

This document was developed for the Ontario Education Services Corporation by Keel Cottrelle LLP, in co-operation with the Ontario Ministry of Education and the Ontario Human Rights Commission. January 2010

Human Rights Concerns Regarding Progressive Discipline

January 11, 2010

The OESC is working with the Ontario Human Rights Commission (“Commission”) and the Ministry of Education, Inclusive Education Branch to create template policies and procedures pursuant to the Ministry’s Equity and Inclusive Education Strategy, which will meet the requirements of the Ontario *Human Rights Code*.

Commission staff at the request of OESC also reviewed the draft template policy and template procedures created by OESC to help school boards implement Bill 157 and the amendments to PPM 144 and PPM 145. The Commission wishes to raise its concerns about the impact of student discipline on students with disabilities and racialized students. The Commission has identified its key concerns in this memo and asks school boards to consider the issues noted below when revising and implementing progressive discipline policy and procedures in accordance with Bill 157, PPM144 and PPM145.

The Commission is prepared to continue to work with the Ministry and the OESC to support the education sector to make systemic changes regarding student discipline by providing school boards with further guidance to assist school boards to meet *Code* requirements when applying discipline.

The Comments Provided by Commission Staff are as Follows:

The Commission’s key message is that the *Code* has primacy over the *Education Act*, regulations and PPMs. The *Code* also has primacy over policies and procedures that may be developed and implemented by school boards. Primacy of the *Code* means that if there is a conflict between the *Education Act*, or one of these other documents, and the *Code*, the *Code* should be applied (unless the other law specifically says it should apply despite the *Code* – the *Education Act* does not say this). The Supreme Court of Canada has said that the *Code* has primacy because it is more like the Constitution than a regular law. In practical terms, the Commission’s position is that the *Code* and supporting policies require school boards to consider human rights mitigating factors when deciding to suspend, transfer, exclude, recommend expulsion or expel a student. The *Code* should also be considered and applied in disciplinary appeals.

The Commission did a community consultation in the summer of 2009. The key themes identified were perceived increases in the number of exclusions and segregated placements, lack of timely and substantive accommodation prior to determining discipline, disproportionate discipline of racialized students, and the failure to apply mitigating factors prior to imposing disciplinary consequences. Significant concern was raised about accommodation and access to education for children in care (who are often racialized and/or have disabilities). The Commission heard that families have difficulty advocating for their rights in disciplinary situations and there is inconsistency in disciplinary approaches across school boards. Finally, the Commission heard concerns about the impacts of police interventions and criminalization of students as a result of discipline. The Commission will be using the results of this consultation to help school boards address systemic human rights concerns.

Discipline policies and procedures continue to have a disproportionate impact on students with disabilities and racialized students. Suspensions, expulsions, exclusions and transfers can all

be experienced as punitive by students and must be consistent with the *Code*, including the duty to accommodate disability. The Commission reminds school boards to apply discipline in a non-discriminatory manner that takes into account any human rights mitigating factors and *Code* principles and Commission policy statements that may apply. The human rights mitigating factors that need to be included in progressive discipline policies and procedures, and considered before taking action (including suspensions, transfers, exclusions, recommendations to expel and expulsions are:

- a. whether racial or other harassment was a factor in the student's behaviour;
- b. whether the principles of progressive discipline have first been attempted;
- c. the impact of the suspension or expulsion on the student's continued education;
- d. whether the imposition of suspension (or expulsion) would likely result in an aggravation or worsening of the student's behaviour or conduct;
- e. the age of the student;
- f. in the case of a student with a disability, whether the behaviour was a manifestation of the disability and whether appropriate accommodation, based on the principle of individualization, had first been provided; and
- g. the safety of other students.

School board administrators, including principals and people involved in disciplinary appeals or expulsion decisions, should also consider the following:

- a. not suspending or expelling a student where the student's behaviour was directly caused by a disability;
- b. the provision of alternative education where a student with a disability must be removed from the classroom for health, safety or other reasons;
- c. the return of the student to the his/her regular classroom;
- d. consultation with parents around the management of behaviour arising from a disability; and
- e. the application of progressive discipline.

When considering discipline of a student with a disability, review the requirements set out in the Commission's *Guidelines on Accessible Education* (2004). This Commission policy says that educators should attempt to determine whether the behaviour in question is a manifestation of the student's disability by considering:

- formal assessments and evaluations of the student;
- relevant information supplied by the student or the student's parents;
- observations of the student;
- the student's accommodation plan, whether the accommodations provided for in the student's accommodation plan were appropriate, and whether the accommodations were being provided consistent with the student's accommodation plan;
- whether the student's disability impaired his or her ability to understand the impact and consequences of the behaviour subject to disciplinary action;
- whether the student's disability impaired his or her ability to control the behaviour subject to disciplinary action; and
- whether the student has undetected disability-related needs that require accommodation.

The *Code* requires accommodation to the point of undue hardship. This standard always applies when there is a need for accommodation under the *Code* and it is a very high standard. Under the *Code* and Ontario Human Rights Commission policy, the employer or service provider can only prove undue hardship based on three factors: cost; outside sources of funding, if any;

and health and safety requirements, if any. This determination has significant legal consequences for a school board and must be supported by facts, figures and quantifiable evidence. For more information about the undue hardship standard, the Commission encourages school boards to review the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* (2000), the *Guidelines on Accessible Education* (2004) and *Human Rights at Work*, 3rd Ed. (see for example the accommodation template in Appendix E).

Exclusions, coupled with an official suspension, keep students out of school for longer than would otherwise be allowed. The Commission is concerned that exclusions may be used to avoid having to provide alternate programs or fulfil reporting requirements and that this seems to have a disproportionate impact on racialized students and students with disabilities. For example, reports have been made to the Commission that students are being suspended for five days and then excluded for further days. Prior to making an exclusion decision, a pupil or his or her parent(s)/guardian(s) should be consulted and *Code* principles must be considered.

Code principles must be considered when transferring students. In a recent Human Rights Tribunal decision exclusion without consultation and transfer of a racialized student were found to be discriminatory: [Persaud v. Toronto District School Board, 2009 HRTO 1728 \(CanLii\)](#).

The template policies and procedures include lists of many discipline infractions. As a result, school board employees have broad subjective discretion to report behaviour. Subjective assessments of student behaviour might be vulnerable to subconscious bias. When combined with the new duty to report, this could add to existing concerns about disproportionate rates of suspensions, exclusions, transfers and expulsions for racialized students and students with disabilities. Police contacts can also have a disproportionate impact on racialized students due to racial profiling. For more information, see the Commission's *Policy and Guidelines on Racism and Racial Discrimination* (2005).

When investigating an incident, the *Code* requires that the investigation take into account human rights principles, such as racial profiling, harassment, and the duty to accommodate to the point of undue hardship. For more information about human rights principles relevant to investigations, see the *Guidelines on Developing Human Rights Policies and Procedures*. *Human Rights at Work*, 3rd Ed. is also a useful resource as it explains the forms of discrimination in section III.2, principles relevant to investigation in section IV.12.d and there is an investigation template in Appendix F that may be modified.

In the case of a student with a disability, a board should only assess whether a student poses a safety risk after accommodation to the point of undue hardship has been provided. This should be consistent with the Commission's *Guidelines for Accessible Education* (2004). A suspension and/or a recommendation to expel must not be imposed if a student identified by a ground of the *Code* has not been accommodated to the point of undue hardship or if there is evidence to suggest that a student's human rights have been infringed in imposing a suspension or would be violated by proceeding with an expulsion. Exclusions and transfers of students with disabilities should also be consistent with the *Code* and the Equity Strategy.

The Commission encourages school boards to collect data to identify and address the disproportionate impact of exclusions, suspensions, transfers and expulsions on students because of their race, disability or other *Code* ground. This may be done through school climate surveys. For more information about monitoring to address systemic racial discrimination, review the Commission's *Policy and Guidelines on Racism and Racial Discrimination* and *Human Rights at Work*, 3rd Ed.

The Commission suggests that it is not sufficient for a school to rely on disciplinary responses to individual incidents without addressing the underlying issues that might be contributing to the occurrence of such incidents. In addition to progressive disciplinary measures, school boards need to have effective measures to resolve conflict, restore relationships and prevent future occurrences of incidents. In accordance with the principles of the *Code* and the Ministry of Education's Equity Strategy, student discipline should aim to resolve issues quickly and keep students engaged as integral parts of a school community. A key part of this will be training. When providing training about Bill 157, and the amendments to PPM 144 and 145, school boards should ensure that staff and administrators are aware of the systemic concerns and requirements of the *Code* as they apply to progressive discipline. See also *Guidelines on Developing Human Rights Policies and Procedures and the Guidelines on Accessible Education* (2004).

For further information about human rights and progressive discipline, the following documents are available on the Commission's website at www.ohrc.on.ca:

[Policy and Guidelines on Racism and Racial Discrimination](#) (for information about race, racial profiling and identifying & addressing systemic racial discrimination)

[Guidelines on Accessible Education](#) (gives guidance on how to apply progressive discipline to students with disabilities in a way that will respect their rights under the *Code*).

[Human Rights at Work, 3rd Ed.](#) (focuses on workplaces, but includes plain language information on all human rights grounds and forms of discrimination; also includes a resource list and templates that may be modified for use by school boards).

[Guidelines on Developing Human Rights Policies and Procedures](#) (gives guidance on how to develop accommodation policies and procedures and dispute resolution mechanisms – both of these are essential supports to a progressive discipline system that is consistent with the principles of the *Code*).

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