
Expulsion Part III – Mitigating Factors

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This week I want to introduce some of the mitigating factors that a school principal must consider, before recommending a pupil be expelled.

If my memory serves me right, one of my past blog pieces (Suspension Part II: Appeal Process and Ground of Appeal) contains a list of mitigating factors. Here it is again:

- The pupil does not have the ability to control his or her behaviour.
- The pupil does not have the ability to understand the foreseeable consequences of his or her behaviour.
- The pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person.
- The pupil's history.
- Whether a progressive discipline approach has been used with the pupil.
- Whether the activity for which the pupil may be or is being suspended or expelled was related to any harassment of the pupil because of his or her race, ethnic origin, religion, disability, gender or sexual orientation or to any other harassment.
- How the suspension or expulsion would affect the pupil's ongoing education.
- The age of the pupil.
- In the case of a pupil for whom an individual education plan has been developed,
 - i. whether the behaviour was a manifestation of a disability identified in the pupil's individual education plan,
 - ii. whether appropriate individualized accommodation has been provided, and
 - iii. whether the suspension or expulsion is likely to result in an aggravation or worsening of the pupil's behaviour or conduct.

This list will not help you if you do not know how to apply these factors. Instead, how about we analyze a fact scenario together? Below is a made-up fact scenario that I have used to educate other lawyers.

TC is a twelve-year-old boy attending Grade 5 at KCLC Elementary School.

TC suffers from a mild learning disability and had a history of behavioural problems.

Previously, KCLC Elementary School had implemented several disciplinary measures including a lunch time detention, two informal one-day suspensions, and a formal two-day suspension.

Approximately three weeks ago, TC used a pellet gun in a park adjacent to the school and the pellets struck another student of the school, causing some bruising on the student's legs.

The principal conducted an investigation, during which he asked TC questions without advising him that he did not need to answer the questions without his parents present. TC admitted playing with the gun in the park, but claimed that he borrowed the pellet gun from a fellow student and did not purposely fire the pellet gun at the victim. TC stated that he was shooting at bugs on the ground and accidentally fired a pellet at that student.

The principal, after suspending TC for 20 school days, recommended to the school board that TC be expelled.

To aid the school board in making a decision at the expulsion hearing, KCLC Elementary School referred TC to Dr. L, for a psychological assessment to determine his potential for future violence. Dr. L was of the opinion that TC was at low risk for acts of extreme violence and would be unlikely to be involved in a weapon-related incident, although he is still at risk for general misbehaviour.

Now, what mitigating factors can TC use to defend himself at the expulsion hearing?

Here are some of my answers (which might differ from yours):

1. TC does not have the ability to understand the consequences of his action, given his age and learning disability. The question that the principal should consider is: would a 12-year-old boy with a learning disability be able to foresee that using a pellet gun to shoot bugs on the ground would result in another student being injured?
2. TC's continuing presence in school does not create an unacceptable risk to the safety of any person. Is TC likely going to injure another person with the pellet gun that he borrowed from another student? Probably not! At least that's what Dr. L has suggested.
3. The school principal has not exercised the progressive discipline approach. Prior to this incident, the longest that TC has been suspended was two days. Going from a two-day suspension to a 20-day suspension pending expulsion is extreme, and violates the progressive discipline policy.
4. The incident did not happen on school ground. The accident that took place in the park would not have affected the school climate negatively.
5. Expelling TC would have a negative impact on his education. This is especially true, considering TC's learning disability.

TC and his parents should also be asking these questions:

1. Did the principal investigate thoroughly? Were all witnesses questioned, including the injured student and the student from whom TC borrowed the pellet gun?
2. What about the fact that TC was questioned in the principal's office without his parents present, and that no one told TC that he did not have to answer any of the principal's questions?
3. Was TC accommodated enough before the incident? If TC has received sufficient accommodation, would it have prevented the incident from happening?

Think about these mitigating factors before going into an expulsion hearing. Of course, if you are unsure about the hearing, or if you would like to receive free legal advice, contact our office.

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