



Bill 13, the Accepting Schools Act, 2012 and Bill 14, the Anti-Bullying Act, 2012 (“Bill 14”),

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Submitted by: The Ontario Bar Association, Education Section



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The Ontario Bar Association's Education Law Section appreciates the opportunity to comment on *Bill 13, the Accepting Schools Act, 2012* ("Bill 13") and *Bill 14, the Anti-Bullying Act, 2012* ("Bill 14"), both of which amend the *Education Act* (the "Act"), with respect to bullying.

The Ontario Bar Association ("OBA") strongly supports efforts to address issues of bullying in schools. It is not clear that a legislative approach is the optimal solution to the problems that lead to, and are caused by, bullying. However, we have provided comments below to assist the Standing Committee on Social Policy in making any legislation based on these Bills as effective as possible.

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 17,500 lawyers, judges, law professors and law students in Ontario. OBA members practice law in no fewer than 37 different sectors. In addition to providing legal education for its members, the OBA has assisted government and other policy makers with countless policy initiatives - both in the interest of the legal profession and in the interest of the public.

Our Education Law Section is comprised of approximately 200 lawyers who would count among their clients virtually every stakeholder in the education sector, including Boards of Education, principals, students, parents and teachers.

Definition of Bullying

Both Bill 13 and Bill 14 attempt to define bullying behaviour. The essential characteristics of a workable definition that will achieve the goals of deterring and remedying bullying include:

- (a) outlining factors that can be determined by those making discipline decisions, rather than requiring specialized expert analysis. So, for example, while intending to cause emotional harm is a factor that should be considered, requiring a determination of "psychological harm" may necessitate expertise outside that of the typical decision-makers contemplated by the bills – principals and trustees;



- (b) a contemplation of the wide range of bullying behaviour and impacts. Limiting the definition to “aggressive” behaviour, for example, does not capture patterns of exclusion and humiliation that are often the tools of bullies;
- (c) ensuring that bullying behaviour that occurs involving individuals who are not students of the board might also be disciplined where appropriate, for example, where students engaging in bullying behaviour against a student from another school board;
- (d) ensuring bullying is distinct from both appropriate behaviour and other inappropriate behaviour, such as assault, that is already dealt with in the legislation. This likely involves some focus on the intended impacts of the behaviour and social/relational factors such as power imbalances. Focusing on intended impact rather than merely result would accomplish two things - being able to discipline bullying before it fully succeeds in causing harm and distinguishing bullying from situations where students are emotionally hurt by legitimate disagreements or relationship decisions ; and
- (e) ensuring that the requirements are realistically provable. A requirement to show intent on a purely subjective basis would, in practice, make a bullying offence almost impossible to prove should the matter proceed to a hearing. Undefined and high hurdles such as “severe” would have a similar effect.

Achieving these essential characteristics would involve combining the Bill 13 and Bill 14 definitions. A more appropriate definition of bullying would be:

bullying means

the ~~severe~~ serious or repeated use by one or more pupils of a written, verbal, electronic or other form of expression, a physical act or gesture or any combination of them if it:

- (a) is directed at another pupilⁱ~~-person and if it has the effect of or~~ is reasonablyⁱⁱ intended to have the effect of,
 - (i) causing physical or emotional harm to the other ~~person~~ pupil or damage to ~~the other~~ person's property,
 - (ii) placing the other ~~person~~ pupil in reasonable fear of harm to himself or herself or damage to his or her property,
 - (iii) creating a hostile environment at school for the other ~~person~~ pupil,



(iv) infringing on the legal rights of the ~~other~~ person ~~pupil~~ at school, or

(v) materially and substantially disrupting the education process or the orderly operation of a school; (“intimidation”); and

(b) occurs in a context where there is a real or perceived power imbalance between the pupil and the individual based on factors such as size, strength, age, intelligence, peer group power, economic status, social status, religion, ethnic origin, sexual orientation, family circumstances, gender, race disability or the receipt of special education; (intimidation)

Statement of Purpose

Bill 13 would amend the Act to identifying the purpose of the student discipline section of (Part XIII of the Act). It is recommended that the purpose section of Part XIII include the promotion of a “*respectful*” environment. A lack of respect can be one of the principal causes of bullying and other inappropriate and destructive behaviour. It also is recommended that “*assault*” be specifically identified as an inappropriate behaviour throughout Part XIII of the legislation. Section 4 of Bill 13 should be amended to provide:

300.0.1 The purposes of this Part include the following:

1. To create schools in Ontario that are safe, inclusive and respectful and accepting of all pupils.
2. To encourage a positive and respectful school climate and prevent inappropriate behaviour, including bullying, sexual assault, assault, gender-based violence and incidents based on homophobia.
3. To address inappropriate pupil behaviour and promote early intervention.
4. To provide support to pupils who are impacted by inappropriate behaviour of other pupils.
5. To establish disciplinary approaches that promote positive behaviour and use measures that include appropriate consequences and supports for pupils to address inappropriate behaviour.
6. To provide pupils with a safe learning environment.



With respect to Bill 13's proposed amendment to subsection 310(1) of the Act, an attempt to address hate based activities, the amendment addresses "*any activity listed in subsection 306(1)*" that is "*motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any similar factor*", there is a concern that "*motivation*" might be difficult to prove. The Education Law section would propose that the language be amended to say "*includes an element of bias, prejudice or hate based on ...*"

Litigation

The Education Law section wishes to raise the concern that the prescriptive approach taken by both bills has the potential to increase the growing trend toward litigating discipline issues. Bill 13 identifies that there may be a process for parents/guardians or pupils to follow if they have concerns about the support provided by a school board. Such a process may not be able to forestall litigation completely. However, consultation with the bar and other stakeholders will assist in designing a process that will best achieve the goal of resolving dispute in a productive manner that allows relationships to continue rather than resorting to the courts.

Data Collection

With respect to Bill 14, there is a concern about the requirement to collect data. While, in and of itself, data collection is supported, there must be a sufficiently economic method for collection. It is crucial that administrators are available to manage the school and are not over-burdened by data collection requirements.

Applying the Anti-bullying Requirements to Other Users of the School

The Education Law Section wishes to also bring attention to subsection 7(2) of Bill 13, which amends Section 301 of the Act as follows:

(3.1) If a board enters into an agreement with another person or entity, other than a board, respecting the use of a school operated by the board, the board shall include in the agreement a requirement that the person or entity follow standards that are consistent with the code of conduct.

The "code of conduct" referenced appears to be Policy/Program Memorandum ("PPM") No. 128. It is further noted that PPM No. 128 does not contain any explicit reference to "bullying", though it does set out standards of behavior that are consistent with Bill 13. It is presumed that



the intent of this section is to ensure that those who enter into facility agreements be respectful to their own constituency and use their best efforts to prevent bullying. For purposes of clarity, the Education Law Section recommends that PPM No. 128 and the above section be amended to set out this intent more clearly.

Other Necessary Elements of the Solution

In order for bullying legislation to be effective, consistency of application and sufficient training for teachers and administrators is necessary. Those who will be enforcing this legislation on the ground must be trained to recognize bullying and address it appropriately, including recognizing when the bully perpetrating the behaviour may have disability related needs that necessitate a different approach to curbing the behavior.

In addition, a strong commitment from the government to ensure funding for training, prevention and remediation is necessary.

Conclusion

Once again, the OBA appreciates the opportunity to comment on these bills and we look forward to continued dialogue to develop solutions to the critical problem of bullying.

ⁱ Restricting the victims of bullying to pupils would not capture all bullying behaviour. Certain staff members may be victims of bullying. In addition, as the Act's structure would limit the meaning of "pupil" to pupil of the same board, it may not capture bullying in the context of inter-board events. Eliminating the term pupil does not give rise to a concern that this would expand the legislation's provisions to non-school-related behaviour. Due to other provisions of the Act, even if the word pupil is removed, the target behaviour would still be limited to behaviour in school or in relation to school activities (eg. section 310(1) and 306(1) both provide that the behaviour for which a principal can discipline is school-related). If pupil is used in the final bill, then the provision should be amended to deal with inter-board issues, such that the provision would read "another pupil, including a pupil of another Board."

ⁱⁱ We assume this is intended to be a modified objective test, which requires only proof of what a reasonable person in the position of the student accused of bullying would have intended by the behaviour. This test is a good balance of fairness and provability. It may, however, be necessary to more fully, explicitly outline this test in the legislation.