

Toronto District School Board

Governance Procedure PR602

Title: **HEARING AN APPEAL UNDER SECTION 265(1)(m) OF THE
*EDUCATION ACT***

Adopted: February 3, 2010, **May 18, 2011**

Revised:

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Authorization: Board

1.0 OBJECTIVE

To establish a process by which the Board will hear appeals of temporary exclusions from a student or from one or more classes in a school, pursuant to section 265(1)(m) of the *Education Act* which states.

s.265(1) it is a 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;

There is no right of appeal from a decision by the principal to refuse admission to the school pursuant to s.305 of the *Education Act* and Regulation 474/00 (Access to School Premises).

Regulation 474/00 does not permit the exclusion from a school of students who are registered to attend the school.

2.0 RESPONSIBILITY

Director of Education

3.0 DEFINITIONS

Adult Pupil means a pupil of the Board who is 18 years old or older or a pupil who is 16 or 17 and has removed him/herself from the care and control of his/her parent and/or guardian.

Pupils who are 18 or older or pupils who are 16 or 17 years old and are living independently may appeal their exclusion and represent themselves during an exclusion.

Appellant means an individual who has been refused admission to a school or classroom in a school pursuant to section 265(1)(m) of the *Education Act* and who has filed an appeal or that individual's parent/guardian or adult representative where the individual who has been refused admission is a pupil of the Board, but not an adult pupil.

Pupils with special needs may be excluded. The application of section 265(1)(m) was confirmed by the Ontario Court of Appeal in *Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board*, 2003, 64 O.R. (3d) 454 (Ont.C.A.). Pupils who are under the age of 18 or have consented may have a parent/guardian or adult such as a family member or close family friend, appeal their exclusion on their behalf. The individual representing the student's interests need not have a formal custody or guardianship arrangement to represent the pupil's interests in an appeal of that pupil's exclusion.

Parties to the exclusion appeal shall be the appellant, who may be represented by a legal or other representative, and the principal (or designate) of the school from which the individual was excluded and may include the superintendent of education of the principal's school, both the principal (or designate) and superintendent may be represented by legal counsel .

The appellant as well as the principal may have legal counsel or an advocate represent his/her interests. The advocate need not be registered as a para-legal with the Law Society of Upper Canada in order to advocate on behalf of the individual or principal. Both the advocate/legal counsel and appellant may make submissions, provided that they are not a duplication.

The *Principal* shall be defined as the principal of the school from which the appellant was excluded or the principal's designate and may include the principal's legal or other representative.

The principal's designate may include the superintendent of education.

4.0 PROCEDURES

4.1 General

4.1.1 The Board of Trustees may exercise any of its powers under the procedure on its own initiative or at the request of a party, and the Board of Trustees may waive application of or vary this procedure at any time. Where an issue arises that is not covered by the procedure, it shall be resolved in a

manner consistent with the procedure, the purpose of the procedure and the *Education Act*.

This general clause provides the trustees with authority to address unexpected issues that might arise during the proceeding. There are various issues that might arise that have not been explicitly addressed by the procedure or for which a single rule cannot apply; this provision provides flexibility to address such matters. For example, the failure of a party to disclose documents as required, a request for an adjournment by a party or by motion of the trustees.

4.1.2 The Board of Trustees may control its own processes

This general clause provides authority for the trustees to control the manner in which the procedural issues regarding the appeal are managed, for example time allotments, disclosure of information etc. It is also a general clause providing authority for the trustees to amend the procedures in a particular case to address exceptional circumstances.

4.1.3 The Board of Trustees will conduct the appeal by means of allowing oral submissions by the parties, in addition, the Board may order or permit such written submissions as it considers appropriate. In the alternative, at the request of the appellant, the Board of Trustees may hold the appeal in writing only.

- (a) Written submissions do not include the Principal's Report or the Appellant's Report, if any.

Although an appeal is to typically be held orally, there might be occasions when written submissions are provided in addition to or instead of some or all of the issues to be heard by way of oral submissions. A decision to permit the parties to provide written submissions would be considered during the pre-appeal meeting and would be based on a consideration of the reasons put forward by the party making the request and the impact that granting the request might have on the proceeding. There might be instances when the

trustees request some information to be provided in writing, such as a timeline or list of names and titles to assist them during the presentation of the oral submissions. The need for such written information could be canvassed during the pre-appeal meeting.

- 4.1.4 A party to the appeal may be represented by legal counsel or an agent. In the event that an appellant retains legal counsel or an agent, the cost of such shall be borne at the appellant's own expense.

There have been requests that the Board, pay the legal bills incurred by the appellant. The decision to obtain legal counsel is the appellant's decision.

5.0 Notice and Scheduling

- 5.1 The appellant may appeal an exclusion pursuant to s. 265(1)(m) by providing notice in writing to the principal of the school and/or the Registrar of the Board.
- 5.2 Where the appellant informs the principal in writing of the appellant's desire to appeal the exclusion, the principal, at his/her earliest opportunity, shall inform the Registrar of the Board for the purpose of scheduling the appeal. The Registrar of the Board shall arrange a date and time for a meeting before the Board of Trustees for the appeal.

There are no timelines pursuant to the Act that dictate when the exclusion must be heard; however, in circumstances where a student has not been admitted to another school or program providing education, efforts should be made to schedule the appeal in a timely manner.

- 5.3 The appeal shall be made orally before the Board of Trustees, except where permission has been granted by the Chair of the Board (or designate) during the pre-appeal conference for an appeal in writing only.
- (a) Any request for an appeal in writing shall be made by the appellant in writing directed to the attention of the Registrar of the Board, who shall seek direction from the Chair of the Board (or designate).
- 5.4 Prior to the meeting before the Board of Trustees for the appeal, a pre-appeal conference meeting shall be scheduled by the Registrar of the Board to take place in person or electronically.

- (a) The participants in the pre-appeal conference shall be the parties to the exclusion appeal, the Chair of the Board (or designate), the superintendent of education for the school (or designate) and the Registrar to the Board (or designate).
- (b) The Chair of the Board (or designate) shall chair the pre-appeal conference meeting. The chair of the pre-appeal conference shall not participate in deciding the appeal without the consent of the parties.

The chair of the pre-appeal meeting can canvass his/her ability to participate in the appeal during the meeting.

- i. review the facts, identify the issues that have given rise to the exclusion and the appeal of the exclusion;
- ii. arrange for the disclosure of information;
- iii. arrange for the disclosure of the Principal's Report;
- iv. arrange for the disclosure of the Appellant's Report, if any;
- v. canvass whether or not there is an opportunity to create an agreed statement of facts, and if so, the dates for its creation, exchange and filing with the Registrar of the Board;
- vi. canvass whether or not a mutually agreeable resolution of the appeal can be effected;
- vii. determine whether any further pre-appeal conferences might be required; and
- viii. canvass and address any other matter that might assist in ensuring a smooth and timely appeal.

The pre-appeal conference provides an opportunity to organize the steps that must take place before the appeal before the trustees, including answering the appellant's questions regarding process and attempting to identify and resolve issues that might detract from the issues on appeal, and attempting to settle the appeal.

- 5.5 If no resolution of the exclusion appeal is effected during the pre-appeal conference meeting, a pre-appeal conference report shall be provided to

the parties by the Registrar of the Board (or designate); a copy of the pre-appeal conference report shall also be provided to the Board of Trustees for the appeal.

- (a) The pre-appeal conference report shall identify the following:
- i. the issues that have given rise to the exclusion and the appeal of the exclusion;
 - ii. whether or not an agreed statement of facts can be generated for the benefit of the Board of Trustees, and if so, the timeline for its creation, exchange and filing with the Registrar of the Board;
 - iii. the date for disclosure of information in addition to an agreed statement of facts or as an alternative to an agreed statement of facts;
 - iv. the disclosure of the Principal's Report and disclosure of the Appellant's Report, if any;
 - v. any other issues identified and resolved during the pre-appeal conference; and
 - ix. the date, time and place for the appeal.

The pre-appeal report will provide a brief synopsis of the matters addressed during the pre-appeal conference and any decisions made regarding such issues. The report is not intended to reflect each party's position regarding the various issues, nor is it intended to provide a complete history or background of events leading up to the exclusion appeal. The report should focus on procedural issues to assist the appeal process to occur smoothly.

6.0 Principal's Report

- 6.1 The principal shall prepare a report for the Board of Trustees. The report will be provided to the appellant and Registrar of the Board in accordance with the date for the disclosure of information identified in the pre-appeal conference report.

- (a) The Principal's Report shall form part of the principal's disclosure and shall provide information regarding the reasons and circumstances of the exclusion.
- (b) The Principal's Report shall reference and include as appendices all documents upon which the principal intends to rely during the appeal.

The Principal's Report is a form of disclosure, so that the trustees and appellant appreciate why the exclusion was imposed. In many circumstances the documentation supporting the reason for the exclusion is voluminous and cannot be effectively reviewed by the trustees during the appeal. The Principal's Report provides a synopsis of the reason for the exclusion and will assist to put the documentation into a context. Each Principal's Report would be tailored to the individual circumstances of the exclusion. Although, each Principal's Report will have common elements, the student's educational history, the programming and services that have been provided to the student, the behaviours giving rise to the exclusion, the attempts made to accommodate the student etc.; the details will vary depending upon the individual circumstances.

7.0 Appellant's Documents

- 7.1 The appellant may prepare a report for the Board of Trustees. If the appellant chooses to prepare a report, the report will be provided to the principal and Registrar of the Board in accordance with the date for the disclosure of information identified in the pre-appeal conference report.
 - (a) The Appellant's Report, if any, shall form part of the appellant's disclosure and shall provide information regarding the reasons and circumstances of the appellant's appeal of the exclusion.
 - (b) The Appellant's Report, if any, shall reference and include as appendices any documents upon which the appellant intends to rely during the appeal.
- 7.2 If the appellant chooses not to prepare a report, but the appellant has documents to present to the Board of Trustees, such documents shall be provided to the principal and Registrar of the Board in accordance with the

date for the disclosure of information identified in the pre-appeal conference report.

The pre-appeal conference process will assist to identify whether or not the appellant will prepare a report as well as what documents, if any, the appellant will want the trustees to have in order to make a decision regarding the appeal. The pre-appeal conference will identify timelines in which the appellant must provide copies of the documents upon which the appellant wishes to rely and will also identify the consequences of failing to provide those documents.

- 7.3 If the appellant does not provide, as identified in the pre-appeal conference report, the Appellant's Report and/or documents upon which the appellant intends to rely during the appeal, a recess or adjournment of the appeal may be granted by the Board of Trustees.

This provision enables the trustees to take a recess or grant an adjournment if the appellant attends the appeal with documents that have never been seen by the principal and which were not properly previously disclosed pursuant to the timeline set out in the pre-appeal conference report.

8.0 Appeal Process

- 8.1 The appeal shall take place in-camera on the date and at the time scheduled by the Registrar of the Board.

Due to the nature of the issues to be reviewed, intimate personal student matters, this matter must be held in-camera pursuant to s.207(2)(b) of the *Education Act*. Although the appellant may request that this matter be held in public, the Board of Trustees cannot violate the individual's right to personal privacy despite the appellant's request or consent.

- 8.2 The Chair of the Board (or designate) shall chair the appeal. The chair of the pre-appeal conference meeting shall not participate in deciding the appeal without the consent of the parties.
- 8.3 In an appeal of a principal's decision to exclude an individual pursuant to section 265(1)(m), the appellant shall bear the onus of proof.

The appellant must show that the decision by the principal to impose the exclusion was not reasonable and therefore, should not be upheld.

- 8.4 The Board of Trustees shall wait for the attendance of the parties for 15 minutes from the time scheduled for the appeal before beginning the appeal. The Board of Trustees may proceed with the appeal in the absence of either party.

If the appellant fails to attend the appeal there is little utility in proceeding.

- 8.5 The appeal shall be made orally before the Board of Trustees, except where permission has been granted by the Chair of the Board (or designate) during the pre-appeal conference for an appeal in writing only.

- 8.6 The report prepared by the principal and the report prepared by the appellant, if any, or documents provided by the appellant on which they wish to rely shall be provided to the Board of Trustees at the commencement of the appeal. The Board of Trustees shall have the right and opportunity to review such documents prior to the commencement of oral submissions. In appropriate circumstances, as determined by the Board of Trustees, or on consent of both parties, the Board of Trustees shall have the right to call a recess or to adjourn the appeal to another date determined by the Registrar of the Board.

In some cases, the Principal's Report and the Appellant's Report or the documents provided by the appellant instead of a report to support the appeal might be too voluminous to review during or prior to the appeal. In such cases, the chair should request a motion or a trustee may move a motion seeking to adjourn the appeal to provide further time for the trustees to review the materials. If the adjournment is to another date (rather than a recess to a later time during the same date), the chair may request that the Registrar canvass the availability of the parties. Before adjourning to another date, consideration should be given to whether or not the appellant will be prejudiced by such an adjournment.

- 8.7 A member of the Board who has a direct conflict or who has received information or had any personal involvement in the matter prior to commencement of the appeal shall disqualify him/herself and shall not take part in the appeal, the deliberations or decision of the Board of Trustees.

- 8.8 Where there is no quorum, the appeal shall be rescheduled.
- 8.9 Any member of the Board of Trustees who arrives after the appeal meeting has commenced shall not take part in the appeal or decision of the appeal
- 8.10 The principal shall have approximately **10 minutes** to address the Board of Trustees orally and to provide an outline of the reasons and circumstances for the exclusion.
- 8.11 The appellant shall have approximately **20 minutes** to address the Board of Trustees orally and to provide reasons why the exclusion should be lifted.
- 8.12 The principal shall have approximately **15 minutes** to orally provide reasons why the exclusion should continue, and may respond to any issues raised by the appellant.
- 8.13 The appellant shall have a further approximately **5 minutes** to orally respond to any new issues raised by the principal that were not previously addressed by the appellant.
- 8.14 The Board of Trustees may ask questions of clarification of the appellant or the principal at any time during their respective presentations, or at the end of the presentations. The times allotted to the appellant and principal shall be calculated excluding the time spent responding to questions from the Board of Trustees. The Board of Trustees may allow for additional time for the presentations of either the appellant or principal or both, including when the appellant is assisted by a translator, to ensure that the information received by the Board of Trustees is complete and understood.

The trustees may ask questions to clarify issues that have been raised by either party. The trustees should not ask questions that are beyond the scope of the issues raised by the parties. Expressions of opinion should be reserved for in-camera deliberations when the parties are not present.

9.0 Orders and Decisions in Writing

- 9.1 The Chair of the Board meeting may make such order or give such directions as he or she considers necessary for the maintenance of order during the appeal. If any person disobeys or fails to comply with any order or direction given during the appeal, the chair may call for the assistance of any peace officer to enforce the order or direction.

- 9.2 The Board of Trustees shall confer and shall provide the appellant and principal with an oral decision at the earliest opportunity, which shall be followed by a decision in writing within 15 school days, or such other time as the Board or Trustees deems appropriate in the circumstances.
- (a) The Board of Trustees shall make a decision to either uphold the exclusion or quash the exclusion.
 - (b) If the pupil is the subject of the exclusion, the Board of Trustees may also recommend that the parties canvass alternative placement opportunities for the pupil.
- 9.3 The decision of the Board of Trustees shall be final.

10. REFERENCE DOCUMENTS

Education Act, section 265(1)(m)