KEEL COTTRELLE LLP
Barristers & Solicitors

36 Toronto Street, Suite 920
Toronto, Ontario
M5C 2C5
TEL: (416) 367-2900
FAX: (416) 367-2791

100 Matheson Blvd. E., Suite 104
Mississauga, Ontario
L4Z 2G7
TEL: (905) 890-7700
FAX: (905) 890-8006

Robert G. Keel
416-219-7716
rkeel@keelcottrelle.on.ca

Jennifer Trépanier
416-367-7704
jtrepanier@keelcottrelle.on.ca

Nicola Simmons
416-367-7694
nsimmons@keelcottrelle.on.ca

Buck Sully
416-367-7680
bsully@keelcottrelle.on.ca

Memorandum

To: Directors of Education, Supervisory Officers, et al.

Date: May 2015

Re: Child and Family Services Review Board Decision — Discipline Committee cannot oust the jurisdiction of the CFSRB by expelling a student under the guise of a suspension

We are writing to you with respect to a recent decision of the CFSRB dealing with the powers of School Boards with respect to policy relating to suspensions and expulsions, as well as the power of the Discipline Committee with respect to remedy.

In *Appellant v. Thames Valley District School Board*,[1] the father of a student (Appellant) filed an appeal of his son's expulsion with the Child and Family Services Review Board (CFSRB) under section 311.7 of the *Education Act*.[2] The position of Thames Valley District School Board was that the CFSRB did not have jurisdiction to hear the appeal, and claimed that the Board's Discipline Committee decided to only suspend the student, and not expel him. Whether a student is suspended or expelled is important because only an expulsion can be appealed to the CFSRB.[3]

The CFSRB held a jurisdiction motion to determine if it could hear the appeal. The CFSRB found that it had jurisdiction to hear the expulsion appeal despite that the decision of the Discipline Committee to only suspend the student. Upon finding it had jurisdiction, the matter proceeded to settlement discussions and was subsequently resolved.

The CFSRB's reasons for determining it had jurisdiction were as follows.

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[1] *Appellant v. Thames Valley District School Board,* 2015 CFSRB 20 (CanLII)
[2] *Education Act*, R.S.O. 1990 c. E. 2
[3] The parent or student (depending on age/circumstance) has a right to appeal an expulsion to the CFSRB under s. 311.7 (1) of the Education Act.

The Legislative Framework

Following is the CFSRB summary of the legislative framework. While most of this summary is well-known to administrators, we are repeating same because it places the Decision in context.

The CFSRB indicated that, under the *Education Act*, a student who is alleged to have committed one of ten[4] specifically-mandated activities while at school, at a school-related activity, or in other circumstances where engaging in the activity will have an impact on the school climate, must be suspended. The principal must conduct an investigation to "*determine whether to recommend to the board that the pupil be expelled*". As the student's misconduct occurred on a school trip, the student was suspended for 20 school days, and the principal recommended he be expelled. The principal prepared a report and provided written notice of the expulsion hearing to the student.[5]

Further, under the *Education Act*, if a principal recommends an expulsion, the board is required to hold an expulsion hearing. The board's powers and duties and the hearing requirements are all to be established in a board policy.[6]

The *Education Act* provides the available options for the Discipline Committee (DC). After the hearing, the DC can decide to either expel or not expel the student.[7] Under section 311.4(1), if the student is not expelled, the DC can either: (1) confirm the original suspension and its duration; (2) confirm the suspension but shorten its duration and amend the record accordingly; or (3) quash the suspension and order that the record be expunged.

If the student is expelled, a series of mandatory provisions are triggered by section 311.5. The school board must assign the student to another school (if the expulsion is from his or her school only) and it must provide a notice of expulsion that gives the reasons for the expulsion. This notice must also include that the student has the right to appeal the expulsion and the steps required to do so.[8]

At the appeal hearing, *Behaviour, Discipline and Safety of Pupils*[9], a Regulation enacted under the *Education Act*, requires that after hearing an appeal, the CFSRB must do one of the following:

1. Confirm the board's decision to expel the pupil.
2. If the board's decision was to expel the pupil from his or her school only, quash the expulsion and reinstate the pupil to the school.

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[4] Section 310(1) includes 10 activities that are numbered 1 through 7.1 and 7.2 to 8.
[5] In accordance with the requirements under section 311.1(7).
[6] Sections 311.3(1) and (2).
[7] Sections 311.4 and 311.5.
[8] Sections 311.6(1) and (2).
[9] O. Reg. 472/07, s. 6.

3. If the board's decision was to expel the pupil from all schools of the board:
   i. change the expulsion to an expulsion from the pupil's school only; or
   ii. quash the expulsion and reinstate the pupil to his or her school.

The Discipline Committee's Decision

The CFSRB reviewed the DC's decision (the Decision). In the Decision, the DC upheld the 20-school day suspension imposed by the principal. It also clearly stated that, "*[t]he Discipline Committee has chosen not to expel*".

The DC was operating under its policy, *Expulsion of Students Policy (4002)* (the Policy). Under the Policy, "*[i]f the Discipline Committee decides not to expel the student* … [it may] *make such other orders as the Discipline Committee considers appropriate*". In its Decision, the DC decided to make *"such other orders as the Discipline Committee deem[ed] appropriate*." Those additional orders were:

> *After weighing the evidence of the hearing, including but not limited to the tone, tenor and conduct during the hearing itself, and concern regarding the collusion with witnesses prior to the interviews with school administration*, ***it is our belief that the relationship between [the pupil] and [his school] is beyond repair. As such, [the pupil] shall be offered one of two options:***
>
> ***a. to remain at [program] and have access to other programs (such as Night School) in order to complete OSSD course requirements; or***
>
> b. ***to be enrolled in another Thames Valley District School Board Secondary School as designated by the Board.*** (emphasis added)

The Jurisdiction Motion

The Appellant claimed that the Decision was a de facto expulsion; his son was effectively prevented from returning to his former school. The School Board argued that it had the authority to create its own Policy under section 311.3 of the *Education Act* and that this enabled it to add, in its Policy, to what the trustees could do following an expulsion hearing. The School Board relied on the fact that many other school boards had given themselves similar powers following expulsion hearings in their own policies.

The CFSRB rejected the School Board's argument. Specifically, it found that section 311.3(1) did not permit school boards to use their ability to make policies to grant themselves additional remedial powers at expulsion hearings. Section 311.3 speaks only to making policies about how the hearing will be conducted. Subsection 311.3(2) makes it clear that the hearing is to be conducted in accordance with the school board's policy, subject to the requirements of section 311.3, which are procedural in nature. The CFSRB stated:

> *There is nothing in the plain reading of the provision, taken in context of the legislation, that permits a school board to add to its remedial powers following the expulsion hearing. Those remedial powers are clearly set out in the legislation under s.311.4 and 311.5 which in no way reference school board policy. The trustees must decide either to expel or not expel a pupil. If the school board decides not to expel a pupil, it can do only one of three things: confirm, shorten or quash the suspension. It has no authority to add terms to the suspension.*
>
> *…*
>
> *The Respondent cannot give itself powers at an expulsion hearing over and above its powers under the Act…They cannot impose a suspension that includes a condition which, in effect is an expulsion. Such an approach would circumvent a pupil's right to appeal an expulsion under the Act. The Respondent has no authority to indirectly deprive a pupil of a statutory right of appeal, an integral part of the legislative scheme.*

The CFSRB concluded that the DC had imposed additional conditions to the original suspension without any authority in the *Education Act* to do so. The CFSRB found that the condition preventing the student from returning to his school effectively made the outcome an expulsion in the guise of a suspension. The CFSRB concluded, "*if it quacks like a duck, it is a duck*".

Further Considerations

The Respondent submitted an alternative argument; it claimed that a school board can refuse to admit a student under section 265(1)(m) of the *Education Act*, and that this was in fact what the DC had done. The CFSRB rejected this argument. Section 265(1) of the *Education Act* is titled "Duties of principal" and subsection (m) gives the principal the duty, subject to an appeal to the board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would, in the principal's judgment, be detrimental to the physical or mental well-being of students. This section refers to the powers of the principal, not the powers of a Discipline Committee at an expulsion hearing. The School Board could not give its Discipline Committee the duties and powers that the *Education Act* gives to principals to manage their schools.

The CFSRB went further and commented on the application of Article 3 of the United Nations' *Convention on the Rights of the Child* (the UNCRC).[10] The CFSRB quoted the Supreme Court of Canada's decision *Baker v. Canada (Minister of Citizenship and Immigration)*[11], where the Supreme Court held that: "*the best interests of the child is an*

[10] *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3.
[11] [1999] 2 SCR 817.

important consideration in all administrative decision making involving children and youth" and, "*that the decision maker must consider the best interests of the child as 'an important factor, give them substantial weight, and be alert, alive and sensitive to them'*."[12] The CFSRB stated that the UNCRC values must inform the approach taken to decisions made about children and statutory interpretation, and that under Article 28.2 of the UNCRC, school discipline, "*is to be administered in a manner consistent with the UNCRC which includes the right of the child to be heard*[13]*, incorporating due process and the best interests of the child*".

The CFSRB concluded that the approach taken by the School Board had the effect of barring an appeal and infringed on the student's procedural right to be heard. This was contrary to the values of the UNCRC, and those values inform the application of the law. A student (or his or her parent) has a right to attend an expulsion appeal before the CFSRB and to make a statement. An approach that circumvented the statutory right to appeal was not in the best interests of the student and was inconsistent with the UNCRC's right of children to be heard.

General Comments

This is a further decision of the CFSRB where the CFSRB has confirmed that the policy developed by school boards must be consistent with and restricted to the powers given to the school board under the *Education Act*. Further, the CFSRB has confirmed that the remedial powers of the Discipline Committee are also restricted to the options set out in the *Education Act* or Regulations. The reference to and the application of the articles in the UNCRC is perhaps a further innovative approach by the CFSRB with respect to the procedural rights of the student which constitute due process.

If anyone has any questions with respect to this Decision, please feel free to contact us.

Regards.

Bob Jennifer Nicola Buck

May 2015

[12] *Ibid*. at paras. 73 and 75.

[13] Regarding the right to be heard, Article 12.1 of the UNCRC provides that: *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*