CHILD AND FAMILY SERVICES REVIEW BOARD
File number: SS17-0019

BETWEEN:

Appellant

Appellant

and

Toronto District School Board

Respondent

REASONS FOR DECISION ON JURISDICTION

INTRODUCTION

[1] The Appellant filed this expulsion appeal under section 311.7 of the *Education Act*, R.S.O. 1990, c. E.2, as amended (the "*Act*").

[2] The Respondent asserts that it has not made a decision to expel the student (the Appellant's son) and as such, there is no expulsion to appeal.

[3] The issue in this decision is whether the CFSRB has jurisdiction to hear the expulsion appeal.

BACKGROUND

[4] On June 8, 2017, the principal of the student's school advised the student's parents that due to an ongoing police investigation, the student was refused admission to his school as of June 9, 2017. The principal asked the student's parents to contact the school to discuss an alternate program and support for the student.

[5] The student's mother received written notice of the refusal to admit by letter dated June 9, 2017. The notice advised the student's mother that the student was refused admission pursuant to section 265(1)(m) of the *Act*, which reads as follows:

> 265(1) It is the duty of a principal of a school, in addition to the principal's duties as a teacher,
>
> (m) subject to an appeal to the Board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal's judgment be detrimental to the physical or mental well-being of the pupils.

[6] On June 13, 2017, the student's mother was contacted by the intake staff of the Safe and Caring Schools Program. The Safe and Caring Schools Program is a program for suspended and expelled students, and provides support for students who cannot be in the regular school setting.

[7] On or about August 30, 2017, the principal of the Safe and Caring Schools Program contacted the student's mother to discuss the Program. The student's parents did not agree to enrol the student into the Program.

[8] The student's parents appealed the refusal to admit to the Respondent.

[9] On September 21, 2017, the principal of the school advised the student's mother that the refusal to admit was no longer in effect and that a 20-day suspension dated September 21, 2017 had been issued. The reason given for the suspension was "sexual assault". The Respondent did not proceed with the parents' appeal of the refusal to admit because it had been rescinded.

[10] The expulsion appeal to the CFSRB was filed on September 22, 2017.

[11] On September 27, 2017, a pre-hearing was held by the CFSRB. A date for the preliminary hearing on jurisdiction was set for October 3, 2017. Further dates were set for the disclosure of documents and witness statements in the event the CFSRB

determined it had jurisdiction to hear the appeal. A pre-hearing report dated September 28, 2017 was provided to the parties.

[12] The jurisdiction hearing was conducted on October 3, 2017. We have decided the CFSRB has jurisdiction to hear the expulsion appeal.

ANALYSIS

[13] The scheme for student discipline is outlined in Part XIII of the *Act,* which deals with "Behaviour, Discipline and Safety". Section 310(1) of the *Act* requires a principal to issue a mandatory suspension if a student has committed any of the enumerated activities listed in that section, including sexual assault. It reads as follows:

> 310(1) A principal shall suspend a pupil if he or she believes that the pupil has engaged in any of the following activities while at school, at a school-related activity or in other circumstances where engaging in the activity will have an impact on the school climate:
>
> 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.
> 7.1 Bullying, if,
>
> i) the pupil has previously been suspended for engaging in bullying, and
> ii) the pupil's continuing presence in the school creates an unacceptable risk to the safety of another person.
>
> 7.2 Any activity listed in subsection 306 (1) that is motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, gender identity, gender expression, or any other similar factor.
> 8. Any other activity that, under a policy of a Board, is an activity for which a principal must suspend a pupil and, therefore in

> accordance with this Part, conduct an investigation to determine whether to recommend to the Board that the pupil be expelled.

[14] Where a student is suspended under section 310, the principal must conduct an investigation under section 311.1 of the *Act* in order to decide whether to recommend to the School Board that the student be expelled.

[15] If the principal recommends an expulsion, the School Board must hold a hearing under section 311.3 of the *Act*. The School Board cannot expel a student if more than 20 school days have expired since the student was suspended under section 311.3(8) of the *Act*.

[16] Under section 311.7(1) of the *Act*, the CFSRB hears appeals of School Board decisions to expel students. The appeal must be filed within 30 days of the School Board's decision. The CFSRB must hear the appeal within 30 days of receipt and must release its decision within 10 days of the hearing, with written reasons to follow within 30 days (*Regulation 472/07*).

[17] The Respondent argues it excluded the student on June 9, 2017 because of the serious allegations (sexual assault) that had been made against him. It did not conduct an investigation because it was advised not to investigate by the police due to the ongoing police investigation. There is no dispute between the parties that this advice was given by the police. The principal rescinded the exclusion and issued a 20-day suspension on September 21, 2017. The Respondent submits no decision has been made to expel the student and as such, the CFSRB does not have jurisdiction to hear this matter.

[18] The Appellant argues the exclusion of the student on June 9, 2017 was outside of the principal's authority because *Regulation 474/00* (amended by *Regulation 471/07*) does not permit the principal to exclude a student enrolled in the principal's school. *Regulation 474/00* states as follows:

> 1 This Regulation governs access to school premises under section 305 of the Act.
>
> 3(1) A person is not permitted to remain on school premises if his or her presence is detrimental to the safety or well-being of a person on the premises, in the judgment of the principal, a vice-principal or another person authorized by the Board to make such a determination.
>
> (2) A person is not permitted to remain on school premises if a policy of the Board requires the person to report his or her presence on the premises in a specified manner and the person fails to do so.
>
> (3) Subsections (1) and (2) do not apply to a pupil enrolled in the school or to a pupil attending a program for suspended or expelled pupils that is located on the school premises.

[19] The Appellant argues that because the principal did not have the authority to exclude the student, the student was suspended on June 9, 2017 pursuant to section 310 of the *Act*. The Appellant submits the Respondent cannot now expel the student because more than 20 days have passed since the suspension. The Appellant argues further that in effect, the student has been expelled by the Respondent. He asks the CFSRB to rescind the expulsion and return the student to his school.

[20] The Respondent has not made a formal decision to expel the student. The issue is whether the student has been effectively expelled and if so, whether the CFSRB has jurisdiction to hear the appeal of this expulsion. In order to decide this issue, we must examine the actions taken by the Respondent in relation to this student and the statutory provisions under the *Act* regarding the removal of a student from school.

[21] This student was prevented from attending school because a refusal to admit was issued by the principal. Under section 265(1)(m) of the *Act*, a refusal to admit is a power given to a principal to refuse admission to the principal's school only. Assuming without deciding that a principal has the authority to refuse to admit a pupil of his or her own school, the refusal in this case was not limited to the student's school. The student was prohibited from attending any school of the Respondent. Refusing this student

admission to all schools was not a refusal to admit, it was, in effect, an expulsion by the Respondent. A principal does not have the authority to expel a student under the *Act*.

[22] The incident which gave rise to the refusal to admit on June 9, 2017 was an incident for which a mandatory suspension was required under section 310 of the *Act*. The student was refused admission to the school on June 9, 2017 for the same incident that he was suspended for on September 21 – an alleged sexual assault. There was no other incident after June 9, 2017; nor could there have been because the student was not in school. In our view, the student was effectively suspended from school on June 9, 2017 because of allegations of sexual assault. Under section 306(4) of the *Act*, a suspension cannot be longer than 20 days. The student has been out of school for approximately 35 school days. A suspension greater than 20 days is an expulsion. See *Appellant* v. *Toronto District School Board*, 2016 CFSRB 59.

[23] For these reasons, we find the student was not refused admission nor was he suspended under the *Act*. He was effectively expelled from all schools of the Respondent. Only the Respondent had the authority to take this action. This conclusion is further supported by the fact that the Respondent directed the student to its Safe and Caring Schools Program. This is a Program for suspended and expelled students.

[24] We heard evidence from the principal of the Safe and Caring Schools Program that the Program does more than offer a program for suspended and expelled students; it also provides short-term support of 20 days or less for students who cannot be in the regular school setting.

[25] There is no evidence before us that the student was directed to the Safe and Caring Schools Program because he cannot be in the regular school setting and requires short-term support. In fact, the evidence demonstrates that the Safe and Caring Schools Program would not have met the student's academic and social needs. There are two reports which support this finding.

[26] The first report is from Dr. "F", who recently completed a full psychological assessment of the student. In his report dated September 28, 2017, Dr. "F" expresses the opinion that the Safe and Caring Schools Program is not equipped to provide the student with the academic enrichment, stimulation and accommodations required by his learning profile. Dr. "F" stated the student's academic and personal growth would be at risk in this placement. Dr. "F" confirmed the student's identification as gifted.

[27] The second report is from " A . M . ", a social worker with "S." Counselling & Consultation. In his report dated September 26, 2017, "A.M." expresses the concern that the Respondent is directing a gifted, school-engaged student towards a program that does not have high academic success among its students and placement in such a program may expose the student to other potential risks (i.e. delinquency). He believes the student will experience the Safe and Caring Schools Program as an unjust punishment and as a result, the student will experience both an under-stimulating environment along with an ongoing sense that he was pushed unfairly into a program that he does not deserve.

[28] When looking at the totality of the Respondent's actions, the only conclusion that can be drawn is that the student was expelled by the Respondent. He was expelled by the Respondent when it: (a) did not locate another school for him to attend after it refused admission to his school; (b) refused to admit the student to any other school; and (c) directed him to a program for suspended and expelled students.

[29] The student has been absent from school since June 9, 2017. It is now October 6, 2017. The legislative scheme requires School Boards to act expeditiously in their disciplinary processes because it recognizes students are being denied the educational services provided by schools when they are suspended and expelled. The *Act* requires School Boards to hold an expulsion hearing within 20 days of the suspension. School Boards cannot deny students their right to have misconduct allegations addressed quickly by refusing to admit students instead of suspending them for the same alleged misconduct.

[30] We recognize that the Respondent was acting on the advice of the police. The Respondent advised us that it wanted to call the police officer who gave this advice and the reason why. In our view, this evidence is not relevant to the question of whether the student has been effectively expelled by the Respondent and whether the CFSRB has jurisdiction to hear an appeal of this expulsion. We are looking at the effect of the Respondent's actions and not the reason why. To have a second preliminary hearing to address this issue would result in further delay to this student. In our view, this delay is unacceptable.

[31] For these reasons, we find the Respondent has effectively expelled the student and as such, we have jurisdiction to hear an appeal of that expulsion. In light of this decision, it is not necessary to decide whether the Respondent is now out of time to expel the student. The student has already been expelled by the Respondent.

[32] The hearing before the CFSRB is a new (*de novo*) hearing. Both parties will be able to call direct evidence about the incident that gave rise to the student's expulsion. The fact that the Respondent has not held a hearing will not prejudice either party. The CFSRB will determine, based on the evidence before it, whether the student should be expelled.

DECISION

[33] The student has been effectively expelled by the Respondent and as such, we have jurisdiction to hear an appeal of this expulsion. In light of this decision, an expulsion hearing will take place. The parties are directed to follow the directions of the CFSRB in relation to the hearing as set out in the Pre-Hearing Report dated September 28, 2017.

[34] In the event the parties wish to attempt resolution of this matter, the CFSRB will provide a mediator to assist them. If the matter does not resolve, the hearing will proceed on October 20, 2017.

Jennifer Scott
Associate Chair

Andrea Himel
Board Member

D. John Hamilton
Board Member

Dated at Toronto, this 6th day of October, 2017.