for identifying student needs and for setting standards for identification procedures.

Section 1 of the Act defines an "exceptional student" as one "whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program."

Exceptional students may be identified pursuant to Ontario Regulation 181/98, *Identification and Placement of Exceptional Pupils*, under the *Education Act*. The principal of a school may, by his or her own decision or at the request of a parent, refer a child to an Identification and Placement Review Committee (IPRC) for a decision as to whether the child is "exceptional", and if so, whether the child should be placed in a regular classroom with support or in a special education class.

In making a determination, the IPRC will consider educational, health and psychological assessments, as well as information submitted by the parents, and can interview the student.

The IPRC also has the authority to make recommendations about special education programs and services for the student, but does not have decision-making authority in these areas.

Following the decision of the IPRC, the principal of the school is notified and he or she will prepare an Individual Education Plan (IEP) for the student. IEPs include the specific educational expectations for the student, an outline of the special education programs and services to be provided to the student and a statement of the methods by which the student's progress will be reviewed.

The objectives of the Ontario special education legislation are: (a) to ensure that an exceptional student receives an appropriate education; and (b) to ensure that parents have a say in the decision-making process.

STRATEGIES TO SUPPORT THE MENTAL HEALTH OF STUDENTS

Educators can take a number of proactive steps to support the mental health of students. The Canadian Mental Health Association recommends the following strategies for educators:

- take steps to be informed about mental illness and the impact that mental health problems can have on learning;

- be supportive and understanding;
- take the time to listen to the student, build trust and understand his/her needs;
- initiate discussions with parents to learn more about a student's circumstances and needs;
- work with the student and parents to determine appropriate accommodations;
- encourage peer support and friendships; and
- encourage practices that support wellness and a balanced life.

School administration needs to develop a clear picture of the professional knowledge and abilities that school staff and school board personnel bring to the task of supporting students with mental health issues. In assessing the capacity of school board personnel, school leaders should consider their training and experience in supporting students with special education needs and their ability to work collaboratively with other members of the school team.

School administration should also identify knowledge and capabilities among parents and community members, such as outside agencies and counselling services, in providing support to special needs students. Among other things, school leaders will assess the resources and expertise that parents and community members might contribute in assisting these students.

The reality is that in some cases, educators cannot, by themselves, effectively support a student who is facing a mental health problem. It is important to initiate discussions with the student's family and work with them to determine appropriate accommodations and solutions. Medication, counselling and psychosocial rehabilitation are treatment options that can help students recover from mental health issues.

There may be circumstances where parents or students are not co-operative in supporting recommended treatment or counselling. In this regard, it may be of value to bring into the discussion a person who the student or family may trust, such as a school board professional or outside expert, to speak to them about the benefits and value of certain treatment or counselling.

Appropriate counselling or assistance from psychologists, physicians, psychiatrists, social workers or other specialists may be utilized on an individual basis depending on the needs of each child. Social skills and behaviour management programs that encourage peer support and healthy lifestyles and relationships may provide assistance to these students.

Educators, while one part of the larger community, play a significant role in the support network for students facing mental health issues. With early identification, sharing of relevant information, consultation with specialized school services, access to outside professionals and collaboration with the student's family, school leaders can work to ensure that appropriate services and resources are provided to support students with mental health needs.

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School administration should identify knowledge and capabilities among parents and community members, such as outside agencies and counselling services.

BILL C-36: CANADA CONSUMER PRODUCT SAFETY ACT – WHY IS IT APPLICABLE?

Educational institutions should be aware of the requirements under Bill C-28 – the *Canada Consumer Product Safety Act* – which was passed by the Canadian government in December 2010. The Act will come into force on June 20, 2011.

The Act is intended to assist with product tracing should a consumer product need to be recalled.

MAINTAINING DOCUMENTS

Among other things, the Act requires any person who advertises or sells a consumer product for commercial purposes to maintain certain documents. For instance, retailers must maintain the name and address of the person from whom they obtained the product, the location where and the period during which they sold the product, and any other prescribed documents. The documents must be kept at the retailer's place of business in Canada for 6 years after the end of the year to which they relate or for any other period that may be prescribed.

WHAT IS A CONSUMER PRODUCT?

It is not uncommon for educational institutions to sell "consumer products", which is defined to mean "a product, including its components, parts or accessories, that may reasonably be expected to be obtained by an individual to be used for non-commercial purposes, including for domestic, recreational and sports purposes, and includes its packaging." In addition, the definition of "sell" includes distribution, whether or not it is made for consideration.

For example, this Act would capture the sale of jewellery, t-shirts, and laptops. The Act does not apply to items such as food, as it is regulated under the *Food and Drugs Act*.

REPORTING INCIDENTS

The Act also requires any person who sells a consumer product for commercial purposes to provide the Minister of Health, and the person

they received the consumer product from, with all information in their control regarding an incident related to the product within two days after becoming aware of the incident. An "incident" does not simply mean where death or a serious adverse effect on a person's health has occurred, but also includes an occurrence that may reasonably have been expected to result in an individual's death or in serious adverse effects on health, as well as a defect or characteristic, or incorrect or insufficient information on a label or instruction (including the lack of a label or instruction), that may reasonably be expected to result in an individual's death or in serious adverse effects on health. It also includes a recall or measure that is initiated for human health or safety reasons.

BENEFITS OF THE ACT

These requirements under the Act are intended to assist with product tracing should a consumer product need to be recalled. They also are intended to assist with the prevention of, and to provide a more effective measure to address, danger to human health or safety.

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BILL C-28: CANADA'S ANTI-SPAM LEGISLATION PASSES

In December 2010, the Canadian Parliament passed Bill C-28, which was formerly known as the *Fighting Internet and Wireless Spam Act* (FISA). It is anticipated that FISA will come into force 6 – 8 months, once the regulations are in place.

FISA will affect how educational institutions market and otherwise communicate with others. This article focuses on the prohibition on sending unsolicited commercial electronic messages.

PROHIBITION ON SENDING “SPAM”

FISA prohibits the sending of a commercial electronic message to an electronic address (e.g., e-mail, instant messaging) unless: (a) the recipient of the message has consented to receiving it, and (b) the message sets out certain information including how to unsubscribe from future messages. The prohibition applies to the sender and any person who acts on behalf of the sender, such as marketing agencies hired by an educational institution.

WHAT IS A COMMERCIAL ELECTRONIC MESSAGE?

A commercial electronic message is a message sent by any means of telecommunication (including a text, sound, voice or image message) where it would be reasonable to conclude that one of its purposes is to encourage participation in a commercial activity. The content, hyperlinks, and contact information contained in the message would be considered in determining the purpose of the message. A commercial activity means any particular transaction, act or conduct or regular course of conduct that is of a commercial character, whether or not the person who carries it out does so expecting profit.

WHAT CONSTITUTES CONSENT?

Consent from a recipient can be express or implied. FISA sets out specific requirements for when express consent is obtained.

FISA also sets out a number of situations where consent may be implied. One is where the sender of the message has an “existing business relationship” or an “existing non-business relationship” with the recipient of the message.

An example of an existing business relationship is where the sender and recipient have a business relationship arising from the purchase of a product, goods, or a service within 2 years of when the message was sent.

The definition of “existing non-business relationship” includes a non-business relationship between a sender and recipient arising from the following situations:

- (a) a donation or gift made by the recipient to the sender within 2 years of when the message was sent, where the sender is a registered charity as defined under s. 248(1) of the *Income Tax Act*;
- (b) volunteer work performed by the recipient for the sender, or attendance at a meeting organized by the sender, within 2 years of when the message was sent, where the sender is a registered charity as defined under s. 248(1) of the *Income Tax Act*;
- (c) membership (as defined in the regulations) by the recipient in a club, association or voluntary organization (as defined in the regulations), within 2 years of when the message was sent.

Note that an electronic message requesting consent to send a commercial electronic message is considered a commercial electronic message.

Before sending out any commercial electronic messages, educational institutions will have to determine whether they have proper consent and that their messages include an unsubscribe mechanism.

A person who contravenes the spamming provisions of FISA is liable to a maximum penalty of \$1 million in the case of an individual.

WHAT INFORMATION MUST THE MESSAGE INCLUDE?

Information required to be in the message includes information on the person who sent the message (as well as the person on whose behalf the message is sent, if different) and information allowing the recipient to contact the sender. The contact information of the sender must be valid for at least 60 days after the message has been sent. The message must also include information allowing the recipient to unsubscribe from receiving commercial electronic messages from the sender. The unsubscribe mechanism must be at no cost to the recipient, by way of the same electronic means the message was sent, and specify an electronic address or link to an internet page. The sender must ensure that the electronic address or link is valid for at least 60 days after the message has been sent. The sender has 10 business days to effect the recipient's request.

Although there is a three-year transition provision that provides for implied consent in limited circumstances, educational institutions will still have to set out prescribed information, including in respect of the unsubscribe mechanism, when Bill C-28 is proclaimed to be in force.

WHAT ARE THE CONSEQUENCES FOR SPAMMING?

A person who contravenes the spamming provisions is liable to an administrative monetary penalty of a maximum of \$1 million in the case of an individual, and \$10 million in the case of any other person. FISA permits regulations to be made applying the maximum fines on a per day basis.

Officers and directors of a corporation can be held personally liable for violations. An employer can be vicariously liable for a violation committed by an employee acting within the scope of his/her employment. There is a due diligence defence to avoid liability.

FISA also provides a potential private right of action for those who are affected by the spamming violation under FISA.

OTHER PROHIBITIONS

FISA also prohibits, in the course of a commercial activity, altering transmission data such that an electronic message is delivered to a destination other than, or in addition to, the destination specified by the sender, without the sender's express consent.

In addition, FISA prohibits, in the course of a commercial activity, installing a computer program on a person's computer system, as well as distributing electronic messages from such person's computer system, without the owner's or authorized user's consent.

AMENDMENTS TO OTHER LEGISLATION

FISA amends other legislation, such as the *Personal Information Protection and Electronic Documents Act* (Canada) in terms of preventing the unauthorized collection or use of an individual's electronic address if it was collected through a computer program designed for collecting electronic addresses. Another example is amendments to the *Telecommunications Act* (Canada), resulting in a possibility for the Do Not Call List to be replaced with a new regime.

IMPACT ON EDUCATIONAL INSTITUTIONS

Once FISA is in force, before sending out any commercial electronic messages, educational institutions will have to determine whether they have the proper consent and that their messages include the information and unsubscribe mechanism required by FISA. In addition, if their electronic marketing practices involve the distribution of software that would be captured under FISA, they must comply with disclosure and consent requirements.

Moreover, educational institutions will need to ensure that their third party service providers are knowledgeable about FISA and will comply with FISA when assisting with and implementing marketing and communication programs and services.

Educational institutions should start reviewing their marketing and communication practices now to determine how to comply with FISA, as the internal process to effect compliance could require substantial lead time.

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