

**The Ontario *Safe Schools Act*:  
School Discipline and Discrimination**

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# Executive Summary

## Introduction

The main purpose of this report is to examine whether the Ontario *Safe Schools Act* and *Regulations* and the school board policies on discipline, known by some as “zero tolerance” policies, are having a disproportionate impact on racial minority students and students with disabilities. Advocates of zero tolerance argue that the policies are colour blind and fair because all the students who commit the same offence will be treated the same. Opponents point to other jurisdictions where there is data showing that suspensions and expulsions have a disproportionate impact on Black and other racial minority students and students with disabilities.

This report finds that in the Greater Toronto Area (GTA) and other parts of Ontario there is a strong perception, which is supported by some independent evidence, that the *Act* and school board policies are having a disproportionate impact on racial minority students, particularly Black students, and students with disabilities.

## Background

In Ontario, the first serious steps towards taking a zero tolerance approach to discipline matters in schools began in the mid-1990s. In late 1993, the Scarborough Board of Education adopted a Safe Schools Policy on Violence and Weapons. In the lead-up to the 1999 provincial election in Ontario, the Progressive Conservative Party platform promised a zero tolerance policy for bad behaviour in schools. The promise began to take shape in April 2000 when Education Minister Janet Ecker released a *Code of Conduct* for Ontario schools. One month later, the Minister introduced the *Safe Schools Act*, which proposed amending the *Education Act* to give force to the *Code of Conduct* and provide principals and teachers with more authority to suspend and expel students. The *Act* was passed by the legislature in June 2000 and came into effect in September 2001.

## The Regulatory Framework

Prior to the enactment of the *Safe Schools Act*, Section 23 of the *Education Act* regulated the suspension and expulsion of students. The authority to suspend a student was limited to principals and the authority to expel was limited to school boards. In both cases, the exercise of that authority was *discretionary*. The grounds for suspension were fairly limited and a student could only be expelled from all of the board’s schools if the pupil’s conduct was so “refractory” that the pupil’s presence was “injurious to other pupils or persons.”

The new regime, which is now part of the *Education Act*, is more complex and, reflecting the zero tolerance philosophy of its proponents, takes a more hardline approach in dealing with behaviour, discipline and safety problems. The authority to suspend a student is provided to both principals and teachers. A principal has the power to suspend for up to twenty school days, while a teacher has the power to either suspend for one day or refer the matter to the principal. The authority to expel has also been expanded, with school boards and principals sharing that authority. There are now two kinds of expulsion: (1) a *limited* expulsion from the school the student was attending until the later of a) a date set by the principal or board (twenty-one days to one year) or b) the date on which the student meets requirements established by the board, and (2) a *full* expulsion from all (publicly funded) schools in the province until the student has attended and met the requirements of a strict discipline program.

Perhaps the most significant change in the new regime is the provision for *mandatory* suspension and expulsion and police involvement. Suspension and expulsion are now mandatory for a wide range of infractions. The provincial *Code of Conduct* also mandates police involvement, in accordance with the police/school protocol, for most of the infractions. However, the *Act* and *Regulations* do provide for mitigating factors, whereby the suspension or expulsion of a student is not mandatory if:

- (a) the pupil does not have the ability to control his or her 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.

The *discretionary* suspension or expulsion of a student is left to school board policies.

The *Act* states that the Minister may require school boards to establish and maintain specified courses and services for students who are suspended and expelled. To date, that has not happened. The *Act* also states that the Minister may establish one or more programs for expelled students to prepare them to return to school. That has happened. Ontario Regulation 37/01 provides that a student who is subject to full expulsion may attend a school in Ontario if the student successfully completes a strict discipline program or has satisfied the objectives required for the successful completion of such a program. When the *Act* came into effect in September 2001, seven strict discipline programs were up and running in Ontario.

### **School Boards: The Toronto District School Board**

School boards in Ontario are under a legal obligation to adopt and revise policies, guidelines and procedures in accordance with the *Act* and *Regulations*

and the provincial *Code of Conduct*. The Toronto District School Board (TDSB), for example, has adopted or revised, among other things, a Code of Conduct and an Appropriate Dress Policy, as well as procedures for appealing suspensions and expulsions.

The TDSB has exercised its option to add to the list of infractions for which suspension or expulsion is mandatory and create a list of infractions for which suspension or expulsion is discretionary. It has constructed a Consequences of Inappropriate Student Behaviour Chart, which lists all the infractions, the minimum number of days a student must be suspended or expelled for, and whether the principal “may” or “shall” notify the police.

The TDSB’s *Safe Schools Procedures Manual* makes it clear that although one or more of the mitigating factors set out in the *Act* and *Regulations* may exist to preclude a mandatory suspension or expulsion, the principal may still impose a discretionary suspension or expulsion. The *Manual* also sets out the factors that a principal must take into account in selecting the most appropriate type and duration of consequence. Furthermore, when a student with exceptionalities is involved, the principal must also consider other enumerated factors relevant to the exceptionality. A teacher who suspends a student must follow the same rules. As a matter of practice, however, the teachers’ federations in Ontario have advised their members not to suspend students and to refer all disciplinary matters to the principal.

Basic data on the student is collected following a suspension. The *Manual* directs the principal or the teacher, as the case may be, to complete a Suspension Report Form. One section of the form requires information on whether the student has been identified as “exceptional”. Data on the race of the student is *not* collected.

The TDSB, on its own initiative, runs four support programs for suspended students and one program for students on limited expulsion. It also runs, in partnership with social service agencies, two strict discipline programs. There are reportedly waiting lists for all of these programs because of limited funding.

## **Zero Tolerance**

Although the Ontario government promised “zero tolerance” for bad behaviour in schools before the *Safe Schools Act* was enacted, and the *Act* prescribes “mandatory” suspensions and expulsions, the presence of mitigating factors in the current legislation precludes it from being strictly characterized as “zero tolerance”. Likewise, although the TDSB Safe Schools Foundation Statement Policy speaks of “zero tolerance” and “mandatory” suspensions and expulsions, the direction to principals and teachers to apply mitigating factors in disciplinary matters precludes it from being strictly characterized as “zero tolerance”. The real issue is whether there is a *practice* of “zero tolerance”.

In assessing whether zero tolerance is being practiced in the school system in Ontario, it is important to keep in mind that principals and teachers are receiving two contradictory messages, one advocating “zero tolerance” and prescribing “mandatory” action and the other directing them to apply mitigating factors.

### **Disproportionate Impact in Other Jurisdictions**

In the United States, the most comprehensive national report on zero tolerance and disciplinary policies in the education system is the Harvard University report, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*. One of the main areas that the report looks at is the disproportionate impact of zero tolerance policies on racial minority children and children with disabilities.

The report found that several decades of research and analysis of data on school discipline show that students of colour are disproportionately impacted by school discipline policies. The report also found that zero tolerance policies are having a “profound” impact on children with special needs.

The report is critical of the Office for Civil Rights (OCR) of the U.S. Department of Education for its failure to consistently apply the adverse impact doctrine in processing school discipline complaints and its failure to initiate investigations without waiting for complaints. However, in one case where the OCR found that Latino and African American students were being disproportionately impacted by the application of discipline, it did apparently apply the adverse impact doctrine. It then negotiated with the school district to implement positive intervention strategies, which led to a sharp drop in the racial disparities.

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.

On the positive side, the federal *Individuals with Disabilities Education Act* is viewed by many in the United States as a sound legal framework for accommodating students with disabilities within the school system, including in the application of discipline. The purpose of the *Act* is to ensure that all children with disabilities have available to them a *free appropriate public education* that emphasizes special education and related services to meet their unique needs.

The provisions on discipline in the *Act* flow from this principle. First, a child with a disability who is removed from school must still have access to educational

services. Second, a child with a disability cannot be removed from a regular school placement indefinitely. And third, a child whose behaviour was a manifestation of disability must be accommodated.

The *Act* also requires States and the Secretary of Interior to collect statistics to determine if significant disproportionality based on race is occurring with respect to placement in particular educational settings and to review and, if appropriate, revise policies, procedures and practices.

In the United Kingdom, there is also evidence that Black students, particularly of Caribbean origin, are disproportionately impacted by the application of discipline in schools. However, not all racial minority students are disproportionately impacted. Asian students, like White students, are subject to a lower number of permanent exclusions relative to their proportion of representation in the student population.

Nova Scotia seems to be the only province in Canada where there has been some collection and analysis of school board statistics on race and the application of discipline. The Black Learners Advisory Committee was able to access data from the Halifax Regional School Board from 1987 to 1992, which showed that Black students were being disproportionately impacted by the application of suspensions.

Nova Scotia has also recently gone through a process of considering and rejecting the adoption of a zero tolerance policy in the education system. As in Ontario, the Progressive Conservative Party platform promised a zero tolerance policy for misbehaviour in schools in the lead-up to the 1999 provincial election. However, shortly after forming a government, a School Conduct Committee, which represented a broad range of stakeholders in the education field, was established. The Committee decided to recommend that a zero tolerance policy *not* be adopted for use in Nova Scotia. One of the Committee's specific concerns was that such policies affect a disproportionate number of poor, minority and special needs students. The government accepted the recommendation.

### **Disproportionate Impact in Ontario**

The total absence of statistics on race and the inaccessibility to statistics on disability make it impossible to determine with any certainty whether the application of discipline in schools is having a disproportionate impact on racial minority students and students with disabilities. However, there is anecdotal evidence and some empirical evidence available from other sources which point in that direction.

One relatively recent study, *Racial and Ethnic Minority High School Students' Perceptions of School Disciplinary Practices: A Look at Some Canadian Findings*, examined the perceptions of differential treatment relating to school

disciplinary practices by high school students in Toronto. The results found that racial minority students, particularly Black students, are much more likely than White students to perceive discrimination with respect to teacher treatment, school suspension practices, the use of police by school authorities, and police treatment at school.

An internal 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*, also shows that the government has been aware since at least 1997 that the use of suspensions and expulsions in schools may have a disproportionate impact on students with disabilities. Furthermore, it clearly states that if students with disabilities are not accommodated, the disproportionate impact may be viewed as discrimination.

Based on interviews with members of the Black community and others in the GTA, there appears to be a strong perception that the *Safe Schools Act* and the new school board policies on discipline are having a disproportionate impact on Black students. The general feeling is that discipline policies have always had a disproportionate impact on Black students, but the *Act* and “zero tolerance” policies have made the problem much worse, with significantly higher numbers of Black students being suspended and expelled. The perception of disproportionate impact also exists in other racial minority communities, including the Tamil, Aboriginal and Latino communities.

A senior official at a school board in the GTA would not confirm or deny that there is a disproportionate impact on Black or other racial minority students. Rather, he seems to believe that students at-risk are being disproportionately impacted and it is necessary to address all the factors – not only racism – that put children at-risk. He also suggested that perceptions about disproportionate impact might not always accord with reality. A senior official at another school board in the GTA does not believe that there is a disproportionate impact because principals apply discipline objectively. He also suggested that the erroneous perception might stem from the fact that the student population in some schools largely consists of one racial or ethnic group.

Interviews with a social worker, a community worker, lawyers, mental health experts, advocates for people with disabilities and others reveal that there is a strong perception that the *Act* and school board policies are having a disproportionate impact on students with disabilities, particularly students with emotional/behavioural disorders, intellectual and learning disabilities, autism, and Tourette's Syndrome (including associate disorders such as attention deficit disorder, obsessive-compulsive disorder and difficulties with impulse control).

A senior official at a school board in the GTA would not confirm or deny that there is a disproportionate impact on students with disabilities, but emphasized

that principals do apply the mitigating factors to ensure that students with disabilities are treated fairly. A senior official at another school board in the GTA stated that the Board has not yet analyzed its statistics to see what the impact is on student with disabilities, but if the analysis does show that there is a disproportionate impact, steps will be taken to remedy the situation.

There is also specific evidence of disproportionate impact. Several school board trustees who adjudicate expulsion and suspension appeal hearings have reported that they see a disproportionate number of Black students at hearings. A senior official at a school board in the GTA, on the other hand, takes the position that the observations of individual trustees should be viewed with caution because they do not sit on all the hearings. However, lawyers who provide summary advice to or represent students who have been suspended or expelled from school also report seeing a disproportionate number of Black students and students with disabilities. Furthermore, the demand for services from community legal clinics which serve the Aboriginal, Latino, East Asian and Southeast Asian, and disability communities has increased since the *Act* came into effect.

Some lawyers and community workers have also observed or have been told that that there is a disproportionate number of racial minority students, particularly Black students, and students with disabilities in alternative programs for suspended and expelled students and strict discipline schools. A senior official at a school board in the GTA, on the other hand, states that in his observations the students in the programs are fairly reflective of the racial and cultural profile of the school system.

There is other evidence of disproportionate impact. Youth, community and social workers as well as teachers and behaviour consultants who provide front-line services to students who have been suspended or expelled report seeing a disproportionate number of racial minority students, particularly Black students, and students with disabilities. An education expert also points out that discipline policies must have a disproportionate impact on Black students because there is evidence that behaviour and special needs classes have a disproportionate number of Black students and students from those classes are disproportionately disciplined. Finally, an expert on children at-risk gave an opinion that based on the evidence that is available about the chances of a poor child being identified as having behavioural problems, and the connection between poverty and race, discipline policies must be having a disproportionate impact on Black children. He also stated that children with learning disabilities are at increased risk for behavioural problems and must therefore come in contact with elements of the *Act* more than other children because of their higher level of anti-social behaviour.

## **Discrimination**

Nearly all the interviewees identified discrimination – direct and systemic – as the main reason why the application of discipline in schools has a disproportionate impact on racial minority students and students with disabilities.

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 a perception that students with disabilities, particularly emotional/behavioural disorders and learning disabilities, are specifically targeted by the *Act*.

Very few interviewees believe that intentional, direct discrimination against Black students is widespread, but some believe that it does occur. There is also some suggestion that the disproportionate impact on Black students may be the result of being suspended for the more “subjective” offences, where there is greater leeway for racial stereotyping and bias to enter into the decision-making process. A high number of interviewees reported that Black students are getting suspended for being disrespectful to the teacher or questioning authority, which are more subjective offences.

Several interviewees take the position that the *Act* and *Regulations* provide principals and school boards with the means to *directly* discriminate against students with disabilities because they may suspend or expel a student for disability-related behaviour. The failure to mandate accommodation to the point of undue hardship inevitably leads to discrimination.

Most of the interviewees, however, believe that systemic discrimination is the main factor leading to the disproportionate suspension and expulsion of Black students. There have been studies done in Toronto in the last two decades which show that Black students are disproportionately streamed into basic level and special needs classes, leave school earlier, and drop out of school in disproportionate numbers. It is believed that the same systemic factors that lead to disproportionality in these areas also lead to disproportionality in the area of suspensions and expulsions.

The failure of the *Act* to incorporate an Aboriginal perspective, such as collective decision-making and community response, is also cited as evidence of systemic factors leading to the disproportionate impact on Aboriginal students.

Several interviewees identified a history of failure to accommodate students with disabilities within the school system in Ontario as the major systemic factor which leads to the disproportionate application of suspensions and expulsions. Furthermore, some believe that the *Act* entrenches the failure to accommodate because it provides schools and school boards with another means of excluding students.

Some interviewees believe that the cuts in support for students that have been made concurrently with the implementation of zero tolerance policies for misbehaviour are exacerbating the impact on students at-risk. Since 2001, due to budget constraints, the TDSB has been forced to significantly reduce or eliminate, among others, Safe Schools Advisors, Community Advisors, Youth Counsellors, Attendance Counsellors and Social Workers. Significant cuts were also made between 1998-2001.

Some interviewees also pointed out that there are multiple and intersecting grounds of discrimination. There are studies which show that Black students are disproportionately represented in special needs classes. It would therefore be a logical inference that suspensions and expulsions would impact even more heavily on Black students in special needs classes. Moreover, other factors such as poverty and immigrant/refugee status may further compound the impact.

### **Broader Impact**

Many interviewees believe that the increased suspension and expulsion of students are having a broad, negative impact on the student, his or her family, the community, and society-at-large. The most commonly identified elements are negative psychological impact, loss of education, higher drop-out rates, and increased criminalization and anti-social behaviour.

### **Recommendations**

The interviewees made a number of suggestions for improvement and consistency with human rights principles: (1) collecting and publishing statistics on race and disability in the application of school discipline with the goal of addressing any inequities; (2) removing all references to “zero tolerance” in school board policies; (3) setting up and fully funding alternative programs for *all* suspended and expelled students; (4) requiring schools to attempt to accommodate students who may be exhibiting disability-related behaviour; (5) training administrators of discipline on racial stereotyping and profiling, cross-cultural differences, accommodating people with disabilities, and understanding the immigrant and refugee experience; (6) establishing a better balance between punishment, on the one hand, and conflict resolution, peer mediation, prevention, human rights protection and equity, on the other hand; (7) using in-school suspensions; (8) mandating mediation before a hearing; (9) applying suspensions and expulsions to Aboriginal and Black students individually, but also *differently*, to account for systemic factors and disproportionality; and (10) restoring the community advisor, youth outreach worker, attendance counsellor and social worker positions that were cut by the Toronto District School Board.

### **Conclusion**

No one disagrees that schools should be safe and free of violence, and reasonable people can disagree how that can best be achieved, but from a human rights perspective, a number of concerns have been raised about the *Safe Schools Act* and school board policies, which may be summarized as follows.

First, the Ministry of Education and school boards are giving two contradictory messages to school administrators and the general public. As a result, while some school administrators may apply the mitigating factors, others may practice zero tolerance. A practice of zero tolerance inevitably conflicts with anti-discrimination legislation, particularly if it targets disability-related behaviour.

Second, although the Ministry of Education and school boards have acknowledged and addressed to some extent the possibility that the application of discipline may have a disproportionate impact on students with disabilities, there has been strong resistance to acknowledging or addressing the possible disproportionate impact on racial minority students.

Third, in the GTA and other parts of Ontario, there is a strong perception supported by some empirical evidence that the *Act* and school board policies are having a disproportionate impact on racial minority students, particularly Black students, and students with disabilities.

Finally, human rights protections have not been adequately incorporated into the current disciplinary regime. It is possible to have a disciplinary regime that both maintains safe and violence-free schools and protects the human rights of all students in the school system.

## I. Introduction

The main purpose of this report is to examine whether the Ontario *Safe Schools Act* and *Regulations* and the school board policies on discipline, known by some as “zero tolerance” policies, are having a disproportionate impact on racial minority students and students with disabilities. Since September 2001, when the *Act* came into effect, school boards around the province have been drafting and implementing policies and procedures to comply with the *Act*.

The *Toronto Star* recently reported that in the 2001-2002 school year, there were 113,000 suspensions and expulsions from schools in Ontario, including 24,238 suspensions and limited expulsions and just under 100 full expulsions issued by the Toronto District School Board (TDSB).<sup>1</sup> Although there is disagreement over how much of an increase this is compared to the previous school year,<sup>2</sup> everyone agrees that there has been an increase and the public perception is that the increase is substantial.

One of the strongest indicators of this is the unprecedented level of organizing, particularly in low-income communities, to support suspended and expelled students. In the Greater Toronto Area (GTA), at least three community-based initiatives have sprung up in the last year.<sup>3</sup> In addition, several community legal clinics, in response to a sudden increase in demand, are now providing summary advice and representing students in suspension and expulsion matters.<sup>4</sup> Finally, community meetings on the impact of zero tolerance policies are now being held

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<sup>1</sup> Tess Kalinowski, “Does getting tough work?” *Toronto Star*, 18 March 2003. The author of the present report tried to confirm these statistics with the Ministry of Education, but was told that the precise numbers for the whole province are still being compiled and will not be available until the end of the year.

<sup>2</sup> Kalinowski, *ibid.* estimated that there was a 40% increase in suspensions and expulsions over the previous year at the TDSB. Two senior officials at different school boards in the GTA both argue that the new and old regimes are so different, and the collection of data so different (the new databases are more precise and accurate), that comparing numbers is very difficult. However, they both acknowledge that there has been an increase. Interview, 14 May 2003, 1-2; Interview, 16 May 2003, 1.

<sup>3</sup> A partnership of organizations led by the Muslim Education Network has established the Community Initiative for Suspended Students in the Morningside-Lawrence area of Scarborough and expects to start running a program to support suspended students from junior kindergarten to grade six in September 2003. Community groups and educators in Regent Park have put forward a Proposal to Establish the Regent Park Program to Prevent Suspension and Support Suspended Kids. Promoting Economic Action and Community Health (PEACH) is running a Wraparound project to assist at-risk youth in the Jane-Finch community in partnership with the Canadian Association of Black Lawyers, Conflict Mediation Services of Downsview, the Hincks-Dellcrest Centre, Oolagen Community Services, the Organization of Parents of Black Children, Pro-Bono Law Ontario, Westview Centennial Secondary School and the Toronto District School Board.

<sup>4</sup> See Part VII, below.

on a regular basis. In the first two weeks of June 2003, for example, at least two such meetings were held in the GTA.<sup>5</sup>

Although initial media reports focused on absurdities such as the criminal prosecution of a high school student who threw a water balloon at his teacher on the last day of school,<sup>6</sup> the more recent focus has been on the impact on Black students. In November 2002, CBC Radio broadcast an in-depth story which presented evidence and opinions that a disproportionate number of Black students were being suspended and expelled in Toronto.<sup>7</sup> For unspecified reasons, the Ministry of Education refused to record an interview with the CBC for this story. This was followed by an article in the *Toronto Star* in March 2003 with essentially the same thesis.<sup>8</sup>

This report starts by looking at background information; the regulatory framework for applying discipline in schools in Ontario; the system set up by the Toronto District School Board; and information on practices and impact in other jurisdictions, including the United States, Britain and Nova Scotia. It then presents findings from independent research conducted in Ontario, including a relatively recent study on perceptions of racial minority students and a Ministry of Education draft monograph with guidelines on disability and the application of discipline. Finally, it puts forward findings from interviews with forty-three individuals, among them lawyers, school board trustees, teachers, principals, students, youth leaders, community workers, youth workers, academics, policy analysts, consultants, social workers, school board superintendents, medical experts, and journalists, who are knowledgeable about school discipline and the impact of discipline policies on racial minority students or students with disabilities. The research focused primarily on the Toronto District School Board, but also looked at the Toronto Catholic District School Board and school boards in other parts of Ontario.

The author of this report faced several barriers in his attempts to gather evidence from official sources. First, although some statistics appeared in a recent *Toronto Star* article, it was difficult to get access to the precise number of students who have been suspended and expelled since the *Safe Schools Act* came into effect. Both the Ministry of Education and school board officials in the GTA failed to provide statistics upon request. Second, the Ministry of Education and school boards do not collect statistics on the race of the students being suspended and expelled and are resistant to looking into the possibility that the application of

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<sup>5</sup> On 10 June 2003 Pro-Bono Law Ontario held a *TeamChild – Wraparound Lawyers Training Session* at the Advocates' Society. On 11 June 2003 the Toronto Civic Action Network in partnership with the Rexdale Cross Cultural Committee and Rexdale Youth Advocates held a Community Town Hall Meeting at the Rexdale Community Health Centre on *Education: The Effects of Zero Tolerance and Funding Cuts on Young People*.

<sup>6</sup> Eli Schuster, "Zero tolerance equals zero judgment," *Report*, 10 September 2001.

<sup>7</sup> "The Colour of Zero Tolerance," *The Current*, CBC Radio One, 20 November 2002. The full transcript of this story can be found at Appendix I, Tab 2.

<sup>8</sup> *Supra* note 1.

discipline may have a disproportionate impact on racial minority students. Statistics on the number of students with exceptionalities who are being suspended is being collected, but the information is not yet accessible to members of the public. Third, requests to see or interview staff at alternative programs, which provide services to suspended and expelled students, were refused.

The official resistance in Ontario, particularly on the issue of school discipline and race, is clearly out-of-step with other jurisdictions that have diverse student bodies. In both the United States and Britain, official statistics are collected on the race of suspended and expelled students and there is an open discussion about the disproportionate impact on racial minority students. Furthermore, the Progressive Conservative government in Nova Scotia considered adopting a zero tolerance policy in the education system at about the same time as the Ontario government, but unlike the latter, it directly addressed the possibility that such a policy may have a disproportionate impact on racial minority students.

Advocates of zero tolerance argue that the policies are colour blind and fair because all the students who commit the same offence will be treated the same.<sup>9</sup> Opponents point to other jurisdictions where there is data showing that suspensions and expulsions have a disproportionate impact on Black and other racial minority students and students with disabilities.

This reports finds that in the GTA and other parts of Ontario there is a strong perception, which is supported by some independent evidence, that the *Safe Schools Act* and school board policies are having a disproportionate impact on racial minority students, particularly Black students, and students with disabilities. Some of the anecdotes told by the interviewees exemplify this:<sup>10</sup>

- Two Black female students were suspended for possessing weapons after they brought nail files to school.<sup>11</sup>
- A Black male student who was accused of stealing money was handcuffed by the police and led out of the school in front of other students, even though the alleged offence (theft) was non-violent.<sup>12</sup>
- A 14-year-old Black student with an intellectual disability was suspended after a teacher was hit by an object in a darkened classroom during the showing of a film. He was questioned by the vice-principal for one and a half hours without his parents being present. The police were called, but he was not charged because of a lack of evidence. He took a lie detector test and passed it. Nevertheless, the school expelled him for almost three months.<sup>13</sup>

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<sup>9</sup> *Supra* note 6.

<sup>10</sup> The anecdotes are hearsay and the principals and teachers involved were not interviewed.

<sup>11</sup> Interview, 9 April 2003, 2.

<sup>12</sup> Interview, 25 March 2003, 2.

<sup>13</sup> Interview, 3 March and 15 May 2003, 1.

- An Iraqi student was suspended for three days after a note with profanities that was signed “Iraq” was found. He was the only Iraqi student in the school. He knew, in fact, that one of his friends had written the note. The student and his father offered to show the vice-principal proof that the handwriting in the note did not match his handwriting, but the vice-principal said that the decision had already been made.<sup>14</sup>
- Five students – two Aboriginal and three White – were caught taking drugs together. The two Aboriginal students were suspended for five days, one of the White students was suspended for three days and the other two White students were not suspended at all. The school told the parents of the Aboriginal students that the two White students were not suspended because they came forward first.<sup>15</sup>
- A Vietnamese student was suspended after a White student complained to a teacher that the Vietnamese student had threatened him. The Vietnamese student said that the White student had been bullying him. The teacher believed the White student and alleged that the Vietnamese student and his older brother were part of a gang. The student and his older brother – who went to a different school and had never met the teacher – both denied the allegation. After the student retained legal counsel, the superintendent and principal backtracked and said that there had been a misunderstanding due to language issues.<sup>16</sup>
- A Tamil student, who had an overall average of about 90%, was suspended and threatened with expulsion on the basis that he had falsified his marks for university entrance. The grade for one course on the student’s transcript had been changed from 79% to 80%. The student claimed that his girlfriend had picked up his transcript and changed the grade without his knowledge. The school administrators told the student’s father that his son’s education was over. After a community organization applied pressure, including asking for the police to be brought in, the school decided to limit the student’s suspension to five days.<sup>17</sup>
- A student with autism, who communicates by pulling hair, scratching, biting or kicking when he becomes frustrated, was suspended and then excluded from school for his behaviour. The student’s behaviour is managed at home through a special program, but the school board has maintained that it would be too costly to establish a similar program at school. As of April 2003, the student had been out of school, and not received any education, for six months.<sup>18</sup>
- Several students who are recognized as having Tourette Syndrome with coprolalia, the vocal tic that results in the uttering of profanity, have been

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<sup>14</sup> Interview, 21 March 2003, 8.

<sup>15</sup> Interview, 20 May 2003, 1.

<sup>16</sup> Interview, 4 April 2003, 1-2.

<sup>17</sup> Interview, 15 May 2003, 3-4.

<sup>18</sup> Interview, 8 April 2003, 3-4.

suspended for swearing in class. In those cases, the principals decided that the swearing was willful and had nothing to do with the syndrome.<sup>19</sup>

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<sup>19</sup> Interview, 14 May 2003, 2; Interview, 13 May 2003, 2.

## II. Background

In Ontario, the first serious steps towards taking a zero tolerance approach to discipline matters in schools began in the mid-1990s. In late 1993, the Scarborough Board of Education adopted a Safe Schools Policy on Violence and Weapons, which appears to have been the first official zero tolerance policy in the province. Within a few months, Black parents and community groups were publicly expressing concern that the policy was having a disproportionate impact on Black students.<sup>20</sup>

In 1995, the federal Solicitor General released the first major study in Canada on the issue, *School Violence and the Zero Tolerance Alternative*, which collected information and opinions from police, teachers, school officials, youth, the general public and the print media. The report found “a good deal of support for zero tolerance policies” and suggested nine principles to guide police and schools.<sup>21</sup> Despite longstanding evidence that zero tolerance policies were having a disproportionate impact on Black students and students with disabilities in the United States, and well-publicized allegations that the Scarborough policy was having a similar impact on Black students, the author of the report failed to include this issue as part of his research. It appears, however, that some of the participants in the research did address it because one of the recommendations states: “Students must be held accountable for their actions and recognize that their misbehaviour is a result of conscious choices, *not the result of disadvantage, discrimination and the like.*”<sup>22</sup> [Emphasis added]

In the lead-up to the 1999 provincial election in Ontario, the Progressive Conservative Party platform promised a “zero tolerance policy for bad behaviour” in schools.<sup>23</sup> The promise began to take shape in April 2000 when Education Minister Janet Ecker released a *Code of Conduct* for Ontario schools. A Ministry of Education news release stated that the Code “would make expulsions and suspensions mandatory for serious infractions like bringing weapons or illegal drugs to school, and sets out a zero tolerance policy for bad behaviour.”<sup>24</sup> One month later, the Minister introduced the *Safe Schools Act*, which proposed amending the *Education Act* to give force to the *Code of Conduct* and provide principals and teachers with more authority to suspend and expel students.<sup>25</sup> The

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<sup>20</sup> Paul Irish, “Probe of Black legal issues slams school violence policy,” *Toronto Star*, 20 March 1994.

<sup>21</sup> Thomas Gabor, *School Violence and the Zero Tolerance Alternative* (Ottawa: Minister of Supply and Services Canada, 1995), p. 4. See Appendix I, Tab 47.

<sup>22</sup> The Acknowledgements gives special thanks to a number of people, mostly police and education officials, including Bob Heath from the Scarborough Board of Education. *Ibid.* at 1.

<sup>23</sup> *Blueprint: Mike Harris' Plan to Keep Ontario on the Right Track* (Toronto: Ontario Progressive Conservative Party, April 1999), 42.

<sup>24</sup> Ontario Ministry of Education, News Release, “Ontario releases *Code of Conduct* and takes action for safer schools,” 26 April 2000.

<sup>25</sup> Ontario Ministry of Education, News Release, “Ecker introduces *Safe Schools Act*,” 31 May 2000.

Act was passed by the legislature in June 2000<sup>26</sup> and came into effect in September 2001.<sup>27</sup>

A review of the House debates on the *Safe Schools Act* in the Ontario legislature shows that there was some debate about the potential impact on student with disabilities.<sup>28</sup> What is remarkable, however, is that it appears that there was no debate about the potential impact on racial minority students. Similarly, while the Ministry of Education did consult with some advocacy groups and mental health agencies on the potential impact of the *Safe Schools Act* and *Regulations* on students with disabilities,<sup>29</sup> it appears that there was very little, if any, consultation about the potential impact on racial minority students.<sup>30</sup>

The House debates also show that Ecker explicitly promised that the government would ensure that suspended and expelled students have access to alternative programs:

Our consultations over the past two years have told us that people not only want consistent standards and respect and responsibility back into the classroom, but they also want supports for students who have been expelled or suspended. We certainly agree. Sending these kids out on the street only puts the problem somewhere else and actually creates additional problems, not only for those students but also for the community.... Parents and guardians... want to see appropriate programs for students who have been suspended, because suspended students can often fall further behind in their schooling. If passed, Bill 81 would give us the authority to make sure that all school boards are providing the structures and supports for suspended students so that they can keep their heads in their books, correct their behaviour and stay out of further trouble. Some school boards in Ontario already offer different kinds of programs for suspended students, where they can keep up with their studies and gain valuable life skills, such as anger management and conflict resolution. But we want to make sure that we have the

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<sup>26</sup> Ontario Ministry of Education, News Release, "Legislature passes *Safe Schools Act*," 14 June 2000.

<sup>27</sup> Ontario Ministry of Education, News Release, "Province moves forward with safe schools strategy," 3 September 2001.

<sup>28</sup> Ontario, Legislative Assembly, *Ontario Debates (Hansard)*, Session 37:1, 6 June 2000 at: <http://hansardindex.ontla.on.ca/hansardeissue/37-1/1067b.htm>; Ontario, Legislative Assembly, *Ontario Debates (Hansard)*, Session 37:1, 8 June 2000 at: <http://hansardindex.ontla.on.ca/hansardeissue/37-1/1069.htm>.

<sup>29</sup> The executive director of an organization that serves people with Tourette Syndrome attended a meeting at the Ministry of Education with 10-12 agencies that work on disability and child behavioural issues, but said that "I wasted my afternoon because not a word I said was taken into consideration." *Supra* note 19, 14 May 2003, at 4. The executive director of a children's mental health centre attended a consultation with an association of mental health agencies, but said that it "was called a consultation, but it was not. They knew what they wanted to do and they were going to do it regardless of what we said." Interview, 10 April 2003, 3-4.

<sup>30</sup> The chair of an organization of parents of Black children stated: "[T]here was no consultation.... I am not aware of any members of my community having any impact on the *Safe Schools Act*." Interview, 22 April 2003, 4. A lawyer at a legal clinic serving the Black community stated: "The potential impact was raised by the initiative of community groups." *Supra* note 13 at 3. The coordinator of a Tamil youth centre stated: "We had an outreach worker who might have given some input." *Supra* note 17 at 6.

best programs and that every school board is in a position to offer them for suspended students and also for expelled students.<sup>31</sup>

School boards in Ontario began amending and adding to their safe schools policies even before the *Safe Schools Act* came into effect. The Toronto District School Board (TDSB), for example, had already adopted a Safe Schools Foundation Statement Policy with a “zero tolerance” component,<sup>32</sup> a Police-School Protocol<sup>33</sup> and a Safe Arrivals for Elementary Schools Policy.<sup>34</sup>

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<sup>31</sup> *Ontario Debates (Hansard)*, 6 June 2000, *supra* note 28.

<sup>32</sup> Adopted 23 June 1999, revised 3 May 2000, 3. See Appendix I, Tab 22.

<sup>33</sup> Adopted 3 May 2000.

<sup>34</sup> Adopted 5 September 2000.

### III. The Regulatory Framework

#### A. The Old Regime

Prior to the enactment of the *Safe Schools Act*, Section 23 of the *Education Act* regulated the suspension and expulsion of students.<sup>35</sup> The authority to suspend a student was limited to principals<sup>36</sup> and the authority to expel was limited to school boards.<sup>37</sup> In both cases, the exercise of that authority was discretionary. A suspension could not exceed twenty days.<sup>38</sup> Although an expulsion could be of indefinite duration, the school board had the discretion to readmit a student at any time.<sup>39</sup> The grounds for suspension were limited to persistent truancy, persistent opposition to authority, habitual neglect of duty, the willful destruction of school property, the use of profane or improper language, or conduct injurious to the moral tone of the school or to the physical or mental well-being of others in the school.<sup>40</sup> A student could be expelled from all of the board's schools if the pupil's conduct was so "refractory" that the pupil's presence was "injurious to other pupils or persons."<sup>41</sup>

#### B. The New Regime

The new regime, which now forms Part XIII of the *Education Act*, is more complex and, reflecting the zero tolerance philosophy of its proponents, takes a more hardline approach in dealing with behaviour, discipline and safety problems.<sup>42</sup>

##### 1. Authority to Suspend and Expel

The authority to suspend a student is provided to both principals and teachers. A principal has the power to suspend for up to twenty school days,<sup>43</sup> while a teacher has the power to either suspend for one day or refer the matter to the principal.<sup>44</sup> The authority to expel has also been expanded, with school boards and principals sharing that authority. There are now two kinds of expulsion: (1) a *limited* expulsion from the school the student was attending until the later of a) a date set by the principal or board (twenty-one days to one year) or b) the date on which the student meets requirements established by the board,<sup>45</sup> and (2) a *full* expulsion from all (publicly funded) schools in the province until the student has

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<sup>35</sup> *Education Act*, R.S.O. 1990, c. E.2, as amended by S.O. 1993, c. 11.

<sup>36</sup> *Ibid.* ss. 23(1).

<sup>37</sup> *Ibid.* ss. 23(3).

<sup>38</sup> *Ibid.* ss. 23(1.1).

<sup>39</sup> *Ibid.* ss. 23(5).

<sup>40</sup> *Ibid.* ss. 23(1).

<sup>41</sup> *Ibid.* ss. 23(3).

<sup>42</sup> *Education Act*, R.S.O. 1990, c. E.2, as amended by S.O. 2000, c. 12. See Appendix I, Tab 14.

<sup>43</sup> *Ibid.* ss. 306(2) and (4).

<sup>44</sup> *Ibid.* ss. 306(2),(3) and (6).

<sup>45</sup> *Ibid.* ss. 309(14) and (18).

attended and met the requirements of a strict discipline program.<sup>46</sup> Pending an inquiry into an incident, a principal must suspend a student who the principal believes may have committed an infraction for which expulsion is mandatory<sup>47</sup> and may suspend a student who the principal believes may have committed an infraction for which expulsion is discretionary.<sup>48</sup> A principal can impose a limited expulsion or refer the matter to the school board,<sup>49</sup> while the school board can impose limited or full expulsion.<sup>50</sup>

## 2. Mandatory Suspension and Expulsion

Perhaps the most significant change in the new regime is the provision for *mandatory* suspension, *mandatory* expulsion and police involvement. A suspension is mandatory if a student commits any of the following infractions:

1. Uttering a threat to inflict serious bodily harm on another person.
2. Possessing alcohol or illegal drugs.
3. Being under the influence of alcohol.
4. Swearing at a teacher or at another person in a position of authority.
5. Committing an act of vandalism that causes extensive damage to school property at the pupil's school or to property located on the premises of the pupil's school.
6. Engaging in another activity that, under a policy of the board, is one for which a suspension is mandatory.<sup>51</sup>

An expulsion is mandatory for the following infractions:

1. Possessing a weapon, including possessing a firearm.
2. Using a weapon to cause or to threaten bodily harm to another person.
3. Committing physical assault on another person that causes bodily harm requiring treatment by a medical practitioner.
4. Committing sexual assault.
5. Trafficking in weapons or in illegal drugs.
6. Committing robbery.
7. Giving alcohol to a minor.
8. Engaging in another activity that, under a policy of the board, is one for which expulsion is mandatory.<sup>52</sup>

## 3. Police Involvement

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<sup>46</sup> *Ibid.* ss. 309(16); Ontario Regulation 37/01, s. 3. See Regulation 37/01 at Appendix I, Tab 15.

<sup>47</sup> *Education Act*, *ibid.* ss. 309(2).

<sup>48</sup> *Ibid.* ss. 310(2).

<sup>49</sup> *Ibid.* ss. 309(7) and 310(3).

<sup>50</sup> *Ibid.* ss. 309(11).

<sup>51</sup> *Ibid.* ss. 306(1). See the Chart on Mandatory Suspensions at Appendix I, Tab 13.

<sup>52</sup> *Ibid.* ss. 309(1). See the Chart on Mandatory Expulsions at Appendix I, Tab 13.

The provincial *Code of Conduct* also mandates police involvement, in accordance with the police/school protocol, for all the above infractions, except for uttering a threat, possession of drugs and acts of vandalism, where police involvement is “as required”, and swearing and being in possession or under the influence of alcohol, where police involvement is not mandatory.<sup>53</sup>

#### 4. Mitigating Factors

However, the *Act* and *Regulations* do provide for mitigating factors, whereby the suspension or expulsion of a student is not mandatory if:

- (c) the pupil does not have the ability to control his or her behaviour;
- (d) the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or
- (e) the pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person.<sup>54</sup>

Furthermore, in considering the duration of a suspension or the type or duration of an expulsion, the principal or board must consider the student's history and other factors prescribed by regulation (none at the moment) and may consider other matters that he, she or it considers appropriate.<sup>55</sup> The minimum duration of a mandatory expulsion is twenty-one days.<sup>56</sup>

#### 5. Discretionary Suspension and Expulsion

The *discretionary* suspension or expulsion of a student is left to school board policies.<sup>57</sup> In other words, school boards have been delegated the authority to list infractions for which a teacher or principal *may* suspend or a principal or board *may* expel. Therefore, a school board policy must incorporate the infractions listed in the *Act* for which suspension and expulsion are mandatory, but it can also (1) add infractions to the mandatory category and (2) create a list of infractions for which suspension or expulsion is discretionary.

#### 6. Notice, Review and Appeal

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<sup>53</sup> *Ontario Schools Code of Conduct*, proclaimed in force 1 September 2001, 10-11. See Appendix I, Tab 16.

<sup>54</sup> *Education Act*, *supra* note 42, ss. 306(5) and 309(3); Ontario Regulation 106/01, s. 1; Ontario Regulation 37/01, s. 2. See Regulations 106/01 and 37/01 at Appendix I, Tab 15.

<sup>55</sup> *Education Act*, *ibid.* ss. 306(9) and 309(19).

<sup>56</sup> *Ibid.* ss. 309(18).

<sup>57</sup> *Ibid.* ss. 307(1) and 310(1).

A written notice of suspension or expulsion must be given promptly to the student, or if the student is a minor, to the student's parent or guardian.<sup>58</sup> A one-day suspension cannot be appealed.<sup>59</sup> A two- to twenty-day suspension is subject to review by a person specified in the school board policy and can then be appealed to the board whose decision is final.<sup>60</sup> The decision of a principal to impose a limited expulsion can be appealed to the school board and the board's decision is final.<sup>61</sup> The decision of a school board to impose an expulsion can be appealed to the Child and Family Services Review Board.<sup>62</sup> The specific procedures for appealing a suspension or expulsion are left to school boards to determine by policy.<sup>63</sup>

## 7. Alternative Programs

The *Act* states that the Minister may require school boards to establish and maintain specified courses and services for students who are suspended and expelled.<sup>64</sup> To date, despite the Minister's promise during the House debates on the *Safe Schools Act*,<sup>65</sup> that has not happened. The *Act* also states that the Minister may establish one or more programs for expelled students to prepare them to return to school. That has happened. Ontario Regulation 37/01 provides that a student who is subject to full expulsion may attend a school in Ontario if the student successfully completes a strict discipline program or has satisfied the objectives required for the successful completion of such a program.<sup>66</sup>

In practice, this means that there is currently no legal requirement for school boards and schools to provide homework or alternative programs for students subject to suspension or limited expulsion. Students subject to full expulsion, however, have the option of attending and completing a strict discipline program if they want to return to a school in Ontario. When the *Safe Schools Act* came into effect in September 2001, seven strict discipline programs were up and running in Ontario.<sup>67</sup> The Ministry of Education has given its approval to fifteen providers of strict discipline programs.<sup>68</sup>

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<sup>58</sup> *Ibid.* ss. 306(10), 309(5) and 309(20).

<sup>59</sup> *Ibid.* ss. 308(4).

<sup>60</sup> *Ibid.* ss. 308(3) and (6).

<sup>61</sup> *Ibid.* ss. 311(3).

<sup>62</sup> *Ibid.* ss. 311(5); O. Reg. 37/01, ss. 4(1).

<sup>63</sup> *Education Act, ibid.* ss. 308(5) and 311(2).

<sup>64</sup> *Ibid.* ss. 312(1) and (2).

<sup>65</sup> *Supra* note 28.

<sup>66</sup> O. Reg. 37/01, ss. 3(1).

<sup>67</sup> *Supra* note 27.

<sup>68</sup> Ministry of Education, Policy/Program Memorandum No. 130, *School Board Programs for Students Who Have Received a Full Expulsion*, 19 September 2001, Appendix B. See Policy/Program Memorandum No. 130 at Appendix I, Tab 17 of this report.

## IV. School Boards: The Toronto District School Board

School boards in Ontario are under a legal obligation to adopt and revise policies, guidelines and procedures in accordance with the *Safe Schools Act* and *Regulations* and the Ontario Schools *Code of Conduct*.<sup>69</sup> The Toronto District School Board (TDSB), for example, has adopted or revised, among other things, a Code of Conduct and an Appropriate Dress Policy,<sup>70</sup> as well as Suspension Procedures, Suspension Review/Appeal Procedures, Expulsion Procedures and an Expulsion Appeal Process, all of which can be found in its *Safe Schools Procedures Manual*.

### A. Suspension and Expulsion

The TDSB has exercised its option to add to the list of infractions for which suspension or expulsion is mandatory and create a list of infractions for which suspension or expulsion is discretionary.<sup>71</sup> It has constructed a Consequences of Inappropriate Student Behaviour Chart, which lists all the infractions, the minimum number of days a student must be suspended or expelled for, and whether the principal “may” or “shall” notify the police. The additional infractions for which suspension is mandatory are:

1. Physical assault.
2. Threats of serious physical injury.
3. Extortion.
4. Sexual harassment.
5. Racial harassment.
6. Distribution of hate material.
7. Hate motivated violence.
8. Inappropriate use of electronic communications/media.
9. Possession or misuse of any harmful substances.
10. Fighting.
11. Bullying, intimidating, threatening.

There is only one additional infraction for which expulsion is mandatory: possession of an explosive substance.

The new list of infractions for which suspension is discretionary includes:

1. Persistent truancy.
2. Persistent opposition to authority.
3. Habitual neglect of duty.

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<sup>69</sup> *Supra* note 42, s. 302.

<sup>70</sup> Adopted 10 April 2002. See Appendix I, Tab 24.

<sup>71</sup> Toronto District School Board, Policy C.010, *Code of Conduct*, adopted 10 April 2002, 13-15. See Appendix I, Tab 23. See also the TDSB brochure, *A Safe Learning Environment*, revised 1 May 2001, at Appendix I, Tab 21.

4. Willful destruction of school property; vandalism causing damage to school or Board property or property located on school or Board premises.
5. Use of profane or improper language.
6. Conduct injurious to the moral tone of the school or to the physical or mental well-being of others.
7. Use of tobacco.
8. Theft.
9. Aid/incite harmful behaviour.

The list of infractions for which expulsion is discretionary is cross-referenced with some of the infractions for which suspension is mandatory:

1. Uttering a threat to inflict serious bodily harm on another person.
2. Committing an act of vandalism that causes extensive damage to school property at the pupil's school or to property located on the premises of the pupil's school.
3. Physical assault.
4. Threats of serious physical injury.
5. Extortion.
6. Distribution of hate material.
7. Hate motivated violence.
8. Inappropriate use of electronic communications/media.
9. Possession or misuse of harmful substances.

## **B. Mitigating Factors**

The *Safe Schools Procedures Manual* makes it clear that although one or more of the mitigating factors set out in the *Education Act* and *Regulations* may exist to preclude a mandatory suspension or expulsion, the principal may still impose a discretionary suspension or expulsion.<sup>72</sup>

The *Manual* also sets out the factors that a principal must take into account in selecting the most appropriate type and duration of consequence:

- nature and circumstances of the incident;
- number of individuals involved;
- degree of harm caused to the victim and the school community (both people and property);
- intent to cause harm;
- age of the individuals involved;
- history of offences;
- consistency of application across the Board; and
- willingness of the individual to undertake a program of restitution or rehabilitation.

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<sup>72</sup> Section E – Suspension Procedures, E.3.2; Section G – Expulsion Procedures, G.2.2.

When a student with exceptionalities is involved, the principal must also consider:

- the nature of the exceptionality;
- extenuating circumstances (parental input to be sought);
- level of understanding and communication of the student;
- degree of intention;
- environmental triggers;
- the student's Individual Educational Plan (IEP); and
- appropriateness of negative consequences in relation to the exceptionality.<sup>73</sup>

A teacher who suspends a student must follow the same rules. Although one or more of the mitigating factors may exist to preclude a mandatory suspension, a teacher may still impose a discretionary suspension.<sup>74</sup> A teacher must also take into account the same factors as above in selecting the most appropriate consequence.<sup>75</sup> As a matter of practice, however, the teachers' federations in Ontario have advised their members not to suspend students and to refer all disciplinary matters to the principal.<sup>76</sup>

## C. Review and Appeal

The *Manual* sets out the procedures for review and appeal of a suspension and appeal of an expulsion. A request for review of a decision by a principal to suspend for more than one day must be made within seven days and will be reviewed by the superintendent of schools. An appeal of that decision must be made to the Board within seven days. A Committee of the Board consisting of three persons (trustees) will hear the appeal and make the final decision. Both the superintendent and the Committee have the power to confirm the principal's decision, modify the type or duration of the suspension, or overrule the decision of the principal and reinstate the student.<sup>77</sup>

Where a principal believes that a student has committed an infraction for which an expulsion is warranted, the principal shall suspend the student for twenty days. This suspension is not subject to review or appeal until after the principal has conducted an inquiry and reached a decision regarding expulsion. If the decision of the principal is not to expel and a suspension is warranted, the suspension would then be subject to a request for review. An appeal of a principal's decision to impose a limited expulsion must be made to the Board within seven days. A Committee of the Board consisting of three persons will

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<sup>73</sup> Section D – General Considerations Related to Discipline, D.4.

<sup>74</sup> Section E – Suspension Procedures, E.3.2.

<sup>75</sup> Section D – General Considerations Related to Discipline, D.14.

<sup>76</sup> Elementary Teachers' Federation of Ontario, "Suspension of Students," *Advisory to Members*; Bill Reith, "Suspensions and expulsions under Bill 81," *Update: Ontario Secondary School Teachers' Federation*, Vol. 29, No. 5, 27 November 2001. See Appendix I, Tab 20.

<sup>77</sup> Section F – Suspension Review/Appeal Procedures, F.1.1 and F.2.1.

hear the appeal and make the final decision. The Committee has the power to confirm the principal's decision, modify the type or duration of the suspension, or overrule the decision of the principal and reinstate the student. The decision is final.

Where a principal refers the matter to the Board and a Committee of the Board decides to impose a limited or full expulsion, the procedures for making an appeal to the Child and Family Services Review Board are set out by the Ministry of Education and the Child and Family Services Review Board.<sup>78</sup>

## D. Due Process and Procedural Fairness

The *Manual* recognizes that a student facing disciplinary consequences must be treated fairly. Procedural fairness requires the school administrator to be impartial and free of bias and includes:

- giving the student reasonable notice of the rule involved;
- the opportunity to be heard – to tell his or her side of the story; and
- the right to know the case against him or her.<sup>79</sup>

The *Manual* further provides that suspension review hearings and suspension hearings are governed by the *Statutory Powers Procedure Act*, which requires the following:

- a party has a right to be represented by counsel or a n agent;
- any party may call and examine witnesses and present arguments and submissions;
- any party may cross-examine witnesses; and
- any witness at the hearing is entitled to be advised by counsel or an agent as to his or her rights, but such counsel or agent may take no other part in the hearing without permission of the school board or Committee of the Board.<sup>80</sup>

## E. Alternative Programs

The TDSB runs four programs for suspended students – Alternative to Suspension (A2S), Alternative Curriculum for Excluded and Suspended Students (ACE), Community Alternative Programming for Suspended Students (CAPSS) and SAFETY – and one program for students on limited expulsion – Support Program for Expelled Students (SPES).<sup>81</sup> School boards are not legally required to run these programs and there is no dedicated provincial government funding for them. The *Manual* also directs schools, where reasonable and practical under

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<sup>78</sup> Section H – Expulsion Appeal Process, H.1.1, H.1.4 and H.2.

<sup>79</sup> Section D – General Considerations Related to Discipline, D.5.

<sup>80</sup> Section G – Expulsion Procedure, G.6.1.

<sup>81</sup> Toronto District School Board, *Attendance/At-risk/Alternative/Safe Schools/SALEP Programs for Suspended/Expelled Students*, Report No. 01-03-0228, 31 January 2003, Appendix A.

the circumstances, to offer relevant schoolwork to suspended students, including suspended students who are being considered for expulsion.<sup>82</sup>

The TDSB, in partnership with two children’s mental health centres, runs two strict discipline programs on a two-year pilot project basis in the GTA. These programs are legally mandated and funded by the Ministry of Education. The criteria for the pilot projects stipulate that the components of the program must be 60% educational and 40% non-educational, which includes assessing and addressing the student’s academic, remedial, psychological, social and emotional needs. Each student’s program is individualized.<sup>83</sup>

## **F. Collection of Data on Disability and Race**

Basic data on the student is collected following a suspension. The *Manual* directs the principal or the teacher, as the case may be, to complete a Suspension Report Form. The form has sections on demographic information, the basis for suspension, support services, and a detailed summary of the incident. Under the section on support services, the principal or the teacher must provide information on whether the student has been identified as “exceptional” by the Identification and Placement Review Committee and, if applicable, check the exceptionality or exceptionalities, including behaviour, communication (learning disability, autism, deaf and hard hearing, speech impairment, language impairment), intellectual (gifted, mild intellectual disability, developmental disability), physical (blind and low vision, physical disability) and multiple (multiple exceptionalities). Data on the race of the student is *not* collected.<sup>84</sup>

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<sup>82</sup> Section E – Suspension Procedures, E.4.

<sup>83</sup> The Toronto District School Board, *Safe Schools Procedures Manual*, Section A – Safe Schools Project Plan – A.4; East Metro Youth Services and the Toronto District School Board, “Expelled Students Program,” *A Strict Discipline Project*. See Appendix I, Tab 27.

<sup>84</sup> Section E – Suspension Procedures, E.4, E.6.

## V. Zero Tolerance

The principle of “zero tolerance” is to some extent self-explanatory, but there is no universally accepted definition. The *American Heritage Dictionary* defines zero tolerance as “[t]he policy or practice of not tolerating undesirable behavior, such as violence or illegal drug use, especially in the automatic imposition of severe penalties for first offenses.”<sup>85</sup> Skiba points out that the typical definitions of zero tolerance emphasize ‘punishing a range of behaviors, both major and minor, equally severely.’<sup>86</sup> The National Center for Education Statistics in the United States defines a zero tolerance policy as “a school or district policy that mandates predetermined consequences or punishments for specific offences.”<sup>87</sup> Gabor found that most participants in his research on school violence and zero tolerance in Canada defined it as “marking out clear lines for acceptable behaviour, along with repercussions for violating the limits.”<sup>88</sup>

Although the Ontario government promised “zero tolerance” for bad behaviour in schools before the *Safe Schools Act* was enacted, and the *Act* prescribes “mandatory” suspensions and expulsions, the presence of mitigating factors in the current legislation precludes it from being strictly characterized as “zero tolerance”. Likewise, although the TDSB Safe Schools Foundation Statement Policy speaks of “zero tolerance” and “mandatory” suspensions and expulsions, the direction to principals and teachers to apply mitigating factors in disciplinary matters precludes it from being strictly characterized as “zero tolerance”. The real issue is whether there is a *practice* of “zero tolerance”. At least one group of experts on school violence in Canada takes the position that zero tolerance can, in fact, only exist as a practice:

In our view, zero tolerance is neither a policy nor a program, but a practice. It is the establishment of a specific consequence (or range of consequences) for a specific infraction and the consistent application of that consequence. In other words, in any disciplinary situation, if an act has a specific and inevitable consequence, then zero tolerance is being practised. For example, possession of a knife in school results in a five-day suspension. If this act is always treated in the same way, zero tolerance is being practiced. No deviation in consequence is allowed. Zero tolerance has recently come to be interpreted as a policy which provides a suspension/expulsion consequence in response to violations of the policy, i.e., absolute disciplinary outcomes. We take the

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<sup>85</sup> *The American Heritage Dictionary of the English Language*, 4<sup>th</sup> ed. (Boston: Houghton Mifflin, 2000).

<sup>86</sup> R. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, Indiana Education Policy Center, 2000, p. 3 (fn. 1). See Appendix I, Tab 31. Online at: <http://www.indiana.edu/~safeschl/ztze.pdf>.

<sup>87</sup> U.S. Department of Education, National Center for Education Statistics, *Violence and Discipline Problems in U.S. Public Schools: 1996-97* (Washington D.C.: U.S. Government Printing Office, 1998), 18. Online at: <http://nces.ed.gov/pubs98/98030.pdf>.

<sup>88</sup> *Supra* note 21 at 5.

position that zero tolerance is practised when the absolute inevitability of a consequence is present, irrespective of what that consequence may be.<sup>89</sup>

In assessing whether zero tolerance is being practiced in the school system in Ontario, it is important to keep in mind that principals and teachers are receiving two contradictory messages, one advocating “zero tolerance” and prescribing “mandatory” action and the other directing them to apply mitigating factors.

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<sup>89</sup> D.M. Day, Golench, C.A., MacDougall J. & C.A. Beals-Gonzalez, *School-Based Violence Prevention in Canada: Results of a National Survey of Policies and Programs* (Ottawa: Supply and Services Canada, 2002), 41 (fn. 2). See Appendix I, Tab 48.

## VI. Disproportionate Impact in Other Jurisdictions

### A. United States

#### 1. The Harvard Civil Rights Project Report

The most comprehensive national report on zero tolerance and disciplinary policies in the U.S. education system, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, was co-written by the Advancement Project and the Civil Rights Project at Harvard University and published in 2000.<sup>90</sup> One of the main areas that the report looked at was the disproportionate impact that zero tolerance policies have on racial minority children and children with disabilities.

Several decades of research and analysis of such data have shown that students of colour are disproportionately impacted by school discipline policies.<sup>91</sup> Two recent studies are discussed. In 1998, the Department of Education found that African American students represent 32% of out-of-school suspensions, even though they represent only 17% of public school enrollment nationally. By contrast White students, who represent 63% of enrollment, represented only 50% of suspensions and 50% of expulsions. A 1999 study by the Applied Research Center also showed that Black children, particularly males, are disciplined more often and severely than any other minority group.<sup>92</sup> The report also found that zero tolerance policies are having a “profound” impact on children with special needs, although the 1997 amendments to the *Individuals with Disabilities Education Act* provide protection for them.<sup>93</sup>

The report is critical of the Office for Civil Rights (OCR) of the U.S. Department of Education for its failure to consistently apply the adverse impact doctrine in processing school discipline complaints and initiate investigations without waiting for complaints. The known cases suggest that the OCR tends to apply the intentional discrimination standard. However, in one case where the OCR found that Latino and African American students were being disproportionately impacted by the application of discipline, it did apparently apply the adverse

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<sup>90</sup> The Advancement Project and the Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* (Boston: Harvard University, 2000). Appendix I, Tab 29.

<sup>91</sup> *Ibid.* Examples of studies can be found in footnote 21 of the report: Children’s Defense Fund, “School Suspensions: Are They Helping Children?,” Cambridge, MA: Washington Research Project (1975); Clarence H. Thornton and William T. Trent, “School Desegregation and Suspension in East Baton Rouge Parish: A Preliminary Report,” 57 *Journal of Negro Education* 482 (1988); Anna C. McFadden, George E. Marsh II, Barrie Jo Price, and Yunhan Hwang, “A Study of Race and Gender Bias in the Punishment of Handicapped Children,” 24 *The Urban Review* 239 (1992); Kids First Coalition, “Locked Out: Exposing the Suspension Epidemic in the Oakland Public Schools,” Oakland, CA (June 1999).

<sup>92</sup> *Ibid.* 7.

<sup>93</sup> *Ibid.* 8-9.

impact doctrine, after failing to find proof of intentional discrimination. It then negotiated with the school district to implement positive strategies such as conflict resolution, peer counselling, workshops on race issues, and training for administrative staff on racial stereotyping, profiling and communication styles. This led to a sharp drop in the racial disparities.<sup>94</sup>

The report also cites evidence to make the following points about the application of zero tolerance policies in discipline matters:

- It conflicts with the healthy developmental needs of children, particularly students at-risk, whose problems tend to be exacerbated rather than remedied.<sup>95</sup>
- There are long-term detrimental consequences for the child, including loss of educational opportunities and an increased risk of dropping out, engaging in conduct that affects the safety of their families and communities, and incarceration.<sup>96</sup>
- There is a need for high quality alternative education programs whose standards and resources match those of regular schools.<sup>97</sup>
- There is an increased criminalization of children, often for conduct that does not threaten the safety of others.<sup>98</sup>
- It has not reduced violence or increased safety in schools.<sup>99</sup>
- Some schools are defying the status quo by creating a safe environment with a low number of disciplinary referrals. Common features of these schools include a positive, more inclusive model of discipline; training teachers on positive classroom management techniques and the root causes of misbehaviour; promotion of a school-wide Code of Conduct; a focus on prevention and strategies for addressing crises; the application of sanctions on a case-by-case basis; and the implementation of programs such as peer courts, conflict resolution, early intervention, mentoring, mediation, and character education.<sup>100</sup>

## 2. The *Individuals with Disabilities Education Act*

The federal *Individuals with Disabilities Education Act*<sup>101</sup> is viewed by many in the United States as a sound legal framework for accommodating students with disabilities within the school system, including in the application of discipline.<sup>102</sup>

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<sup>94</sup> *Ibid.* 33-34.

<sup>95</sup> *Ibid.* 10-11.

<sup>96</sup> *Ibid.* 11-12.

<sup>97</sup> *Ibid.* 13.

<sup>98</sup> *Ibid.* 13-14.

<sup>99</sup> *Ibid.* 14-15.

<sup>100</sup> *Ibid.* 24-25.

<sup>101</sup> 20 U.S.C. Sections 1400 et seq. See Appendix I, Tabs 34 and 35.

<sup>102</sup> The *Opportunities Suspended* report states that the law provides “a plethora of protections for children with special needs that, if fully complied with, would provide extremely valuable safeguards for this group of students.” *Supra* note 90 at 35.

The purpose of the *Act* is “to ensure that all children with disabilities have available to them a *free appropriate public education* that emphasizes special education and related services to meet their unique needs....” [Emphasis added] The provisions on discipline in the *Act* flow from this principle.<sup>103</sup>

First, a child with a disability who is removed from school must still have access to educational services. As such, the rule is that a child with a disability who is suspended or otherwise removed from a school for more than 10 days must be accommodated within an appropriate interim alternative educational setting.

Second, a child with a disability cannot be removed from a regular school placement indefinitely. As such, there are caps, even for the most serious infractions. A child with a disability who is subject to discipline by school personnel for carrying a weapon to school or knowingly possessing or using illegal drugs or selling a controlled substance may be removed from the school, but for no more than 45 days. A hearing officer may also order that a child with a disability be removed from school if there is substantial evidence that the child is substantially likely to injure him or herself or others and reasonable efforts have been made to minimize the risk of harm in the child’s current placement, but for no more than 45 days.

Third, a child whose behaviour was a manifestation of disability must be accommodated. Any disciplinary action which involves changing the placement of a student with a disability for more than 10 days is subject to a manifestation determination review of the relationship between the child’s disability and the behaviour subject to the discipline action. The Individual Education Plan (IEP) team who conducts the review can only find that the behaviour was not a manifestation of disability if:

- 1) the child’s IEP and placement were appropriate and the special education services, supplementary aids and services, and behaviour intervention strategies were provided consistent with the child’s IEP and placement (that is, there was no failure to accommodate the child);
- 2) the child’s disability did not impair the ability of the child to understand the impact and consequences of the behaviour; and
- 3) the child’s disability did not impair the ability of the child to control the behaviour.

If the review determines that the child’s behaviour was not a manifestation of disability, then the relevant disciplinary procedures will apply to the child in the same way they would be applied to a child without a disability, except that the child with a disability must be accommodated in an alternative educational setting for any suspension or other removal from the school for longer than 10 days.<sup>104</sup>

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<sup>103</sup> *Supra* note 101 at s. 1400(d).

<sup>104</sup> *Ibid.* at 1415(k).

Finally, the *Act* requires States and the Secretary of Interior to collect statistics to determine if significant disproportionality based on race is occurring with respect to placement in particular educational settings, and to review and, if appropriate, revise policies, procedures and practices.<sup>105</sup> This would cover the placement of Black and other racial minority students with disabilities in alternative educational settings following the application of disciplinary procedures.

## B. United Kingdom

There is also evidence in the United Kingdom that Black students, particularly of Caribbean origin, are disproportionately impacted by the application of discipline in schools. Figures from schools in England in 1997-98 showed that Black Caribbean students comprised 6.2% of students permanently excluded from school, but only represented 1.5% of the school population (the ratios for Black African boys and Black Other boys were 1.6:1.0% and 2.3:0.7%, respectively). By contrast, White students constituted 83.9% of students permanently excluded from school, but made up 88.6% of the student population. Not all racial minority students were disproportionately impacted by permanent exclusions. Asian students (Indian, Pakistani, Bangladeshi and Chinese), like White students, were subject to a lower number of permanent exclusions relative to their proportion of representation in the student population.<sup>106</sup> Data from schools in England and Wales in 1994-95 was similar.<sup>107</sup>

## C. Nova Scotia

### Collection of Race Statistics and Rejection of Zero Tolerance

Nova Scotia seems to be the only province in Canada where there has been some collection and analysis of school board statistics on race and the application of discipline. The Black Learners Advisory Committee was able to access data from the Halifax Regional School Board from 1987 to 1992, which showed that Black students were being disproportionately impacted by the application of suspensions. Although Black students represented only eight percent of the student population, they accounted for sixteen to twenty percent of suspensions.<sup>108</sup>

Nova Scotia has also recently gone through a process of considering and rejecting the adoption of a zero tolerance policy in the education system. As in Ontario, the Progressive Conservative Party platform promised a “zero tolerance

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<sup>105</sup> *Ibid.* at 1418(c).

<sup>106</sup> L. Appiah, and N. Chunilal, *Examining School Exclusions and the Race Factor* (London: The Runnymede Trust, 1999), 2. See Appendix I, Tab 39.

<sup>107</sup> Commission for Racial Equality, *Exclusion from School and Racial Equality: A Good Practice Guide* (London: 1997), 3. See Appendix I, Tab 40.

<sup>108</sup> *BLAC Report on Education: Redressing Inequality-Empowering Black Learners*, vol. 1 (Halifax: Black Learners Advisory Committee, 1994).

policy for violent behaviour and drugs” in schools in the lead-up to the 1999 provincial election.<sup>109</sup> In contrast to Ontario, however, the government ultimately decided not to adopt a zero tolerance approach to discipline in schools.

Shortly after forming a government, a School Conduct Committee, which represented a broad range of stakeholders in the education field, was set up with a mandate to develop a *Code of Conduct* for review and adoption by the Minister of Education. Part of that mandate included identifying zero tolerance guidelines. The Committee reviewed zero tolerance policies in jurisdictions across North America and decided to recommend that a zero tolerance policy *not* be adopted for use in Nova Scotia. The Committee reasoned that the concept of zero tolerance fails to meet the principles of consistency and fairness, which are necessary for a discipline policy to be effective through its acceptance by stakeholders. In regards to fairness, the Committee was specifically concerned that zero tolerance policies affected a “disproportionate number of poor, minority and special needs students.”<sup>110</sup> The recommendation was accepted by the government.<sup>111</sup>

The Department of Education is also planning to implement a province-wide system of data collection of behaviour infractions and related consequences in the 2003-04 school year, which may include differentiation on the basis of race and special needs.<sup>112</sup>

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<sup>109</sup> *John Hamm's Plan for Nova Scotia: Strong Leadership... a clear course* (Halifax: Nova Scotia Progressive Conservative Party, 1999), 25.

<sup>110</sup> School Code of Conduct Committee, *Report on School Conduct Code*, December 2000, 1, 9. See Appendix I, Tab 41.

<sup>111</sup> A. Power, *Rethinking Zero Tolerance: Beyond the Quick Fix*, Paper Presented at the 2<sup>nd</sup> Annual Human Rights Symposium: Focus on Racial Discrimination, Osgoode Hall Law School Professional Development Program, 23 May 2003 [unpublished], 1. See Appendix I, Tab 42.

<sup>112</sup> *Ibid.* at 5.

## VII. Disproportionate Impact in Ontario

School boards in Ontario do not collect statistics on the race of the students who are suspended and expelled and there are no plans to do so. A senior official at a school board in the GTA stated that he was “not aware of any ongoing discussion that would take us in that direction at this time” and expressed concern that the statistics “would be misused, that people would take [them] in isolation and interpret them for their own purposes.”<sup>113</sup> A senior official at another school board in the GTA took a similar position: “I don’t think that it would be appropriate. There has been no discussion whatsoever within our school board of any attempt to gather statistics based on race and ethnic background.”<sup>114</sup> Statistics on the number of students with exceptionalities who are being suspended are being collected, but they are not yet available to members of the public.<sup>115</sup>

The total absence of statistics on race and the inaccessibility to statistics on disability makes it impossible to determine with any certainty whether the application of discipline in schools is having a disproportionate impact on racial minority students and students with disabilities. However, there is anecdotal evidence and some empirical evidence available from other sources which point in that direction. The following section of the report reviews some of that evidence in conjunction with the views of school board officials.

### A. Study on Perceptions of Racial Minority Students

Unlike the United States and the United Kingdom, school boards and schools in Canada rarely, if ever, collect statistics on the race of students who are suspended and expelled – at least not in any systematic way. The absence of such data precludes determining with any certainty whether racial minority students are disproportionately impacted by suspensions and expulsions. However, one relatively recent study, *Racial and Ethnic Minority High School Students’ Perceptions of School Disciplinary Practices: A Look at Some Canadian Findings*, provides significant perceptual evidence.<sup>116</sup>

The study examined the perceptions of differential treatment relating to school disciplinary practices by high school students of Black, South Asian, Asian, White and “other” (Aboriginal, Hispanic and mixed-race) racial backgrounds in Toronto. The results found that racial minority students, particularly Black students, are much more likely than White students to perceive discrimination with respect to

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<sup>113</sup> *Supra* note 2, 14 May 2003, at 10, 12.

<sup>114</sup> *Ibid.*, 16 May 2003, at 5.

<sup>115</sup> The school board official said that a freedom of information request would have to be made because the information had not yet been presented to the trustees and generally information does not become public until the trustees have seen it. *Ibid.*

<sup>116</sup> 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*: 185-195. See Appendix I, Tab 43.

teacher treatment, school suspension practices, the use of police by school authorities and police treatment at school. More specifically:

- *Teacher Treatment.* Black students were significantly more likely than South Asian, Asian, White and “other” racial minority students to perceive that teachers at their school treat students from their racial group worse or much worse. South Asian students were also more likely than White students to perceive that they would be treated worse or much worse
- *School Suspension Practices.* Black students were more likely than South Asian, Asian, White and students from “other” racial backgrounds to perceive that members of their own racial group were more likely to be suspended. South Asian students were significantly more likely than Asian and White students to perceive discriminatory treatment and students from “other” racial backgrounds were significantly more likely than White students to perceive discriminatory treatment.
- *Use of Police by School Authorities.* Black students were significantly more likely than South Asian, Asian, White and students from “other” racial backgrounds to perceive that students from their racial group were more likely to have the police called on them. South Asian students were more likely than White students and Asian students to perceive discriminatory treatment and students from “other” racial backgrounds were significantly more likely than White students to perceive discriminatory treatment.
- *Police Treatment at School.* Black students were significantly more likely than South Asian, Asian, White and students from “other” racial backgrounds to perceive that they would be treated worse or much worse by the police at school. South Asian, Asian and students from “other” racial backgrounds were also all significantly more likely than White students to perceive discriminatory treatment.<sup>117</sup>

The likelihood of perceiving discriminatory treatment is particularly strong for Black students. For example, compared to White students, Black students were 7.41 times more likely to perceive discriminatory treatment by teachers, 17.5 times more likely to perceive discriminatory treatment in the application of suspension practices, 31.6 times more likely to perceive discriminatory treatment in the use of police by the school, and 26.9 times more likely to perceive discriminatory treatment by the police at school. The gap between Black students and South Asian students, who are second most likely to perceive discrimination, is quite wide (the same statistics for South Asian students relative to White students in the aforementioned categories are 2.86, 4.38, 7.25 and 8.28 times more likely).<sup>118</sup>

Although there is little quantitative evidence to assess whether the perceptions of the students in this study accurately represents reality, the authors point out that the very fact that racial minority students have these beliefs needs to be

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<sup>117</sup> *Ibid.* at 190.

<sup>118</sup> *Ibid.* at 192.

addressed because it is “a psychological reality for students which undoubtedly impacts on their schooling experience” and “has important implications if schools are to develop measures to ensure that students from all racial and ethnic groups perceive equal educational opportunity.”<sup>119</sup>

## B. Special Education Monograph No. 5

The Ontario government has been aware for more than five years that the use of suspensions and expulsions in schools may have a disproportionate impact on students with disabilities, and be viewed as discrimination if there is no attempt to accommodate them. In 1997, the Ministry of Education circulated an internal draft of 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*. The key excerpt is worth quoting in its entirety:

### 3.0 POTENTIAL FOR DISPROPORTIONATE IMPACT OF THE VFSP

Initially, violence prevention policies usually focus upon those students who are willfully violent. Strategies such as suspensions and expulsions are used to protect others in the school from dangerous outbursts, and to provide a clear signal to a student who has been violent that violence is not acceptable.

*However, some students who have violent outbursts are not wholly responsible for their behaviour. Some students with severe disabilities have varying levels of understanding and controlling acceptable behaviour. These students may need additional support to understand, change, and demonstrate acceptable behaviour consistently over time.*

Usually pupils with severe behavioural problems will have been formally identified by an Identification, Placement and Review Committee (IPRC). Regulation 305 requires that all exceptional pupils have an Individual Education Plan (IEP), which sets out the specific special education programs and services they require to meet their educational goals. The IEP will include the needs of the pupil as identified by the IPRC and will set out academic and other educational goals for the pupil. Pupils with behavioural problems will have behavioural and/or social goals set out in the IEP.

The ministry is concerned that if such pupils are suspended or expelled when behavioural episodes occur, these pupils will never have access to the education they require to succeed. *If suspensions and expulsions are used before other educational strategies are tried, per the IEP, the student will be denied the very type of educational program which has the potential to reduce or even eliminate the pupil’s unacceptable behaviour.*

Just as we would remediate a pupil who fails a mathematics or language test, rather than use suspensions or expulsions, *we need to review the remedial strategies which can be used when pupils fail to meet behavioural objectives in their IEP. To do otherwise may potentially be viewed as **discrimination** toward a child due to disability.*<sup>120</sup> [Emphasis added]

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<sup>119</sup> *Ibid.* at 186, 194.

<sup>120</sup> Ministry of Education and Training, *Special Education Monograph No. 5: Guidelines for the Implementation of the Ministry of Education and Training’s Violence-Free Schools Policy with*

Monograph No. 5 has never been formally adopted, but the principle that some students are not wholly responsible for their behaviour is reflected in the mitigating factors in the *Safe Schools Act* and *Regulations*. What is completely missing in the new legislation is the principle (which *is* found in the U.S. *Individuals with Disabilities Education Act*) that there must be an attempt to accommodate a student with a disability before using a suspension or expulsion.

## C. General Perceptions

### 1. Black Students

Based on interviews with lawyers, a school board trustee, community workers, youth, parents and academics from the Black community in the GTA, there appears to be a strong perception that the *Safe Schools Act* and the new school board policies on discipline are having a disproportionate impact on Black students. The general feeling is that discipline policies have always had a disproportionate impact on Black students, but the *Act* and “zero tolerance” policies have made the problem much worse, with significantly higher numbers of Black students being suspended and expelled.

The chair of an organization of parents of Black children states that when the organization was founded in 1980, the issue of suspensions and the unfair treatment of Black students was an issue that parents identified as “serious”. However, she notes that since the *Safe Schools Act* came into effect, the organization is getting more calls about expulsions and the increased presence of police in schools. She also points out that “[a]ll the major [advocacy and education] groups in the African Canadian community... are aware of this problem. Some people are calling it racial profiling.”<sup>121</sup>

A school board trustee, who has also advocated and worked in a low-income, multiracial community with a significant Black population for thirty-five years, states that the impact of school discipline policies on Black students has always been a problem, but “[it] is now a front burner issue because the numbers have increased.”<sup>122</sup> She made this observation about the schools in her ward:

In the school year 2002-2003, which is not yet ended, at the three high schools I represent as a trustee there is the following situation. [At the first school] there have been 131 suspensions. [The second school] has 145 suspensions. [The third school] has 65. This is only what is recorded. Almost all of them are Black or visible minority students.<sup>123</sup>

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*respect to Exceptional Pupils and Others with Special Needs*, revised 2 October 1997, 2-3. See Appendix I, Tab 44.

<sup>121</sup> *Supra* note 30 at 1-2.

<sup>122</sup> *Supra* note 12 at 4.

<sup>123</sup> *Ibid.* at 1.

A lawyer at a legal clinic that serves the Black community notes that there has been an “increased level of feedback from the Black community” on this issue and that the impact on Black students has “definitely increased” since the implementation of the *Safe Schools Act*.<sup>124</sup> As a result, the clinic, which provides legal representation to African Canadians on a variety of issues, has made representation of Black students in suspension and expulsion matters one of its priority areas of work.<sup>125</sup>

The executive director of a Somali social service organization states that the impact on Somali students only became an issue when the zero tolerance policies started: “We saw an increase in the number of suspensions and expulsions of Somali students since these policies came into effect. And not for good reasons.”<sup>126</sup> A family services worker at a social service organization that serves the Caribbean and Black community also believes that the new policies have “impacted on students as a whole, but mainly Black children.”<sup>127</sup>

A specialist on race and ethnic relations at a school board in the GTA also notes: “In my observations and liaison with visible minority parents, they have complained about the interpretation of the Safe Schools policies which have had adverse effects on their children.”<sup>128</sup>

The perception that Black students are being disproportionately impacted by discipline policies is not limited to the Black community. The executive director of a legal clinic that serves children and youth remarked: “Schools with large racialized communities, for example, around Jane and Finch, have always had a high number of suspensions and expulsions and students not returning.”<sup>129</sup> Perhaps the most straightforward comment came from the course director in the education faculty of an Ontario university:

I think anybody who looks at the issue honestly would have to acknowledge the disproportionate impact [on Black students]. A lot of people really believe that they don't look at race. It is the same reason that they don't collect statistics. It maintains the façade that everyone is treated the same, so there can't possibly be a discriminatory outcome. I can't say whether most people in the [school] system know about the disproportionate impact, but I think anyone who looks at it honestly would know it, and I think that there are lots of people who know it but would never say it.<sup>130</sup>

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<sup>124</sup> *Supra* note 13 at 1, 3.

<sup>125</sup> The executive director of the clinic recently said: “It has taken over our caseload.... It's really a huge problem.” Christian Cotroneo, “Schools target blacks: Lawyer,” *Toronto Star*, 6 December 2002.

<sup>126</sup> Interview, 17 March 2003, 1-2.

<sup>127</sup> Interview, 18 March 2003, 1.

<sup>128</sup> Interview, 15 May 2003, 1.

<sup>129</sup> Interview, 5 March and 28 May 2003, 1.

<sup>130</sup> Interview, 23 May 2003, 3.

## 2. South Asian, Aboriginal, Latino, East Asian and Southeast Asian Students

The perception of disproportionate impact also exists in other racial minority communities. The coordinator of a Tamil youth centre believes that there were quite a number of suspensions of Tamil students in the past, but that the *Safe Schools Act* and new school board policies have made things much worse.<sup>131</sup> A lawyer at a legal clinic that serves the Aboriginal community states that he was not aware of discipline policies being a particularly significant issue prior to the *Act*, but there is a disproportionate impact on Aboriginal students now.<sup>132</sup> A community worker at a legal clinic that serves the Latino community made a similar observation about the Latino community.<sup>133</sup> The executive director of a legal clinic that serves the Chinese and Southeast Asian communities has noticed an increase in cases, but is not sure if it represents a disproportionate impact on Chinese and Vietnamese students.<sup>134</sup>

A senior official at a school board in the GTA would not confirm or deny that there is a disproportionate impact on Black or other racial minority students. Rather, he seems to believe that students at-risk are being disproportionately impacted and it is necessary to address all the factors – not only racism – that put children at-risk:

Kids who don't come to school regularly are not successful in school. If you are not successful in school, you don't feel as good about yourself. If you don't feel as good about yourself, you tend to act out. If you tend to act out, your behaviour is not acceptable, and on it goes. We know certain things. We have the information about who lives in areas with different socio-economic groupings. We know that kids who come from two-parent families generally do better in school than kids who come from one-parent families. We know that boys don't do as well on provincial tests in reading and math. We also know that boys learn differently from girls. We also know that far more boys get suspended than girls.... Do I have a concern about the number of black boys in difficulties? Yes, I do. But I am also equally concerned about other students who are from other groups that find themselves in difficulty.... There are a multitude of factors that can come into play in many issues when you have kids at-risk. I think that [racism] is one of the factors, but it is not the only factor. So from my perspective, I want to have the discussion that would look at the many factors and try to address them from a multifaceted standpoint.<sup>135</sup>

He also suggests that perceptions about disproportionate impact may not always be in accord with reality. He cites the example of a low-income community in downtown Toronto where the issue was raised: "The community did bring that forward, and I, along with a number of other people, have met with them looking to develop intervention and suspension support programs, in this case, for kids in grades 1, 2 and 3, etc. But when we actually looked at the statistics, the rates of suspension were lower than anywhere else around."<sup>136</sup>

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<sup>131</sup> *Supra* note 17 at 2, 6-7.

<sup>132</sup> Interview, 3 April 2003, 1,3.

<sup>133</sup> Interview, 26 March 2003, 1, 3.

<sup>134</sup> *Supra* note 16 at 1, 3.

<sup>135</sup> *Supra* note 2, 14 May 2003, at 8-10.

<sup>136</sup> *Ibid.* at 11.

A senior official at another school board in the GTA does not believe that there is a disproportionate impact on Black and other racial minority students because principals apply discipline objectively:

From a racial perspective, no, I don't agree, although I am aware in certain communities that is a perception. Because I am involved with suspensions and reviews, I can say that it is based on objective behaviour that students commit, regardless of racial background.... In my experience, in the actual decision-making, the principal gathers the information and makes a determination whether or not the particular behaviour occurred and who did what. The ethnic background of the student isn't a consideration in the decision-making. Our principals would say that I just look at the facts of what happened, the age and gender of the student, the seriousness of the injury or whatever it is that happened, whether it is a repetitive kind of behaviour, and what steps have been taken before to try and get the child to change the behaviour.<sup>137</sup>

He also suggests that the erroneous perception of disproportionate impact may stem from the fact that the student population in some schools largely consists of one racial or ethnic group:

Some schools represent Latin American communities, some represent Filipino communities, some represent Chinese communities and some represent African Canadian communities. The largest population in that building is represented by that group and then there might be a variety of other groups with small representation. It wouldn't surprise me if the kids who are part of the largest group in the school are leading in suspensions because statistically they are the largest group, not because of any particular bias in decision-making.<sup>138</sup>

### 3. Students with Disabilities

Interviews with a social worker, a community worker, lawyers, mental health experts, advocates for people with disabilities and others reveal that there is a strong perception that the *Safe Schools Act* and the new school board policies are having disproportionate impact on students with disabilities, particularly students with emotional/behavioural disorders, intellectual and learning disabilities, autism, and Tourette's Syndrome (including associate disorders such as attention deficit disorder, obsessive-compulsive disorder and difficulties with impulse control).

The executive director of a children's mental health centre believes that suspension and expulsion policies were a significant issue for students with emotional disorders and learning disabilities before the *Act* came into effect, but "it is a bigger issue now."<sup>139</sup> A behaviour consultant for a school board in Northern Ontario states that he now sees the suspension and expulsion of students with emotional/behavioural disorders "all the time.... [T]here has been a substantial increase in suspensions and expulsions."<sup>140</sup>

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<sup>137</sup> *Ibid.*, 16 May 2003, at 4.

<sup>138</sup> *Ibid.* at 5.

<sup>139</sup> *Supra* note 29 at 4.

<sup>140</sup> *Supra* note 19, 13 May 2003, at 3.

The executive director of an organization that serves people with Tourette Syndrome reports that there has been an “absolute increase” in the suspension and expulsion of students with Tourette syndrome: “There were concerns before, but there has definitely been an increase since the *Act* was enacted.”<sup>141</sup> The coordinator of an advocacy group for students with disabilities states that there have definitely been “more suspensions” of students with disabilities since zero tolerance policies came into effect.<sup>142</sup> The executive director of a legal clinic that serves children and youth has also noticed that since the new school board policies came into effect, “[t]he public expectation of mandatory consequences has pushed schools to act more aggressively towards students with learning disabilities.”<sup>143</sup>

A senior official at a school board in the GTA would not confirm or deny that there is a disproportionate impact on students with disabilities, but emphasized that principals do apply the mitigating factors to ensure that students with disabilities are treated fairly:

The *Safe Schools Act* does provide for mitigating factors. There are three of them. Our focus and intention is to always work with the mitigating factors. In the case of special education students – and it is something we are actually engaged in discussions and review about right now – what are the needs of the students and how do they fit? We try very hard to not go in a straight line from point A to B. There are some people who look at the chart of consequences and they would choose to treat that as a drop down menu. I can tell you that from my direction and from those on the Board who work with me in schools, this is not a drop down menu. It may be prescriptive and a legislative requirement, but we do not treat it as a drop down menu and we work very hard to look at all factors and circumstances.<sup>144</sup>

A senior official at another school board in the GTA stated that the Board has not yet analyzed its statistics to see what the impact is on student with disabilities, but if the analysis does show that there is a disproportionate impact, steps will be taken to remedy the situation:

[Our special education committee was] presented with a report which identified across our system the numbers of student who were suspended who had an exceptionality, what kind of exceptionality it was, and so on. We haven’t analyzed that information yet. At the end of the school year, I can see us giving the database to our research department and then say what can we learn from this? Can we target additional resources? Can we identify a group that seems to be disproportionately represented? Can we analyze why did that happen? Why are those students getting into difficulties. Can we introduce programs and positive intervention strategies to offset that? But we are not at a point yet where I could say that they are disproportionately represented.<sup>145</sup>

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<sup>141</sup> *Supra* note 19, 14 May 2003, at 4.

<sup>142</sup> Interview, 8 May 2003, 11.

<sup>143</sup> *Supra* note 129 at 1.

<sup>144</sup> *Supra* note 2, 14 May 2003, at 8.

<sup>145</sup> *Ibid.*, 16 May 2003, at 4-5.

## D. Expulsion and Suspension Appeal Hearings

### 1. Black Students

Several trustees at a school board in the GTA who adjudicate expulsion and suspension appeal hearings have reported that they see a disproportionate number of Black students at hearings. A trustee, who has sat on 15-20 hearings since November 2000, stated: "I believe, based on my experience and talking with colleagues, we are, in this Board expelling boys of colour – Black or Indian, visible minority boys – at a much greater rate than mainstream White kids.... In my experience, it is Black male students who are most likely to be in an expulsion hearing."<sup>146</sup> Another trustee, who sat on "many" expulsion hearings before the *Safe Schools Act* came into effect and two since then, stated: "At expulsion hearings, it is disproportionately Black males... If I sit on six expulsion hearings, five would be Black or members of visible minorities.... The [new] policy has not changed anything. It has made things worse."<sup>147</sup>

A recent CBC radio program on school discipline and racial profiling reported similar findings in interviews with eleven TDSB trustees: "Every trustee contacted who has sat on an expulsion hearing reported [seeing a disproportionate number of visible minorities.] At least 80% of the students they see before them are visible minorities. The vast majority of them are Black."<sup>148</sup>

However, a senior official at a school board in the GTA takes the position that the observations of individual trustees should be viewed with caution: "I don't think that it is totally fair for individual trustees to make those sorts of statements when they don't sit on all the hearings, only on some."<sup>149</sup>

## E. Lawyers

Lawyers who provide summary advice to or represent students who have been suspended or expelled from school report seeing a disproportionate number of Black students and students with disabilities. The demand for services in this area from community legal clinics which serve the Aboriginal, Latino, East Asian and Southeast Asian and disability communities has also increased.

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<sup>146</sup> Interview, 7 April 2003, 1-2.

<sup>147</sup> *Supra* note 12 at 6.

<sup>148</sup> "The Colour of Zero Tolerance," *The Current*, CBC Radio One, 20 November 2002. The CBC asked each trustee how many expulsion hearings he or she had sat on and how many of the students who appeared were visible minorities. The raw tabulation was 56 hearings and 52 visible minority students. (The CBC did not cross tabulate to account for the overlap of several trustees sitting on one hearing, but states that the "at least 80%" figure is accurate.) Interview, Producer, CBC Radio One, 20 May 2003, p. 1.

<sup>149</sup> *Supra* note 2, 14 May 2003, at 11-12.

## 1. Black Students

A lawyer, who has provided representation to students at five expulsion hearings over the last ten years, states that all of those clients were Black. He also reports that, out of about one hundred referrals or contacts on suspension matters, in all but two cases, the students were Black.<sup>150</sup> Two lawyers, who practise together at the same firm and have represented about five students at expulsion hearings, report that all, except one, were African Canadian or Somali.<sup>151</sup> The executive director of a legal clinic that serves children and youth states that about half of the clients that the clinic represents at hearings are visible minority students, and of that half, two-thirds are Black. Furthermore, 75% of the students that the clinic provides brief services or summary advice to are visible minorities.<sup>152</sup>

## 2. Aboriginal, Latino, East Asian and Southeast Asian Students

Legal clinics serving the Aboriginal, Latino, and East Asian and Southeast Asian communities have all gone from doing no work in the area of school discipline prior to the enactment of the *Safe Schools Act* to contacts with parents and students about discipline issues at least once per month. A legal clinic that serves the Aboriginal community sees about one student every three weeks;<sup>153</sup> a legal clinic that serves the Latino community receives a call about once per month;<sup>154</sup> and a legal clinic that serves the East and Southeast Asian communities has received just under twenty calls over the past one to two years.<sup>155</sup>

## 3. Students with Disabilities

A lawyer at a community legal clinic northeast of the GTA reports that in the last year the clinic has been addressing the “fall-out” from the *Safe Schools Act*: “When we have calls from clients regarding a suspension, expulsion or exclusion or any kind of disciplinary action, we are not hearing from people whose children do not have disabilities as much as we are hearing about the application of that legislation to children with disabilities.”<sup>156</sup> The executive director of a legal clinic that serves children and youth states that 95% of the students to whom the clinic provides brief services or summary advice have special needs and 85% of the students represented at hearings have special needs.<sup>157</sup>

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<sup>150</sup> Interview, 14 March and 28 May 2003, 2.

<sup>151</sup> Interview, 24 April 2003, 1; Interview, 11 April 2003, 1.

<sup>152</sup> *Supra* note 129 at 2.

<sup>153</sup> *Supra* note 132.

<sup>154</sup> *Supra* note 133.

<sup>155</sup> *Supra* note 16.

<sup>156</sup> *Supra* note 18 at 1.

<sup>157</sup> *Supra* note 129 at 2.

## F. Alternative Programs

The author of this report was not able to interview the staff of alternative programs or strict discipline programs in the GTA. Telephone calls were either not returned or there was a refusal to be interviewed and a referral to a senior official at a school board in the GTA.<sup>158</sup> That official stated that according to his observations the students in the programs “are fairly reflective of the students who are in our schools in terms of the profile culturally and racially, except there are far more boys than girls.”<sup>159</sup> Some of the other interviewees, however, believe that there are a disproportionate number of racial minority students, particularly Black students, and students with disabilities in those programs.

A community worker at a social service organization that serves Caribbean and Black youth has seen the students in alternative programs for excluded and suspended students, such as the ACE program, and observed: “[I]f you look... at students who are sent to [alternative] schools, where excluded kids are sent, the number of kids there are disproportionately Black.”<sup>160</sup> A school board trustee, who has sat on committees for Supervised Alternative Learning for Excused Pupils (SALEP), states: “I must tell you of my dismay and horror at the amount of Black students who are coming through these programs. If I see a student who is not Black, I question it. I ask what is happening. Have you got the wrong student?”<sup>161</sup>

The executive director of a legal clinic that serves children and youth reports that she spoke to someone who works in a program for expelled students and was told that out of thirty students in the program, only one was White and all of them had learning disabilities.<sup>162</sup> A lawyer at a legal clinic that serves the Black community has been told by the principals of strict discipline schools as well as students who have attended them, that there are a disproportionate number of Black students in those schools.<sup>163</sup>

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<sup>158</sup> For example, the author of this report contacted one of the principals of alternatives programs in the GTA. She refused to be interviewed and made a referral to a senior school board official. The author also independently arranged an interview, through an e-mail network of community workers, with youth workers at a community centre, which runs an ACE program for excluded and suspended students. Immediately before the interview began, one of the youth workers called the principal of the program to ensure that they could speak about the issue of disproportionate impact. The principal told her not to answer any questions, to cancel the interview and to make a referral to the same senior school board official.

<sup>159</sup> *Supra* note 2, 14 May 2003, at 9.

<sup>160</sup> Interview, 16 April 2003, 2.

<sup>161</sup> *Supra* note 12 at 1.

<sup>162</sup> *Supra* note 129 at 1.

<sup>163</sup> *Supra* note 103 at 1.

## G. Front-Line Workers

Youth, community and social workers as well teachers and behaviour consultants who provide front-line services to students who have been suspended or expelled report seeing a disproportionate number of racial minority students, particularly Black students, and students with disabilities.

### 1. Black Students

A counsellor at a youth employment program in a low-income, multiracial community with a significant Black population, stated:

I mostly see Black students.... Quite a few of them are experiencing the negative effects of zero tolerance. I haven't met one White student yet. I have met a few Latino and Hispanic students, but not one White student.... [W]e found that while before we had a waiting list of thirty students to get into our program, we now have fifty to fifty-seven students trying to get into the program because they are trying to find something to do while they are suspended.... I now ask them why they aren't in school, especially the Black students. They say they were suspended or expelled because of zero tolerance....<sup>164</sup>

She also recalled attending an anti-violence workshop at Metro Hall, which was attended by a large number of students who were suspended or expelled from school, and observed that “[i]t was predominantly Black and a few East Indian kids.”<sup>165</sup>

A community worker at a social service organization that serves Caribbean and Black youth also stated: “[Y]ou have schools where there are significantly less Black students, but more of them will be suspended. A case in point is [a high school in the GTA with a large Asian population and a small Black population.] Only about 10% of the students there are Black, but lots of students will tell you that they are being suspended at an alarming rate, higher than other groups.”<sup>166</sup>

A social worker who works with at-risk youth at a high school in a low-income, multiracial community stated: “[T]he vast majority of suspensions will impact on visible minority students because that is the demographic of the school. However, within this diverse school, there are disadvantaged groups who are being impacted more than others. The groups I think are being impacted the most are young Black males and Tamil boys, and to a certain extent Afghan boys.”<sup>167</sup>

The chair of a Muslim social service organization, which is working on implementing a community program for suspended elementary school students,

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<sup>164</sup> *Supra* note 11 at 1-2.

<sup>165</sup> *Ibid.* at 3.

<sup>166</sup> *Supra* note 160 at 1.

<sup>167</sup> Interview, 15 April 2003, 1.

stated: “Black students are definitely suspended more frequently than White students are.... What I have observed in terms of application is that, when the law is applied, a White kid might be suspended for one or two days, but the Black kid is suspended for five days.”<sup>168</sup>

## 2. Latino Students

A community worker at a legal clinic that serves the Latino community has noted that all the parents who have contacted her are “visible” members of the Latino community: “In my experience, it is indigenous, Black and mixed Latinos who are being suspended and expelled, not White Latinos.”<sup>169</sup>

## 3. Students with Disabilities

A teacher at an elementary school in a low-income community states that students with certain types of mental disabilities are mostly heavily impacted by zero tolerance policies:

If you take a look at the numbers in terms of who is most affected by the zero tolerance policy, the majority are identified as having some type of disability such as Mild Intellectual Disorder, Learning Disability or Behavioural. Those are the three labels that kids in special education are placed in.... I would say a large portion of suspended and expelled students would fall into one of those three categories. It will affect them the greatest because they are more likely to get into a situation where zero tolerance has to be applied.<sup>170</sup>

A social worker who works with at-risk youth in a high school in a low-income community has also observed that suspensions are handed out “quite freely” to students who have poor impulse control and the discretion not to suspend is not exercised: “There are fewer resources within the school environment to assist kids with special needs, so perhaps the hands of the school are tied. The school has no choice. There is discretion but there is a lot of pressure from teachers who don’t want the classroom environment to be unsafe.”<sup>171</sup> A behaviour consultant for a school board in Northern Ontario has noticed similar trends in the schools in which he works:

The *Safe Schools Act* really targets the kids with emotional/behaviour disorders. It effectively excludes them from mainstream programs.... I see a lot of principals who feel that their hands are tied and that if a child commits a certain act, they feel obliged to suspend the child. Even if there are mitigating circumstances, they are generally not applied.<sup>172</sup>

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<sup>168</sup> *Supra* note 14 at 2-3.

<sup>169</sup> *Supra* note 133 at 2.

<sup>170</sup> Interview, 11 April 2003, 2.

<sup>171</sup> *Supra* note 167 at 2.

<sup>172</sup> *Supra* note 19, 13 May 2003, at 1.

## H. Behaviour and Special Needs Classes

The course director in the education faculty of an Ontario university points out that discipline policies must have a disproportionate impact on Black students because there is evidence that behaviour and special needs classes have a disproportionate number of Black students and students from those classes are disproportionately disciplined:

The same thing is true of behaviour classes and special education classes: there is a disproportionate number of Black kids. Those kids who are not meeting success academically in school would logically be the kids who also then act out in different ways for all kinds of reasons, masking their academic issues or other issues they have. This leads to the kinds of stuff that leads to the suspension. When I was teaching behaviour classes in [a school board in the GTA,] there was a work group set up called the behavioural work group. There were quite a lot of people from [the city] who worked on this for two years. A report of the behavioural work group came out. This was in [a low-income ward with seven schools.] We did a study of the kids who were in behaviour classes in those seven schools and statistically it was overwhelmingly Black. I am not mentioning behaviour classes for no reason because when you look at who ends out getting suspended, it is overwhelmingly those kids.<sup>173</sup>

## I. Children At-Risk

An expert on children at-risk at an Ontario university states that if Black children and children with disabilities are “at risk of or exhibit more anti-social behaviour than other children, then the fact is that [discipline policies] would have a disproportionate impact on them.”<sup>174</sup>

### 1. Black Students

The expert points out that, based on the evidence that is available about the chances of a poor child being identified as having behavioural problems, and the connection between poverty and race, discipline policies must be having a disproportionate impact on Black children:

If you grow up poor in Ontario, the odds of being identified by your teacher as having multiple behaviour problems are ten times that of the middle class... [C]learly these kids are in more trouble in school and the [Safe Schools] Act is going to have a bigger effect on them... [B]lack kids may have higher levels of anti-social behaviour. That may be accounted for solely because of their economic disadvantage. There is a British study which suggests that if you control for economic disadvantage, the effects of race and ethnicity on levels of emotional and behavioural disturbance in children wash out. What appears to be the driving force is that Black kids are disproportionately poor.<sup>175</sup>

He further states that the unresolved issue is whether discrimination is compounding the disproportionate impact: “The second [issue] is whether there

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<sup>173</sup> *Supra* note 130 at 2.

<sup>174</sup> Interview, 6 May 2003, 1.

<sup>175</sup> *Ibid.* 1-2.

is distortion of their behaviour, whether they are treated unfairly compared to other kids, controlling for levels of anti-social behaviour. We don't have any firm data on that."<sup>176</sup>

## 2. Students with Disabilities

The expert makes similar observations about students with learning disabilities: "Two things have to be considered. First, children with learning disabilities are at increased risk for behavioural problems. They come in contact with elements of the *Act* more than other kids because of their higher level of anti-social behaviour. Second, whether they are treated unfairly, compared to other kids, controlling for the levels of anti-social behaviour, we don't know."<sup>177</sup>

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<sup>176</sup> *Ibid.* 2.

<sup>177</sup> *Ibid.*

## VIII. Discrimination

Nearly all the interviewees identified discrimination – direct and systemic – as the main reason why the application of discipline in schools has a disproportionate impact on racial minority students and students with disabilities. Some interviewees also pointed out that there are multiple and intersecting grounds of discrimination, including race, disability, poverty and immigrant/refugee status.

### A. General Perceptions

#### 1. Black Students

Many Black students who are suspended or expelled believe that it is because of discrimination:

- A community worker at a social service organization that serves Caribbean and Black youth reports that discrimination is “usually the first thing that comes out of the kids’ mouths.”<sup>178</sup>
- A social worker who works with at-risk youth in a high school has observed: “The students who I talk to feel it is discriminatory... The students who are from the groups that are being disproportionately impacted know what is happening.”<sup>179</sup>
- A counsellor at a youth employment program states: “[The Black students] compare themselves to White students. A White student does the exact same thing and remains in school. But a Black student is either expelled or suspended for thirty to forty days.... If they get into an argument or something with a White student, the Black student is expelled, but the White student gets to stay in school.”<sup>180</sup>
- A family services worker at a social service organization that serves the Caribbean and Black community notes that “Black children who are being picked on are being suspended after a fight, but the White children who did the picking on are not. Black children are being suspended for things that White children are not being suspended for. Black children feel that White children are not being disciplined in the same way.”<sup>181</sup>

These comments are consistent with the study on the racial minority students’ perception of school disciplinary practices in Toronto, which was discussed earlier in this report.<sup>182</sup>

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<sup>178</sup> *Supra* note 160 at 1.

<sup>179</sup> *Supra* note 167 at 3.

<sup>180</sup> *Supra* note 11 at 1.

<sup>181</sup> *Supra* note 127 at 2.

<sup>182</sup> *Supra* note 116.

Many Black parents also believe that discrimination plays a role, not only in the way Black children are treated, but also the way Black parents are treated. A specialist on race and ethnic relations at a school board in the GTA notes: “Some parents perceive outcomes as discriminatory since they have articulated that a two-tiered system exists whereby visible minority students are not treated in the same manner as students from the dominant culture when it comes to consequences for the same offense.”<sup>183</sup> The chair of an organization of parents of Black children notes:

In many of these cases, the parents... will say it is racism. Most often, they will identify the problem behind it as racism. There are fights in school that some students claim originated in racial taunting.... There have been cases where the parents have complained that the White student had started it, but that student was not suspended. Or the parent might say, if the White student started it, why is my child suspended for the same length of time as the student who started it. They believe there is something behind the way their child is treated.<sup>184</sup>

A counsellor at a youth employment program has noticed: “Sometimes the parents are treated in the same manner as the students. I have had parents tell me that they have gone down to the school to try to sort things out and are asked to leave in a rude manner.”<sup>185</sup> A lawyer, who represents Black students, shares that observation:

[T]he parents are absolutely targeted. The kids will get slapped with a suspension, but the parents will get do-not-trespass notices and be themselves subject to fairly aggressive measures.... [The] underlying racist stereotyping by principals and teachers... crystallizes with the Black mother. All we have is someone trying to talk about what is happening. But it is immediately interpreted as violent, hysterical and threatening versus if [a White mother] came in and sounded like me – there would be room for dialogue.”<sup>186</sup>

A lawyer at a legal clinic that serves the Black community has also observed that some parents have been given trespass orders when they try to advocate for their children and sometimes the school will even notify the Children’s Aid Society:

Another huge problem is that, if parents fight back by being assertive or non-cooperative, schools sometimes call the Children’s Aid Society. The school blames the parents for not disciplining the child properly. In four out of my six current files, CAS has been called. In all those cases, the CAS investigated, found no basis and the file was closed. In one case, the school wanted to have the child labelled as having attention deficit disorder, and put on medication, but the parent refused to cooperate, and CAS was called.<sup>187</sup>

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<sup>183</sup> *Supra* note 128 at 1.

<sup>184</sup> *Supra* note 30 at 3.

<sup>185</sup> *Supra* note 11 at 1.

<sup>186</sup> *Supra* note 151, 11 April 2003, at 1-2.

<sup>187</sup> *Supra* note 13 at 2.

## 2. Tamil Students

The coordinator of a Tamil youth centre has observed that at certain schools in the GTA, if Tamil students get into a fight with another group, they will be suspended and the other group will not. He has noticed that this has happened at one school four or five times and it does not happen at all schools, only specific ones.<sup>188</sup>

## 3. Aboriginal Students

There appears to be a perception that Aboriginal students are treated differently than other students in the application of discipline. A lawyer at a legal clinic that serves the Aboriginal community states that if an Aboriginal student gets into a fight with another student, “unless both students are Aboriginal, our experience is that the student who gets kicked out is the Aboriginal student.”<sup>189</sup> An education policy analyst at First Nations organization in Northern Ontario reports that they see cases where students from different racial backgrounds commit the same offence, but the Aboriginal students are more harshly treated. For example:

Five students – two Aboriginal and three White students – were caught getting high on drugs together. Under the policy, they all should have been punished equally. But what happened was the two Aboriginal students were suspended for five days, one of the White students was suspended for three days and the other two students weren’t suspended at all. The school told the parents of the Aboriginal students that the two White students were not suspended because they came forward first.<sup>190</sup>

## 4. Latino Students

A community worker at a legal clinic that serves the Latino community states that Latino parents believe that racism is causing their children to be disciplined because school administrators always take the word of a White student over a Latino student or a White student is shown more leniency for committing the same offence as a Latino student. For example:

In one case, a White student had attacked a Latino student. The Latino student’s parents wanted the White student to be suspended, but the school just said that everyone should calm down and things could be sorted out without a suspension. I never get calls from parents because the school wants to sort things out when a Latino student has done something wrong.<sup>191</sup>

## 5. Students with Disabilities

Several interviewees believe that the *Safe Schools Act* facilitates discrimination against students with disabilities. A behaviour consultant for a school board in

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<sup>188</sup> *Supra* note 17 at 2.

<sup>189</sup> *Supra* note 132 at 1.

<sup>190</sup> *Supra* note 15 at 1.

<sup>191</sup> *Supra* note 133 at 1-2.

Northern Ontario reports that the *Act* has shifted protection away from the rights of special education students, who are a minority, to the rights of the majority of students:

A number of years ago, special education was geared towards the needs of the special education student. You now find that school administrators are saying that they have to think about the others. So the attention has shifted from the needs of the student to the needs of the larger group. So decisions, in order to meet the expectations of the *Safe School Act*, are geared to protect the majority rather than the individual needs of children.<sup>192</sup>

He has also observed that the *Act* “really targets” students with emotional/behavioural disorders and “effectively excludes them from mainstream programs.”<sup>193</sup> The executive director of a children’s mental health centre shares the view that the *Act* itself is discriminatory because it specifically targets students with emotional difficulties and learning disabilities.<sup>194</sup> The coordinator of an advocacy group for students with disabilities also believes that students with disabilities, whether because they look differently or behave differently, attract attention and are treated differently under the *Act*.<sup>195</sup>

## **B. Direct Discrimination**

### **1. Black Students**

Very few interviewees believe that intentional, direct discrimination against Black students is widespread, but some believe that it does occur. The executive director of legal clinic that serves children and youth states that there is some “genuine” racism around.<sup>196</sup> A school board trustee states that “some teachers and educators are racist.”<sup>197</sup> A lawyer, who represents students, believes that “by and large the racism is unconscious but for some it is a deliberate act.”<sup>198</sup> A social worker who works with at-risk youth in a high school has the sense that there is both conscious and unconscious discrimination:

I have heard comments made about certain groups that sound discriminatory. When there is a policy like Safe Schools, I get worried about how the discretion is used. I don’t mean to sound totally negative. Generally, I think people are pretty caring and wanting students to do well. But certainly there are some decisions that are made that I have concerns about because it looks discriminatory to me.<sup>199</sup>

A lawyer at a legal clinic that serves the Black community takes the position that even if the discrimination is unconscious, it is still direct discrimination: “It

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<sup>192</sup> *Supra* note 19, 13 May 2003, at 2.

<sup>193</sup> *Ibid.* at 1.

<sup>194</sup> *Supra* note 29 at 2.

<sup>195</sup> *Supra* note 142 at 4.

<sup>196</sup> *Supra* note 129 at 3.

<sup>197</sup> *Supra* note 12 at 2.

<sup>198</sup> *Supra* note 151, 11 April 2003, at 3.

<sup>199</sup> *Supra* note 167 at 3.

normally starts with a particular teacher. What we see is that Black children are not given a margin of error. There are teachers and principals who hold assumptions and stereotypes about Black children. It may be unconscious, but it operates at the level of expectation they have about Black boys. I see that as direct discrimination.”<sup>200</sup>

Some interviewees point out that there are disciplinary rules on hair and clothing that are seen as specifically target Black students. A community worker at a social service organization that serves Caribbean and Black youth reports:

[Black students] feel that they are being singled out. They feel that some of the rules are being geared towards them. For example, there is a rule in [one high school’s] rulebook that says something like it is prohibited to put a comb or pick in your hair, or something like that. The students felt that it was definitely a Black thing, that they were being targetted as Black students because students of other races don’t put those things in their hair. Some of them were called on to follow this rule and felt it was so discriminatory against them.<sup>201</sup>

A former equity advisor to a school board in the GTA states: “I don’t understand why schools focus on hats and what kids wear to school. At a forum on diversity, one person couldn’t keep her mind off baggy pants.... It is an irritant to teachers because it is seen as a form of resistance to school authority. The issue of being appropriately dressed does not come up as much for other [racial] groups.”<sup>202</sup> A school board trustee complains that Black students are suspended for “wearing a bandana, which may be seen as belonging to a gang, without looking at the whole issue of North American pop culture and how kids are caught up in it.”<sup>203</sup> A counsellor at a youth employment program provided a concrete example of a Black student who was suspended because of an amulet he was wearing:

There was an African student who was wearing something that the teacher felt was offensive to him, but the student felt it was his culture.... He was wearing an African outfit but it was the chain around his neck that the teacher found offensive, without understanding what it meant or caring to know what it meant. It was an African amulet and the teacher said that he found the symbol disturbing.<sup>204</sup>

Tellingly, the coordinator of a Tamil youth centre reports that school administrators also complain about the hip hop clothing that Tamil youth wear.<sup>205</sup>

There is also some suggestion that the disproportionate impact on Black students may be the result of being suspended for the more “subjective” offences, where there is greater leeway for racial stereotyping and bias to enter into the decision-making process. There are, in fact, studies in United States

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<sup>200</sup> *Supra* note 13 at 2.

<sup>201</sup> *Supra* note 160 at 1.

<sup>202</sup> Interview, 17 April 2003, 2.

<sup>203</sup> *Supra* note 12 at 3.

<sup>204</sup> *Supra* note 11 at 2.

<sup>205</sup> *Supra* note 17 at 3.

which show that the discipline of students of colour peaks in the most subjective categories such as “disturbing school” or “defiance or disrespect of authority”.<sup>206</sup> The situation may be similar in Ontario. While many interviewees reported that Black students are getting suspended for fights or violence, an equally high number reported they are getting suspended for being disrespectful to the teacher or questioning authority, which are more subjective offences.

## 2. Students with Disabilities

Several interviewees take the position that the *Safe Schools Act* and *Regulations*<sup>207</sup> provide principals and school boards with the means to *directly* discriminate against students with disabilities because they may suspend or expel a student for disability-related behaviour. A lawyer at a legal clinic that serves persons with disabilities puts it this way:

One, with respect to suspension and expulsion, [the *Safe Schools Act*] does not prohibit schools from suspending and expelling students with disabilities where the behaviour that is being impugned is related to the child's disability. It does not forbid that. *It says explicitly that a principal may suspend and expel in that situation.* When the behaviour is directly related to the disability, it should be excusable, but the *Safe Schools Act* says that, even if it is, the principal may nevertheless proceed to suspend or expel them. That is direct discrimination on the basis of disability.... *When somebody's disability accounts for their behaviour, then suspending or expelling them for that behaviour, is suspending or expelling them because of their disability.* The Human Rights Code *very clearly says that suspending or expelling someone because of their disability is discriminatory.* But the *Safe Schools Act* purports to legitimize those actions taken by a principal or a school board.

...

The school should be concerned about *behaviours that nevertheless occur when the accommodations are present.* It doesn't make sense to punish a child for disability-related behaviours over which they have no control. There is no rationale that can be put forward for punishing a child in that situation. There is nothing that the child can be taught or learn in that situation.<sup>208</sup> [Emphasis added]

He uses the example of a student with Tourette Syndrome:

I have heard the school board lawyers use the Tourette's example *ad nauseum* to say that where a student has Tourette's, and that explains the swearing, that would be a situation where you would not need to use *the Safe Schools Act* for a response. Nevertheless, the *Safe Schools Act* permits a principal to discipline a child with Tourette's for swearing. There is nothing in the *Act* which prohibits it, whereas the *Human Rights Code* surely prohibits disciplining a child for that behaviour.<sup>209</sup>

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<sup>206</sup> *Opportunities Suspended*, *supra* note 90 at 7-8; K. Carrillo, “Suspend Negative Behaviours, not Students who Perform Them,” *Albuquerque Journal*, 20 December 2001. See Appendix I, Tab 33. Online at: [http://www.abqjournal.com/opinion/guest\\_columns/guest12-20-01.htm](http://www.abqjournal.com/opinion/guest_columns/guest12-20-01.htm).

<sup>207</sup> *Education Act*, *supra* note 42 at ss. 306(5) and 309(3); Ontario Regulation 106/01, s. 1; Ontario Regulation 37/01, s. 2.

<sup>208</sup> Interview, 10 April 2003, 2.

<sup>209</sup> *Ibid.* at 5.

A lawyer at a community legal clinic northeast of the GTA states that the Ministry of Education and the school boards are “subscribing to the pre-Charter viewpoint that similarly situated people should be treated similarly. In the case of students, all students are similarly situated because they are students, and therefore they should be similarly treated.”<sup>210</sup>

The executive director of a legal clinic that serves children and youth also takes the position that the *Safe Schools Act* and *Regulations* allow for direct discrimination:

[The] *Regulations* do not conform to the *Human Rights Code*. For example, it is a mandatory offence to swear at a teacher. In my view, under the *Code*, you cannot suspend a student with Tourette’s unless you have accommodated. The *Regulations*, however, do not speak about accommodation, they just say suspension is not mandatory. The *Regulations* are deeply flawed because they do not say that you cannot suspend unless you accommodate as required under the *Human Rights Code*. There are very few, if any, school principals who would look beyond the *Regulations* to the *Code*. It is, in fact, unfair to expect them to look at and figure out the overlay of different legal regimes.<sup>211</sup>

She also believes that the failure to mandate reasonable accommodation inevitably leads to discrimination: “[I]t is discrimination to treat students identically. It is discrimination if you have not attempted to reasonably accommodate a student with a disability to the point of undue hardship.”<sup>212</sup>

The executive director of an organization that serves people with Tourette Syndrome confirms that students with Tourette Syndrome who swear are being suspended:

Swearing is one [offence] that is totally misunderstood. I hear from parents about children with coprolalia being suspended for swearing. Coprolalia is the medical term for the utterance of profanity.... Coprolalia... [is] not directed. It comes in the middle of a sentence. It comes totally out of context. We need to get the message across that these utterances and gestures are not directed. It is very difficult for a teacher to have to explain that to the rest of the classroom. It is hard for the parent of a child in that classroom who is hearing about that. The parent would say it is not appropriate for my child to hear that. You have to sit down as reasonable adults and discuss and explain what is going on. Educators have to know what it really is.<sup>213</sup>

A behaviour consultant for a school board in Northern Ontario has also come across such cases and observed that “[t]he principal has discretion so he decides that the swearing has nothing to do with Tourette’s and is willful swearing.”<sup>214</sup>

## C. Systemic Discrimination

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<sup>210</sup> *Supra* note 18 at 6.

<sup>211</sup> *Supra* note 129 at 5.

<sup>212</sup> *Ibid.* at 3.

<sup>213</sup> *Supra* note 19, 14 May 2003, at 2.

<sup>214</sup> *Ibid.*, 13 May 2003, at 2.

## 1. Black Students

Most of the interviewees believe that systemic discrimination is the main factor leading to the disproportionate suspension and expulsion of Black students. There have been studies done in Toronto in the last two decades which show that Black students are disproportionately streamed into basic level and special needs classes and leave school earlier and drop out of school in disproportionate numbers.<sup>215</sup> It is believed that the same systemic factors which lead to a disproportionate impact on Black students in these areas lead to a disproportionate impact on Black students in the area of suspensions and expulsions.<sup>216</sup>

The chair of an organization of parents of Black children believes that there is a clear line between the systemic barriers in the education system and the suspension and expulsion of Black students:

My perception is that we have had to work so hard and lobby and advocate so hard because there are systemic barriers. We have been asking for structural and deep-rooted change so that we will have an education system that is inclusive and based on equity and anti-racism where all of our students will receive fair treatment and sit in school feeling that they are part of the environment. That they will see themselves reflected in the curriculum. We believe that much systemic change is needed. It seems to me that the suspensions and expulsions flow out of the stereotyping and low expectation of our students. It is all connected to racist assumptions. It is connected to how these students are perceived as the troublemakers in the class.<sup>217</sup>

The executive director of a legal clinic that serves children and youth also sees a correlation between systemic discrimination and discipline:

There is systemic discrimination. Immigrant kids and kids with different cultural backgrounds are required, with other kids, to do screening tests in grade three. Those tests are designed for middle class White kids. The test results may not result in them being labelled as having a special education need, but they are perceived to have a lower IQ and there are lower expectations for them... All this leads to lower self esteem which

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<sup>215</sup> See e.g. S. 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); M. Cheng Tsuji, G., Yau, M., & S. Ziegler, *The every secondary student survey, Fall 1987 (Report # 191)* (Toronto: Research Section, Toronto Board of Education, 1989); M. Cheng, 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); G. Dei,., 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); K. Braithwaite, & 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).

<sup>216</sup> For example, a lawyer who represents students states: "[I]n the same way that Black kids have been streamed historically into technical schools because of the belief that that is where they properly belong, those same attitudes affect disciplinary issues." *Supra* note 151, 24 April 2003, at 2.

<sup>217</sup> *Supra* note 30 at 3.

in turn leads to more misbehaviour which in turn leads to suspension and expulsion which in turn leads to dropping out of school.<sup>218</sup>

A lawyer at a legal clinic that serves the Black community has observed that schools never ask whether systemic factors are causing a student to misbehave:

The systemic nature of it is that the majority of teachers and principals are White and the curriculum is not inclusive. That can have an impact in terms of the students' connection to school and engagement with school. If a Black student is affected by that, and then begins to act out, that is not considered. It is not looked at as an underlying reason for the behaviour. The emphasis is only on the student's behaviour and there is no look at what is causing it.<sup>219</sup>

The course director in the faculty of education of an Ontario university explains that this is because the *Safe Schools Act* and zero tolerance policies reflect the archaic notion that equity means treating everyone the same:

I think that systemic issues allow the individual principal and teacher to act on their stereotypes as opposed to confronting their stereotypes. No one would ever say that they suspend because of colour or race, but they don't spend time consciously thinking about why so many of the students who are getting in trouble and coming to the office are Black. They take the attitude that everyone is treated the same way, so they never ask critical questions. By never looking at why some of those things are happening, you are, in fact, perpetuating the inequality.<sup>220</sup>

## 2. Aboriginal Students

The interviewees identified systemic factors as the cause of the disproportionate impact on Aboriginal students. A youth court worker at a legal clinic that serves the Aboriginal community states that the *Safe Schools Act* fails to incorporate an Aboriginal perspective: "[I]t is punitive, while from an Aboriginal perspective, it should be more of a collective decision. The vice-principal or whoever is in charge puts the onus on the young person. It is not collective at all and makes no sense from an Aboriginal perspective. Aboriginal kids are used to a community response."<sup>221</sup>

## 3. Students with Disabilities

Several interviewees identified a history of failure to accommodate students with disabilities within the school system in Ontario as the major systemic factor which leads to the disproportionate application of suspensions and expulsions. Furthermore, some believe that the *Safe Schools Act* entrenches the failure to accommodate because it provides schools and school boards with another means of excluding students.

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<sup>218</sup> *Supra* note 129 at 3.

<sup>219</sup> *Supra* note 13 at 2.

<sup>220</sup> *Supra* note 130 at 2-3.

<sup>221</sup> Interview, 3 April 2003, 2.

The coordinator of an advocacy group for students with disabilities has observed that “[student with disabilities] have been forced to be segregated for years because they haven’t been getting... the accommodation they required.” While the legal requirement to accommodate students in regular classes has become stronger over the years, “now [principals] have the *Safe Schools Act* as another tool... another way of saying your kid can be here, but I can send him out if things go wrong.”<sup>222</sup> A behaviour consultant for a school board in Northern Ontario has also observed that the *Act* is used as a “veiled threat”: “[M]any principals impose ‘informal’ suspensions, where parents are pressured to keep their child at home. It is a coercive relationship between school officials and the parents.”<sup>223</sup>

A lawyer at a legal clinic that serves persons with disabilities has noticed that schools never see their failure to accommodate as a cause of the behaviour that leads to suspension or expulsion:

The schools never seem to have look at what happened and ask themselves whether their failure to accommodate is actually one of the causative factors related to the impugned behaviour. What they end out doing when they don’t provide the accommodation is they are acting in a way which helps to cause the behaviour which they then use to justify the use of the suspension or expulsion provisions of the *Safe Schools Act*.<sup>224</sup>

#### 4. Cuts in Resources

Some interviewees believe that the cuts in support for students that have been made concurrently with the implementation of zero tolerance policies for misbehaviour are exacerbating the impact on students at-risk. Since 2001, due to budget constraints, the TDSB has been forced to significantly reduce or eliminate, among others, Safe Schools Advisors, Community Advisors, Youth Counsellors, Attendance Counsellors and Social Workers. Significant cuts were also made between 1998-2001.<sup>225</sup> A school board trustee believes that the confluence of the *Safe Schools Act* and the cuts have created the following trajectory:

As resources have shrunk, those students who are at-risk become more at-risk. Because when there is less support generally, it is going to be the kids who need that support most who are most at-risk. And then you have a policy which focuses on punishment rather than prevention, which is what the *Safe Schools Act* does. It doesn’t say to a principal that if a child exhibits these behaviours, then this is the program that the child needs to

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<sup>222</sup> *Supra* note 142 at 3.

<sup>223</sup> *Supra* note 19, 13 May 2003, at 2.

<sup>224</sup> *Supra* note 208 at p. 5.

<sup>225</sup> Under the provincial government’s education funding formula, the Toronto District School Board has been forced to make \$418 million in cuts since 1998. TDSB, *The Real Costs of Public Education* (Toronto: TDSB, 2001-2002), 1; TDSB, *Minutes*, Committee of the Whole (Private Session), Report No. 14, 4 May 2001, 454; TDSB Supervisor, *Highlights of Cost Saving Management Plan*, (Toronto: TDSB, 2002-2003).

go into. It says that if the child exhibits these behaviours, you get to boot him or her out.<sup>226</sup>

A social worker who works with at-risk youth in a high school believes that the higher suspension rate can at least partly be explained by the loss of supports in the school system: “It is symptomatic of the cuts to the system. There hasn’t been enough resources in special education departments for quite some time, so I don’t know if it is just the recent cuts. The teachers are feeling quite stressed and the schools don’t know what else to do, so they suspend the students.”<sup>227</sup>

A senior official at a school board in the GTA does not see a direct relationship between the cuts in services and the increase in suspensions and expulsions, but believes that the cuts have diminished the ability of schools to assist students at-risk: “I would certainly make the comment that schools and principals are under stress in order to work with students and families who are in crisis or need supportive intervention. I don’t think some of the cuts are helping that.”<sup>228</sup>

The coordinator of a Tamil youth centre believes that the cuts have clearly exacerbated the impact of suspensions and expulsions on Tamil students:

Three years ago, the Toronto District School Board had at least four or five Tamil staff as support staff, whether as school board counsellors or youth outreach workers. Right now, the number of Tamil support staff doing that kind of work at the Toronto Board is zero. Two of them were guidance counsellors who were brought in to assist in situations involving Tamil students or families because of language barriers and so on. One was a youth outreach worker. To us, that was the biggest loss because that person was directly involved in suspensions and expulsions.... Whenever there was a twenty-day suspension, the youth outreach worker was involved. They helped them get into a new school, worked with the student at the new school and ensured that they finished the year properly. Now, that’s not the way it happens. The Safe Schools protocol transfers them to a new school, but with no support. They are left out to dry.<sup>229</sup>

## **D. Multiple and Intersecting Grounds of Discrimination**

As has been discussed elsewhere in this paper, there are studies which show that Black students are disproportionately represented in special needs classes.<sup>230</sup> It would therefore be a logical inference that suspensions and expulsions would impact even more heavily on Black students in special needs classes. Moreover, other factors such as poverty and immigrant/refugee status may further compound the impact.

A significant number of interviewees do, in fact, believe that other factors, such as being poor or an immigrant or refugee, are significant causative factors, which

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<sup>226</sup> *Supra* note 146 at 2.

<sup>227</sup> *Supra* note 167 at 2-3.

<sup>228</sup> *Supra* note 2, 14 May 2003, at 7.

<sup>229</sup> *Supra* note 17 at 2, 4.

<sup>230</sup> *Supra* note 215.

at the very least exacerbate the impact on racial minority students. A policy analyst at a legal clinic that serves the Black community believes that, while other factors are important, for Black students, race is the overriding factor:

The impact is very layered. It is tempered by accent, nationality, class and gender. All those things come into play, but the underlying issue is what it means to be Black. For example, Somali kids may have a rough time because of their accent, but kids whose family has been here for generations also have a rough time. Racism is filtered through all these experiences. I work both with kids who were born here and are immigrants. It seems to cut across the board. All Black kids experience racism in schools. It cuts across class lines. I have been to private schools. The *Act* doesn't extend to private schools, but Black kids still face these problems. We still see a lot of the same stereotypes and problems. Class may provide some cushion but it doesn't protect you from racism.<sup>231</sup>

There are, in fact, multivariate studies in the United States which show that, even after controlling for socio-economic background, there continues to be an overrepresentation of Black students in suspensions.<sup>232</sup>

Other interviewees, however, believe that other factors such as poverty or immigration status are as important causative factors as race. A school board trustee states: "I think other factors, such as being poor or an immigrant, are huge... There are multiple biases in the system."<sup>233</sup> A family services worker at a social service organization that serves the Caribbean and Black community has observed:

I find that when children come to Canada, they are having difficulties because the issue of reunification with the culture and adjustment is not being addressed. What I see is that a child may go to school with several different problems – economic and social – and when a behavioural issue comes up, it is seen as strange, and time is not taken out to understand what is going on.... My perception is that there are racial biases. It is worse if you are in the social welfare system. A child who is known to be from a poor, Black, immigrant background is more targeted because of socio-economic status.<sup>234</sup>

The chair of a Muslim social service organization, which is located in a multiracial, low-income community, believes that immigrant parents, especially if they are poor, are often less successful in advocating for their children, which compounds the disproportionate impact on a Black student:

In one case that was reported to me by a parent, a Black kid and a White kid were in a fight, but the White kid was allowed back in school before the Black kid, even though the White kid initiated the fight. I would speculate that the White parent is much more articulate than the immigrant parent who doesn't understand the system. The more you know the system, the better they treat you. The vast majority of kids who are suspended

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<sup>231</sup> Interview, 3 March 2003, 2.

<sup>232</sup> R.J. Skiba, & R. Peterson, "The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?" (1999) 80(5) *Phi Delta Kappan*, 80(5), 372-382. See Appendix I, Tab 32. Online at: <http://www.pdkintl.org/kappan/kski9901.htm>.

<sup>233</sup> *Supra* note 146 at 2.

<sup>234</sup> *Supra* note 127 at 1-2.

have parents who don't know the system. That is a major reason why there is this disparity. The inability of immigrant parents to advocate for their children.<sup>235</sup>

The executive director of a Somali social service organization has found that school administrators often fail to take the refugee background of Somali students into account when applying discipline for misbehaviour:

The teachers follow policies which are supposed to apply to kids in normal situations. We have situations where a Somali kid is not acting normally because the kid has come through refugee camps.... We tell the educators that the kids are not acting in a normal way because of the situation they have been in. I show them photographs from Somalia of a child running in the same direction as American soldiers who are firing guns, a child holding a gun and children looking at dead bodies. I try to tell the educators that when they apply the policies they should remember that this is where Somali kids are coming from.<sup>236</sup>

He has also observed that some Somali parents believe that there is a triple impact on them: "A lot of the parents are telling us that it has to do with colour and background. Some parents were telling us that we are Black, we are immigrants and Muslims, which means we have three strikes against us."<sup>237</sup>

## **IX. Broader Impact**

Many interviewees believe that the increased suspension and expulsion of students are having a broad, negative impact on the student, his or her family,

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<sup>235</sup> *Supra* note 14 at 3.

<sup>236</sup> *Supra* note 126 at 1.

<sup>237</sup> *Ibid.* at 1.

the community and society-at-large. The most commonly identified elements are negative psychological impact, loss of education, higher drop-out rates and increased criminalization and anti-social behaviour.

## A. Psychological Impact

Some interviewees believe that suspension and expulsion can have a fairly serious negative psychological impact on the student. An expert on children at risk at an Ontario university has observed that “being expelled makes kids feel differently. They feel that they are not a part of Canadian childhood anymore and that tends to push them to the outside.”<sup>238</sup>

A counsellor at a youth employment program has noticed that “[the students’] self-esteem drops. They feel like they never thought racism would happen or still exists, but now they are thinking, it really is true, I am less of a person because of my colour. And they say, you know what, if that is what people think, I am going to go out and prove what they think.”<sup>239</sup> An outreach worker at a Tamil youth centre notes that there are psychological issues: “A lot of kids I work with have self-esteem problems to begin with, and if they are suspended, they think that they are not going to make it in the world. Their self-esteem just drops. They feel hopeless.”<sup>240</sup> The chair of a Muslim social service organization has observed that “[being suspended] makes a lot of young people angry, and it makes them hate school.... They are shamed in front of their colleagues when they are suspended.”<sup>241</sup> A family services worker at a social service organization that serves the Caribbean and Black community notes that “[i]t affects them psychologically.... Many students don’t have the will power to go on.”<sup>242</sup> The executive director of a Somali social service organization believes that “[i]t is a stigma that the student carries.”<sup>243</sup>

The executive director of a legal clinic that serves children and youth notes that many children with disabilities require continuity – a fixed, predictable regime – which even a short suspension will disrupt.<sup>244</sup> A community worker at a legal clinic that serves persons with disabilities states that children with disabilities who are not accommodated in the education system experience drops in self-esteem and may even become suicidal.<sup>245</sup>

## B. Loss of Education

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<sup>238</sup> *Supra* note 174 at 2.

<sup>239</sup> *Supra* note 11 at 2-3.

<sup>240</sup> Interview, 15 May 2003, 5.

<sup>241</sup> *Supra* note 14 at 5.

<sup>242</sup> *Supra* note 127 at 3.

<sup>243</sup> *Supra* note 126 at 2.

<sup>244</sup> *Supra* note 129 at 4.

<sup>245</sup> Interview, 10 April 2003, 6.

Several interviewees point out that the most tangible loss for a student who is suspended or expelled is education, both present and future. A youth leader states that “[i]f you expel a student, they don’t get an education and that’s a huge negative impact.”<sup>246</sup> The chair of a Muslim social service organization points out that “[a] child who is excluded from school will not learn.”<sup>247</sup> A teacher at an elementary school in a low-income, multiracial community notes that “[t]he more time you are out of a structured learning environment, the less you are learning.”<sup>248</sup> A lawyer at a legal clinic that serves persons with disabilities points out that “[w]hile the student is not receiving academic programming, the student regresses academically.”<sup>249</sup> A lawyer at a legal clinic that serves the Black community states that “it impacts on their plan to go on to post-secondary education.”<sup>250</sup>

The TDSB’s *Safe Schools Procedures Manual* directs schools, where reasonable and practical, to offer relevant schoolwork to suspended students<sup>251</sup> and a senior official at a school board in the GTA is adamant that principals have a “moral responsibility” to ensure that suspended students get remedial work.<sup>252</sup> Nonetheless, many interviewees report that suspended students rarely receive schoolwork. A school board trustee states that in the ward she represents “none of [the students] get remedial work when they are suspended.”<sup>253</sup> A family services worker at a social service organization that serves the Caribbean and Black community has noted that “not many [students] are given work to do at home.... I don’t see educational support in most cases, unless the parents put extreme pressure on the school.”<sup>254</sup> A counsellor at a youth employment program has observed:

[The students] just have nothing to do. They are not given the work they are supposed to be given. Suppose they run out of the work that they are supposed to have. They can’t go to the school because they are banned from the school. They can’t go to the teacher who they need the work from. It is ridiculous. When the parents try to call in, it is after school hours, or they leave a message and no one gets back to them.<sup>255</sup>

A lawyer, who represents students, believes that a student facing expulsion does not receive schoolwork because the school doesn’t want the student to come back:

I have never had a kid get remedial work. I have never ever had a school say you are subject to a twenty-day suspension, pending an expulsion hearing, and in the meantime

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<sup>246</sup> Interview, 19 March 2003, 1.

<sup>247</sup> *Supra* note 14 at 6.

<sup>248</sup> *Supra* note 170 at 3.

<sup>249</sup> *Supra* note 208 at 5.

<sup>250</sup> *Supra* note 13 at 2.

<sup>251</sup> *Supra* note 82.

<sup>252</sup> *Supra* note 2, 14 May 2003, at 3.

<sup>253</sup> *Supra* note 12 at 5.

<sup>254</sup> *Supra* note 127 at 2-3.

<sup>255</sup> *Supra* note 11 at 3.

this is the work we will provide to you and we will grade it. They want them out. It is motivated by getting these kids out of the system, so if that is your motivation, why would you create an environment of support?<sup>256</sup>

The TDSB runs four program for suspended students and one program for students on limited expulsion,<sup>257</sup> but some interviewees say that it is difficult for a student to get into those programs. The chair of a Muslim social service organization notes that there are no alternative programs for students in junior kindergarten to grade six: “There is a gap in this age group in terms of services and programs that are available. The current programs only address suspensions for grade seven and above and there is nothing below that. At some schools, though, with the coming of the zero tolerance law, suspensions are now experienced from junior kindergarten to grade six.”<sup>258</sup>

A school board trustee has observed that many students above grade seven are unable to get into the Board programs: “I know a student who has been out of school since October of last year and he just turned 17. He is still out of school and hasn’t been placed in a program. They keep promising him.”<sup>259</sup> A lawyer, who represents students, has also noticed that there are “very few spots” in those programs, and none of their clients were in them.<sup>260</sup>

Another school board trustee states that the lack of spaces in the Board’s programs is explained by the Ministry of Education’s failure to support alternative programs for students who are suspended or on limited expulsion:

By the Ministry’s standard, all those students who are kicked out for up to a year are supposed to manage on their own. There is no Ministry funding for programs for limited expulsions or suspensions. We can’t fit all those kids into our programs so they are on their own for four months. They are at home. A kid who has a lousy attendance record and has struggled in school, we tell him to just manage on his own for four months.<sup>261</sup>

As was discussed above, it was not supposed to be like this. During the House debates on the *Safe Schools Act*, the Minister of Education explicitly promised that the government would support alternative programs for suspended and expelled students.<sup>262</sup>

A senior official at a school board in the GTA states, however, that the Board is providing alternative programs for those students, even though it is not a legal requirement:

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<sup>256</sup> *Supra* note 151, 24 April 2003, at 4.

<sup>257</sup> *Supra* note 81.

<sup>258</sup> *Supra* note 14 at 1.

<sup>259</sup> *Supra* note 12 at 5.

<sup>260</sup> *Supra* note 151, 11 April 2003, at 4.

<sup>261</sup> *Supra* note 146 at 3.

<sup>262</sup> *Ontario Debates (Hansard)*, 6 June 2000, *supra* note 28.

There is no legislative requirement, but every student this year who has received a limited expulsion has been provided with opportunity for support in a program. We had some challenges earlier on with the timing on that because of limitations of space, but since the fall we have tripled our resources and spaces for those students. We are looking forward to September to look at other ways – more flexible program offerings – of supporting kids in those circumstances.<sup>263</sup>

Some interviewees also say that it is difficult for some students to get into another school, or if they do, the school is too far away from their home. A lawyer at a legal clinic that serves the Aboriginal community has noticed that “what is so frustrating for students is that they are out [of school] and no one seems to know how to get them back in, particularly when there is a criminal charge.”<sup>264</sup> The executive director of a Somali social service organization has seen cases where “students cannot get into another school” and the parents have to “struggle” to get them into a private Islamic school.<sup>265</sup> A social worker who works with at-risk youth at a high school has observed that students “may get transferred to schools that are far away, and if [the parents] are poor, they may not have the money to give to their kids for TTC.” She gives the example of one case where it took four to five months to find an alternative placement for a student: “She was not happy at home and wanted to be in school, but there were a whole bunch of barriers to get her placed elsewhere. There seems to be politics around getting a student into another program. There are negotiations around taking a student.”<sup>266</sup> A community worker at a social service organization that serves Caribbean and Black youth also provides an example of the difficulties that a student had :

The schools are so bombarded with students that there are waiting lists. The kid I mentioned who was here could not get into another school for three or four months. He came here in November and didn’t get into another school until February. The waiting period is tough for them to overcome. Even then, when he did eventually get into school, access was a problem. There are only a few of those schools in the city. He lived in [the East End] and he had to go all the way to the West End... where the school was.<sup>267</sup>

A senior official at a school board in the GTA confirmed that about 30% of students on limited expulsion do not join alternative programs. He agrees that some students are unable to join because of factors beyond their control, but maintains that others are able but choose not to: “Someone who works for me told me last week about a student on a limited expulsion from now until the end of the school year, who refused the opportunity to go one kilometer away from where he lived. His mother said it was too far and he said that he wanted to get a job.”<sup>268</sup>

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<sup>263</sup> *Supra* note 2, 14 May 2003, at 4.

<sup>264</sup> *Supra* note 132 at 2.

<sup>265</sup> *Supra* note 126 at 2.

<sup>266</sup> *Supra* note 167 at 3.

<sup>267</sup> *Supra* note 160 at p. 3.

<sup>268</sup> *Supra* note 2, 14 May 2003, at 4.

## C. Dropping Out

Many interviewees believe that the increased use of suspensions and expulsions is pushing students to drop out of school. There are, in fact, American studies which show 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.<sup>269</sup> A former equity advisor to a school board in the GTA believes that if studies were done in Toronto, they would show that suspensions and expulsions increase the drop-out rate of Black and other disadvantaged students:

We did some research at [a school board in the GTA] on dropouts and it was quite alarming. There was a correlation between the schools with high drop out rates and the proportion of Black and socially and economically disadvantaged students. If those students are being disproportionately impacted by suspension and expulsion, then the correlation is that the disproportionate drop-out rate for those groups will become even worse.<sup>270</sup>

A community worker at a social service organization that serves Caribbean and Black youth has observed that “[m]ultiple suspensions or expulsion usually leads to dropping out....”<sup>271</sup> A school board trustee, who is also a community worker in a low-income, multiracial community with a significant Black population, has noticed that “[t]he drop out rate is much higher in the Black community because of the zero tolerance policies brought on by the Ministry.... [W]e have sixteen and seventeen year-old Black males in this neighbourhood, who have been kicked out of school, some have learning disabilities and dyslexia and have no jobs skills.... They are chronic dropouts with no life skills, nothing at all.”<sup>272</sup> The coordinator of a Tamil youth centre has observed that “a twenty-day suspension is a month out of school and a trigger to dropping out.”<sup>273</sup> A community worker at a legal clinic that serves the Latino community has noticed that suspensions and expulsions are “increasing the drop-out rate” in the Latino community.<sup>274</sup> A lawyer at a legal clinic that serves the Aboriginal community explains that “Aboriginal students tend not to go as far in school. Every roadblock you put up is another reason for them to drop out.”<sup>275</sup>

## D. Criminalization and Anti-Social Behaviour

Many interviewees believe that the application of zero tolerance leads to increased criminalization of students and exacerbates anti-social behaviour. One

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<sup>269</sup> Skiba, *supra* note 232; L.M. DeRidder, “How Suspension and Expulsion Contributes to Dropping Out,” *The Education Digest*, February 1991.

<sup>270</sup> *Supra* note 202 at p. 3.

<sup>271</sup> *Supra* note 160 at p. 2.

<sup>272</sup> *Supra* note 12 at 1-3.

<sup>273</sup> *Supra* note 17 at 5.

<sup>274</sup> *Supra* note 133 at 2.

<sup>275</sup> *Supra* note 132 at 3.

major area of concern is the increased power given to police to supervise Black students, particularly given the evidence that Blacks are already subject to disproportionate racial profiling by the police.<sup>276</sup> The chair of an organization of parents of Black children states that some Black parents are expressing concern about the “increased police presence in schools.”<sup>277</sup> She cites the example of a thirteen year-old boy who was being handcuffed by the police in his school because an anonymous violent note had been found and someone had attributed it to him. He was being handcuffed even before there was an investigation to ascertain authorship of the note.<sup>278</sup>

A school board trustee recounts a similar incident that she witnessed in a high school where a teenager was handcuffed by police because he had stolen some money: “I saw a Black male student... who was handcuffed and being taken out by White officers. He was taken out in front of his peers like that. He had stolen some money, but it wasn’t a life and death issue, or use of a weapon, where he had to be handcuffed and taken out of the school like that.”<sup>279</sup>

The executive director of a legal clinic that serves children and youth points out that suspended students tend to hang out on streets and malls during the school day, which is a “powerful excuse for police to stop them and question why they aren’t in school. It escalates police supervision of racialized kids.”<sup>280</sup> A lawyer at a legal clinic that serves the Black community believes that this all leads to Black students “being criminalized earlier.”<sup>281</sup>

A lawyer at a legal clinic that serves persons with disabilities believes that the criminalization of students with disabilities is also a direct consequence of the *Safe Schools Act*.

As part of the uniform approach to behaviour, there are calls to the police about students who exhibit disability-related behaviour. These are excusable behaviours but they are treated the same way as aggressive acts that are inexcusable. It is astounding to think that for merely being a person with a disability and exhibiting behaviours related to that disability, students are facing being arrested by the police and being charged with criminal offences.<sup>282</sup>

An expert on children at-risk at an Ontario university states that there is “good evidence” that suspending and expelling students increases the risk that they will become anti-social or escalates their anti-social behaviour:

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

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<sup>276</sup> See e.g. the October 2002 *Toronto Star* series on racial profiling: <http://www.thestar.com>.

<sup>277</sup> *Supra* note 30 at 4.

<sup>278</sup> *Ibid.* at 2.

<sup>279</sup> *Supra* note 12 at 2.

<sup>280</sup> *Supra* note 129 at 4.

<sup>281</sup> *Supra* note 13 at 2.

<sup>282</sup> *Supra* note 208 at 6.

or other kids who are having difficulties. That can escalate their anti-social behaviour.... There is some literature that points out if you put anti-social kids together it escalates their anti-social behaviour. What anti-social kids need is a lot of contact with pro-social kids. When they are pushed to the outside and come in contact with other anti-social kids, that escalates their 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. Once kids are out of the mainline and out of school, that increases the risk of them becoming anti-social. Or if they are anti-social in the first place, it increases the risk that their anti-social behaviour will increase.<sup>283</sup>

The observations of several of the interviewees, particularly those who work in low-income communities, corroborates this. A social worker who works with at-risk youth in a high school states: "If you have a three- or four-day suspension, I get worried about those kids because they are usually already at-risk and more vulnerable than other kids to get into more trouble. They are the exact kids that need more support, not less."<sup>284</sup> The chair of a Muslim social service organization, which is located in a low-income community, has observed that "when a child is suspended, he goes home and becomes a prime recruit for drug dealers."<sup>285</sup> A community worker at a social service organization that serves Caribbean and Black youth has also observed that "[m]ultiple suspensions or expulsions usually leads to dropping out and then joining a gang in the neighbourhood or the neighbourhood drug dealer."<sup>286</sup>

A counsellor at a youth employment program in a low-income community has directly observed that "[t]he students who are suspended come into the mall and hang out. They vandalize... together." She has also had discussions with students who express concern about being led into anti-social activity:

It affects their family and the community because they are in the community doing nothing. At least in school they can become useful or learn something useful. Now they are just hanging about doing nothing. The kids have said that they end out hanging out with the bad kids and getting a record for stealing cars or something like that, which is not something they would normally do. They just have nothing to do.<sup>287</sup>

An elementary school principal who has worked extensively in schools in low-income communities made a similar observation: "This community... is not the safest place for kids to be on their own during the day when everyone is at school.... There have been examples of kids under suspension who have got into way bigger trouble than what they were ever suspended for."<sup>288</sup>

The government knew that this was going to happen. During the House debates on the *Safe Schools Act*, the then Minister of Education said that the government

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<sup>283</sup> *Supra* note 174 at 2-3.

<sup>284</sup> *Supra* note 167 at 2.

<sup>285</sup> *Supra* note 14 at 5.

<sup>286</sup> *Supra* note 160 at 2.

<sup>287</sup> *Supra* note 11 at 2-3.

<sup>288</sup> *Supra* note 130 at 4.

would provide supports for suspended and expelled students because “sending these kids out on the street only puts the problem somewhere else and actually creates additional problems, not only for those students but also for the community...”<sup>289</sup> Nonetheless, to date, the government has failed to fulfill its promise to provide those supports for suspended students and students on limited expulsion.

## **X. Interviewees’ Recommendations**

The interviewees made a number of recommendations about how to improve the current framework established by the *Safe Schools Act* or alternatives which would reduce or eliminate the (perceived) disproportionate impact on racial

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<sup>289</sup> *Ontario Debates (Hansard)*, 6 June 2000, *supra* note 28.

minority students and students with disabilities. The main recommendations, with some further explanation where necessary, are:

1. Collecting, publishing and analyzing statistics on the race and disability/disabilities of all students being suspended and expelled with the goal of addressing any inequities that may exist in the application of suspensions and expulsions. The analysis should incorporate the intersection between race and disability, as in the U.S. *Individuals with Disabilities Education Act*.<sup>290</sup>
2. Removing the reference to “zero tolerance” in the Toronto District School Board’s Safe Schools Foundation Statement Policy and other school board policies in Ontario. Government and school board officials should stop referring to the *Safe Schools Act* and *Regulations* and school board policies as a “zero tolerance” regime.
3. Guaranteeing all children the right to a free and appropriate education. This would include a legal requirement that the Ministry of Education and school boards set up and fully fund alternative programs for all suspended and expelled students. At a minimum, this right should be guaranteed to children with disabilities, as in the U.S. *Individuals with Disabilities Education Act* (see below).<sup>291</sup> It is worth pointing out again that during the House Debates on the *Safe Schools Act*, the Minister of Education did promise that the government would support alternative programs for suspended and expelled students.<sup>292</sup>
4. Guaranteeing all students with disabilities the protections found in the Ontario Ministry of Education’s Draft Special Education Monograph No. 5 and the U.S. *Individuals with Disabilities Education Act*, including:
  - Guaranteed access to an interim alternative education program.
  - A right to return to one’s original education placement after a set number of days (for example, no more than 45 days).
  - A requirement that the school attempt to reasonably accommodate a student with a disability who may be exhibiting a disability-related behaviour before suspension or expulsion.<sup>293</sup>

At a minimum, the *Education Act* and *Regulations* should be amended to prohibit suspending or expelling a student for disability-related behaviour. Instead, the student should be reasonably accommodated (which may involve a change of placement but not suspension or expulsion).

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<sup>290</sup> See Part VI, above.

<sup>291</sup> See Part VI, above

<sup>292</sup> *Ontario Debates (Hansard)*, 6 June 2000, *supra* note 28.

<sup>293</sup> See Part VI, above.

5. Training the administrators of discipline, particularly principals, teachers and trustees, on racial stereotyping and profiling, cross-cultural differences, accommodating people with disabilities, and understanding the immigrant and refugee experience.
6. Creating a better balance between peacekeeping (intervention and security approaches), peacemaking (dispute management and negotiation approaches) and peacebuilding (longer range approaches that aim to prevent future escalation of conflicts or to restore healthy relationships after outbreaks of violence, by redressing underlying inequities and social conflicts). In other words, the current disciplinary regime should create a better balance between punishment, conflict resolution, peer mediation, prevention, human rights protection, and equity.
7. Using in-school suspensions, particularly where the student does not present a threat to the safety of others, in order to ensure that a suspended student is not unsupervised during the day. Some schools already use in-school suspensions.
8. Mandating mediation before a hearing in order to try to bring out underlying issues and find a resolution to the problem as early as possible.
9. Applying suspensions and expulsions to Aboriginal and Black students individually, but also *differently*, to account for systemic factors and disproportionality, as in the sentencing principles of the *Criminal Code*.<sup>294</sup> Section 718.2(e) of the *Code* requires judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of Aboriginal offenders. It is designed to ameliorate the serious problem of overrepresentation of Aboriginal people in prisons. Section 718.2(e) directs judges to undertake the sentencing of such offenders individually, but also *differently*, because the circumstances of Aboriginal people are unique. In sentencing an Aboriginal offender, the judge must consider: (a) the unique *systemic or background factors* which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. For particularly violent and serious offences, imprisonment would likely result, but for less serious offences, an offender may receive a non-custodial sentence with an emphasis on restorative justice.<sup>295</sup> The above principles are also applicable, with some modifications, to Black offenders.<sup>296</sup>

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<sup>294</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>295</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>296</sup> See *R. v. Borde* (10 February 2003), C38189 (Ont. C.A.).

10. Restoring the community advisor, youth outreach worker, attendance counsellor and social worker positions that were cut by the Toronto District School Board.

## **XI. Conclusion**

September 1, 2003 will mark the second anniversary of the enactment of the *Safe Schools Act* in Ontario. Over the past twenty-two months, school boards have been amending and adopting policies and procedures governing the application of discipline in schools, the number of suspensions and expulsions has increased, and there has been growing concern over the human rights

implications of the new regime. No one disagrees that schools should be safe and free of violence, and reasonable people can disagree how that can best be achieved, but from a human rights perspective, a number of concerns have been raised, which may be summarized as follows.

First, the Ministry of Education and school boards are giving two contradictory messages to school administrators and the general public. On the one hand, the new regime is being promoted as a zero tolerance approach to misbehaviour in schools. On the other hand, the presence of mitigating factors in the *Act* and school board policies precludes it from being strictly defined as a zero tolerance regime. This contradiction leaves the door open for inconsistency in application. While some school administrators may apply the mitigating factors, others may practice zero tolerance. A practice of zero tolerance would inevitably conflict with anti-discrimination legislation, particularly if it targets disability-related behaviour.

Second, although the Ministry of Education and school boards have acknowledged and addressed to some extent the possibility that the application of discipline may have a disproportionate impact on students with disabilities, there has been strong resistance to acknowledging or addressing the possible disproportionate impact on racial minority students. The level of resistance is remarkably high given that there is clear and credible evidence of a disproportionate impact on racial minority students in other jurisdictions and Black community groups in the GTA have raised the issue publicly since at least the mid-1990s.

Third, in the GTA and other parts of Ontario, there is a strong perception supported by some empirical evidence that the *Act* and school board policies are having a disproportionate impact on racial minority students, particularly Black students, and students with disabilities. If the perceptions set out in this report reflect reality, it is cause for great concern. It means that some of the most disadvantaged students in the school system are being further marginalized. It is well established that at-risk students who leave the school system are much more likely to end up on social assistance, in low-end jobs, committing crime or being incarcerated. However, even if the perceptions are not true, it is still cause for concern that students and communities believe that the school system discriminates against them. Such students are more likely to become disengaged from school and drop out, with all the accompanying loss of opportunities and social ills.

Finally, the interviewees' recommendations towards the end of the report reflect the strong perception that human rights protections have not been adequately incorporated into the current disciplinary regime. All the interviewees believe that it is possible to have a disciplinary regime that both maintains safe and violence-free schools and protects the human rights of all students in the school system.