



**SUBMISSION OF THE
ONTARIO HUMAN RIGHTS COMMISSION**

To the

**Toronto District School Board
Safe and Compassionate Schools Task Force**

APRIL 29, 2004

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OVERVIEW

The Commission is pleased to have the opportunity to make this public submission to the Toronto District School Board's *Safe and Compassionate Schools Task Force*. The Commission makes this submission in accordance with its previously stated intent to examine the concern that the *Safe Schools Act* and related school board policies are having a discriminatory effect on racialized students and students with disabilities.

The discriminatory effect of safe school legislation and policies was a prominent concern raised during the course of two recent public inquiries undertaken by the Commission and set out in the Commission's reports entitled: *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*,¹ and *Paying the Price: The Human Cost of Racial Profiling*.²

The Commission believes that the stated purposes of the *Safe Schools Act* and Regulations and related school board policies – to promote respect, non-violent conflict resolution and the safety of people in schools – are reasonable and *bona fide* and of paramount importance.

At the same time, the Commission believes there is cause for concern, based on written and verbal submissions received during its two public inquiries noted above, based on findings from an external report prepared for the Commission entitled *The Ontario Safe Schools Act: School Discipline and Discrimination* (the "External Report"),³ as well as allegations raised directly with the Commission, that the application of the *Safe Schools Act* and at least some school board policies, such as the TDSB's Safe Schools Policy⁴, are having, or are at risk of having, a discriminatory effect on racialized students and students with disabilities.

THE REGULATORY FRAMEWORK

In 2001, the Ontario Legislature passed the *Safe Schools Act*, which gave force to the provincial Code of Conduct and provided principals, teachers, and school boards with more authority to suspend and expel students and involve the police. The *Safe Schools Act* specifies infractions which require mandatory suspensions, expulsions and police involvement. It also permits school board policies to add infractions for which suspensions or expulsions are either mandatory or discretionary.

The *Safe Schools Act* and Regulations⁵ provide that the suspension or expulsion of a student is not mandatory if (a) the pupil does not have the ability to control his or her

¹ *The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities*. Consultation Report, Ontario Human Rights Commission 2003.

² *Paying the Price: The Human Cost of Racial Profiling*. Inquiry Report,

³ *The Ontario Safe Schools Act: School Discipline and Discrimination*. External report prepared by Ken Bhattacharjee, human rights consultant, for the Ontario Human Rights Commission (2004).

⁴ Toronto District School Board Policy P.051 SCH: Safe Schools

⁵ Ontario Regulation 37/01

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 of any person. However, the administrator of discipline retains the discretion to suspend or expel in these circumstances. As well, the *Act* does not recognize disability and the duty to accommodate as a mitigating factor.

The *Safe Schools Act* also provides that the Minister of Education may require school boards to establish and maintain specified courses and services for students who are suspended and expelled. In addition, the *Act* states that the Minister may establish one or more programs ("strict discipline" programs) for students on full expulsion⁶ to prepare them to return to school. The Ministry has established strict discipline programs for students on full expulsion. The Ministry has not required school boards to establish courses and services for suspended students and students on limited expulsion.⁷

The *Safe Schools Act* obligated school boards to implement policies, guidelines and procedures in accordance with the *Act*. The Toronto District School Board (TDSB), for example, adopted its Safe Schools Foundation Statement Policy that included a "zero tolerance" component in June 1999 and revised it in May 2000.⁸ The TDSB also adopted a *Code of Conduct* in April 2002, which outlines infractions for mandatory or discretionary expulsion.

DISPROPORTIONATE IMPACT OF 'ZERO TOLERANCE' DISCIPLINE

External Report Prepared for the Commission

The External Report prepared for the Commission finds that in Toronto and other parts of Ontario there is a strong perception, which is supported by some independent evidence, that the *Safe Schools Act* and related school board policies are having a disproportionate impact on racial minority students, particularly Black students, and students with disabilities.

In addition to reviewing the legal framework for applying discipline in schools in Ontario, the External Report looks at research and practices in other jurisdictions, including the United States, Britain and Nova Scotia. It then presents independent findings from Ontario including: a study on racial minority students' perceptions of disciplinary practices; interviews with forty-two individuals, among them lawyers, school board trustees and superintendents, teachers, principals, students, youth leaders, community and social workers, youth workers, academics, policy analysts, consultants, medical experts, and journalists, who are knowledgeable about school discipline and its impact on racial minority students or students with disabilities.

⁶ "Full" expulsion means expulsion from all (publicly funded) schools in the province.

⁷ A suspension is for up to twenty days. A limited expulsion is twenty-one days to one year.

⁸ *Supra*, note 4.

Though the External Report looked at other school boards in Ontario, the Report highlights the discipline policies and practices of the Toronto District School Board, which reports to be the largest school board in Canada and one of the most diverse and multicultural education systems in the world.

OTHER JURISDICTIONS

In the United States, the most comprehensive national report on 'zero tolerance' and disciplinary policies in the U.S. education system is the Harvard University report, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*.⁹ The report found that several decades of research and analysis of data on school discipline show that students of colour and children with special needs are disproportionately impacted by school discipline policies. The report also cites evidence to make the following points about the application of 'zero tolerance': it conflicts with the healthy developmental needs of children, particularly students at-risk; there are long-term detrimental consequences for the child; there is a need for high quality alternative education programs; there is increased criminalization of children; it has not reduced violence or increased safety in schools; and some schools are defying the status quo by creating a safe environment with a low number of disciplinary referrals.

In the United Kingdom, there is also some research showing that Black students, particularly of Caribbean origin, are disproportionately impacted by the application of discipline in schools.¹⁰

Empirical research from Nova Scotia released in 1994 also demonstrates that Black students were being disproportionately impacted by the application of suspensions.¹¹ In 1999, the Government of Nova Scotia had considered adopting a 'zero tolerance' school discipline policy,¹² but unlike Ontario, they later rejected doing so as their School Conduct Committee found such policies affect a disproportionate number of poor, minority and special needs students.¹³

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In Ontario, there does not appear to be any data collection on the race of students disciplined that might have gauged the discriminatory effect of 'zero tolerance'

⁹ The Advancement Project and the Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* (Boston: Harvard University, 2000).

¹⁰ Appiah L. and N. Chunilal, *Examining School Exclusions and the Race Factor* (London: The Runnymede Trust, 1999), 2. Also see, Commission for Racial Equality, *Exclusion from School and Racial Equality: A Good Practice Guide* (London: 1997), 3.

¹¹ *BLAC Report on Education: Redressing Inequality-Empowering Black Learners*, vol. 1 (Halifax: Black Learners Advisory Committee, 1994).

¹² *John Hamm's Plan for Nova Scotia: Strong Leadership... a clear course* (Halifax: Nova Scotia Progressive Conservative Party, 1999), 25.

¹³ School Code of Conduct Committee, *Report on School Conduct Code*, December 2000, 1, 9. Also see, A. Power, *Rethinking Zero Tolerance: Beyond the Quick Fix*, Paper Presented at the 2nd Annual Human Rights Symposium: Focus on Racial Discrimination, Osgoode Hall Law School Professional Development Program, 23 May 2003, 1.

legislation and policies. And, although very little statistical research has been conducted on this matter, the authors of the study *Racial and Ethnic Minority High School Students' Perceptions of School Disciplinary Practices: A Look at Some Canadian Findings* conclude that the perception of racial profiling in the school system must be addressed because it is "a psychological reality for students which undoubtedly impacts on their schooling experience."¹⁴

The External Report prepared for the Commission found that strong perceptions and experiences exist in many different circles that the *Safe Schools Act* and related school board policies on discipline are having a discriminatory effect on racialized students and students with disabilities, and that these perceptions and experiences have been reported to the Ministry of Education, schools boards and the Commission.

The general observation is that discipline policies have always had a discriminatory effect on Black students, but the *Act* and "zero tolerance" policies have made the problem much worse, with front-line workers reporting significantly higher numbers of racialized students and students with disabilities being suspended and expelled.

Specifically, there is a perception that students from certain racial groups, particularly Black, Tamil, Aboriginal and Latino students, are treated more harshly than other students in the application of discipline for the same offence. There is also some suggestion that a discriminatory effect on Black students may be the result of suspensions for more "subjective" offences, such as being disrespectful or questioning authority, where there is greater leeway for racial stereotyping and bias to enter into the decision-making process.

Studies done in Toronto over the last two decades show that systemic factors result in Black students being disproportionately streamed into basic level and special needs classes, leaving school earlier and dropping out in disproportionate numbers.¹⁵ Views were expressed that these same systemic factors also lead to a discriminatory effect in the area of suspensions and expulsions.

Views were also held that the *Safe Schools Act* and *Regulations* entrench a failure to accommodate and provide principals and school boards with the means to exclude

¹⁴ M.D. Ruck & S. Wortley, "Racial and Ethnic Minority High School Perceptions of School Disciplinary Practices: A Look at Some Canadian Findings" (2002) 31(3) *Journal of Youth and Adolescence* 185 at 186,194.

¹⁵ See e.g. Larter, S., Draffin, S., Power, M., & M. Cheng, *Identification, placement and review process: Parent's/Guardian's opinions (Report # 179)* (Toronto: The Board of Education for the City of Toronto, Information Services Division, 1986); Cheng, M., Tsuji, G., Yau, M., & S. Ziegler, *The every secondary student survey, Fall 1987 (Report # 191)* (Toronto: Research Section, Toronto Board of Education, 1989); Cheng, M., Yau, M., & S. Ziegler, *The 1991 every secondary student survey, part II: Detailed profiles of Toronto's secondary school students (Report #204)* (Toronto: Research Services, Toronto Board of Education, 1993); Dei, G., Mazzuca, J., Mclsaac E., & R. Campbell, *Drop-Out or Push Out? The Dynamics of Black Students Disengagement from School* (Toronto: University of Toronto Press, 1995); Braithwaite K. & C. James (eds.), *Educating African Canadians* (Toronto: James Lorimer, 1996); Dei, G., Mazzuca J., Mclsaac, E., & J. Zine, *Reconstructing "Drop-Out": A Critical Ethnography of the Dynamics of Black Students Disengagement from School* (Toronto: University of Toronto Press, 1997).

students with disabilities, particularly students with learning disabilities and/or behavioural problems, through the use of suspensions and expulsions.

An Ontario Ministry of Education draft document, *Special Education Monograph No. 5, 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*, shows that the government has been aware since at least 1997 that the use of suspensions and expulsions in schools may have a disproportionate effect on students with disabilities. Furthermore, the Monograph clearly states that if students with disabilities are not accommodated, the disproportionate impact may be viewed as discrimination.

Some of the Toronto studies referred to above also show that Black students are disproportionately represented in special needs classes.¹⁶ An inference was made that suspensions and expulsions would impact more heavily on racialized students in special needs classes. Moreover, other factors such as poverty and immigrant/refugee status may further compound the effect.

It was also reported that students who are suspended and expelled are having difficulty accessing alternative education services due to the failure of schools to provide homework, the absence of programs in certain geographical areas, and the limited capacity of these programs. And, there are no alternative programs for students in junior kindergarten to grade six.

The failure of the *Safe Schools Act* to incorporate an Aboriginal perspective, such as collective decision-making and community response, was also identified as evidence of systemic factors leading to a discriminatory effect on Aboriginal students.

It was also argued that budget pressures resulting in cuts to safe schools advisors, community advisors, youth counselors, attendance counselors and social workers made concurrently with the implementation of the *Safe Schools Act* and related policies exacerbated the impact on students at-risk.

Many believed that increased suspensions and expulsions of students are having a broad, negative impact not only on the student, but also on his or her family, the community and society-at-large. The most commonly identified elements are negative psychological impact, loss of education, higher dropout rates and increased criminalization and anti-social behaviour.

The External Report prepared for the Commission concludes with a number of suggestions from interviewees for improvement and consistency with human rights principles which can be found in the Executive Summary and in the body of the Report itself, and are summarized below in the recommendations section of this Submission.

¹⁶ Ibid.

Additional Findings from Two Commission Inquiries

RACIAL PROFILING

During the Commission's 2003 inquiry into racial profiling,¹⁷ there was a strong perception reported that the *Safe Schools Act* and school board policies applying the Act are having a discriminatory effect on racialized students. Again, participants emphasized that the discriminatory effect was also reaching beyond students and impacting on their families, communities and society at large. The most commonly identified impacts were: loss of education and educational opportunities; negative psychological impact; increased criminalization of children often for conduct that does not threaten the safety of others; and promotion of anti-social behaviours.

Loss of education or loss of educational opportunity was identified as one of the most significant and tangible losses a child can experience. At some schools, suspensions can be experienced as early as kindergarten to grade six. In some cases, students are out of school for a long period of time. The Commission heard that remedial work to be completed during the suspension is rarely assigned and, for students who are expelled, it is very difficult to get into an alternative program or another school. The result of this can be devastating to the child's future. Ambitions to pursue higher education can be shattered and even completing high school can be in doubt.

There was also a concern that the increased use of suspensions and expulsions is pushing students to drop out of school. This fear seems to be well founded, as there are American studies which confirm that suspension is a moderate to strong predictor of a student dropping out and that suspension and expulsion are one of the top three school-related reasons for dropping out.¹⁸

And, it was reported to the Commission that children who are out of school are more likely to meet anti-social children and learn or engage in anti-social behaviours. For example, David R. Offord, Director, Canadian Centre for Studies of Children at Risk notes:

Once kids are out of the mainline and expelled, then they are on a different path, for sure. First, they don't have much to do during the day. They may make contact with older kids or other kids who are having difficulties. ... There is some literature that points out if you put anti-social kids together it escalates their anti-social behaviour. ... It can have an impact on the community in which they live and, of course, it contributes to an important problem in Canada, which is serious anti-social behaviour, both violent and non-violent.¹⁹

¹⁷ Supra, note 2.

¹⁸ R.J. Skiba & R. Peterson, "The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?" (1999) 80(5) *Phi Delta Kappan* 372, online: <<http://www.pdkintl.org/kappan/kski9901.htm>>; L.M. DeRidder, "How Suspension and Expulsion Contributes to Dropping Out" *The Education Digest* (February 1991).

¹⁹ Interview with David R. Offord, Director, Canadian Centre for Studies of Children At-Risk, McMaster University, 6 May 2003. Cited in the Commission's report on *racial profiling*, Supra, note 2.

ACCESSIBLE EDUCATION FOR STUDENTS WITH DISABILITIES

The Commission heard in its review of accessible education in Ontario²⁰ that the school system is not well equipped to deal with students whose disabilities may manifest in disobedient or disruptive behaviour. Consultees told the Commission that, in many cases, students are suspended or expelled without due consideration of their right to accommodation.

Justice for Children and Youth observed in their submission:

"Since the implementation of the *Safe Schools Act*..[there has been] an increase in the number of parents of students, and students reporting suspensions and expulsions to our offices. More specifically, there has been an increase in the number of reported cases of suspensions and expulsions by students identified by their particular boards of education as 'exceptional'. Quite often students are expelled or suspended for the very behaviour which makes them exceptional. For example, in two recent cases parents of students with Tourettes Syndrome reported to us that their children were being disciplined for swearing..., a behaviour which is beyond their control. In both of these cases, the student had been identified as exceptional."²¹

The Commission was told that students with disabilities are being ostracized for behaviour that may be beyond their control, and that the suspension and expulsion provisions of the *Safe Schools Act* are not being interpreted or applied consistently throughout the province.

The view was also expressed that the *Safe Schools Act* is often applied more strictly to children with disabilities from racialized communities resulting in 'intersecting' grounds of discrimination. For example, in its submission ARCH stated:

"[I]t is the view of some racialized communities that their children are more likely to be suspended or expelled than white children and that the *Safe Schools Act* is applied differentially to them. In many instances, although the conduct giving rise to the reprisal is disability related, the student's needs are not identified or supported."²²

The Commission recognized in its consultation report²³ that maintaining a safe learning environment for students, school staff and educators alike is an important objective. And where a student engages in behaviour that impacts upon the well-being of others, it may be open to education providers to argue that to accommodate that student would cause undue hardship on the basis of health and safety issues, specifically, that the accommodation would pose a risk to public safety. However, the seriousness of the risk will be evaluated only after accommodation has been provided and only after appropriate precautions have been taken to reduce the risk. The onus of proof will be on the education provider to provide objective and direct evidence of this risk.

²⁰ Supra, note 1.

²¹ Ibid.

²² Ibid.

²³ Ibid.

REMEDYING DISCRIMINATORY EFFECT

The Commission's Position

The Commission is of the view that the Ministry of Education and school boards ought to know and accept the existing evidence indicating that the application of “zero tolerance” disciplinary legislation, regulations and policies can have a discriminatory effect on racialized students and students with disabilities and can further exacerbate their already disadvantaged position in society. The Ministry of Education and school boards should be cognizant that this is a recognized phenomenon in other jurisdictions and should account for this by taking appropriate steps to monitor for and prevent this known discriminatory phenomenon.

The Ministry of Education and school boards should examine and implement alternative measures that would reasonably support the *bona fide* goal of safe schools and at the same time not result in a discriminatory effect on racialized students and students with disabilities.

The Ministry of Education and school boards should ensure that the individual circumstances of racialized students and students with disabilities are accounted for in the application of discipline. This would include assessing individual circumstances, exercising discretion in certain cases, ensuring the provision of appropriate accommodations to meet the needs of students with disabilities, and providing adequate alternative education services for all students who are suspended or expelled.

The Commission believes that engaging in these actions will help the Ministry of Education and school boards fulfill their responsibilities to provide for equal access without discrimination to education services in accordance with the Ontario *Human Rights Code*.²⁴

Summary of Recommendations

The following is a summary of specific recommendations based on findings outlined above from the Commission's two public inquiry reports on accessible education and on racial profiling, as well as the External Report prepared for the Commission.

The Ministry of Education and school boards should:

1. Accept and acknowledge the existence of the discriminatory effect of ‘zero tolerance’ legislation and policies, as well as the phenomenon of racial profiling; and, take steps to monitor for, prevent, and combat any discriminatory effect including developing or modifying legislation, policies, practices, training, awareness²⁵ and public relations activities, and report publicly in this regard,²⁶

²⁴ The right to freedom from discrimination under the *Human Rights Code* also applies to the private school sector.

²⁵ Commission's report on racial profiling, *Supra* note 2, recommendation #12. Also see, External Report prepared for the Commission on the effect of safe schools legislation and policies, *Supra* note 3, recommendation #5.

2. Address the perceptions and real experiences of affected communities, including meeting with communities to discuss concerns and develop solutions;²⁷
3. Collect and analyze data on suspension and expulsions under the *Safe Schools Act* and school board policies in order to monitor, prevent and combat any discriminatory effect on individuals protected under the *Code*, including students from racialized communities and students with disabilities. Consult with affected communities and the Ontario Human Rights Commission to establish appropriate guidelines on the collection and use of data, including ensuring anonymity and using data only for the purpose of addressing inequities and promoting compliance with the *Code*;²⁸
4. Incorporate more anti-discrimination and diversity training in the elementary and secondary school curriculum. Improve recruitment, retention and promotion of employees who are members of racialized groups.²⁹ This should also be the case for private schools operating in Ontario.³⁰
5. Implement or restore support positions such as community advisor, youth outreach worker, attendance counselor and social worker positions;³¹
6. In accordance with the *Human Rights Code*, fulfill the duty to accommodate, rather than suspend or expel, a student for disability-related behaviour;³²
7. Remove all references to “zero tolerance” in school board policies;³³
8. Establish a better balance between punishment, on the one hand, and conflict resolution, peer mediation, prevention, human rights protection and equity, on the other.³⁴ This could include making use of in-school suspensions;³⁵ and mandating mediation before an expulsion hearing;³⁶
9. Establish and fully fund a sufficient number of alternative programs for *all* suspended and expelled students;³⁷

²⁶ Commission’s report on racial profiling, *Supra* note 2, recommendation #6.

²⁷ *Ibid*, recommendation #9.

²⁸ *Ibid*, recommendation #10. Also see: Commission’s report on accessible education, *Supra* note 1, recommendation #6; and, the External Report prepared for the Commission on the effect of safe schools legislation and policies, *Supra* note 3; *Individuals with Disabilities in Education Act* 20 U.S.C. at 1418(c); Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, at Article 6, United Nations Ad Hoc Committee, January 2004.

²⁹ *Ibid*, recommendation #14.

³⁰ *Ibid*, recommendation #13.

³¹ External Report prepared for the Commission on the effect of safe schools legislation and policies, *Supra* note 3,, recommendation #10.

³² Commission’s report on accessible education, *Supra* note 1, recommendation #5. Also see, the External Report prepared for the Commission on the effect of safe schools legislation and policies, *Supra* note 3, recommendation #4.

³³ External Report prepared for the Commission on the effect of safe schools legislation and policies, *Supra* note 3, recommendation #2

³⁴ *Ibid*, recommendation #6.

³⁵ *Ibid*, recommendation #7.

³⁶ *Ibid*, recommendation #8.

³⁷ *Ibid*, recommendation #3.

10. Review practices to ensure responsiveness to the unique needs of Aboriginal persons.³⁸

Next Steps

The Commission encourages the Ministry of Education and school boards to:

1. Review empirical and other relevant research and recommendations set out in earlier studies and reports on the discriminatory effects of 'zero tolerance' discipline policies;
2. Review and respond to the findings and recommendations set out in this Submission of the Commission and the External Report presented to the TDSB Task Force, in a timely manner pursuant to the release of findings of the TDSB Task Force;
3. In addition to all the other recommended actions set out in the Commission's reports on racial profiling and on accessible education, also respond to the particular concerns with respect to the potential discriminatory effects of safe school legislation and policies, in accordance with the timelines set out in those reports.

For its part, the Commission will:

1. Continue to exercise its broad mandate under the *Code* to forward human rights policy through research and monitoring, inquiries, advice, communication and public education; and in particular, encourage cooperation between government, the education sector and affected individuals and communities and their representatives, in order to address concerns raised regarding the potential discriminatory effect of safe schools legislation and policies on racialized students and students with disabilities;
2. Monitor progress made on the recommended actions set out in this Submission to the TDSB Task Force on Safe and Compassionate Schools, and in the External Report, as well as the recommendations set out in the Commission's inquiry reports on racial profiling and on accessible education;
3. To the extent that the issues raised are not addressed, possibly undertake further inquiries;
4. In accordance with the Commission's mandate under section 29 of the *Code*, make this Submission and the External Report available to the public.

CONCLUSION

The existence and mandate of the TDSB's Task Force is a very positive step and presents the opportunity to address the findings and views of the Commission and many others summarized in this Submission: that there is a very strong perception in

³⁸ Ibid, recommendation #9. Also see, the Commission's report on racial profiling, Supra note 2, recommendation #4.

racialized and disability communities in Toronto and other parts of Ontario, based on real experiences, and consistent with empirical evidence across jurisdictions, that 'zero tolerance' disciplinary legislation and school board policies are having, or are at risk of having, a discriminatory effect on racialized students and students with disabilities.

It is the Commission's view that human rights protections have not been adequately incorporated into the current disciplinary regime. Yet the Commission believes that through awareness and cooperation it is possible and vital that the education system finds ways to ensure safe and violence-free schools without adversely affecting the protected human rights of all students.