Submissions to the Standing Committee on Social Policy regarding Bill 13, An Act to amend the Education Act with respect to bullying and other matters

May 14, 2012

Noa Mendelsohn Aviv
Director, Equality Program
Canadian Civil Liberties Association

506-360 Bloor Street West
Toronto, ON M5S 1X1
Phone: 416-363-0321
Email: mail@ccla.org
www.ccla.org
The Canadian Civil Liberties Association

The Canadian Civil Liberties Association (CCLA) is a national organization with thousands of supporters from across the country, including many in Ontario, from all walks of life. Founded in 1964, the organization works to promote and protect the rights and freedoms of all people in Canada. CCLA has expertise, special knowledge and perspective on civil liberties in general, and the specific rights and freedoms that arise in regard to Bills 13 and 14 – including freedom of association, freedom of expression, life, security of the person, equality, and freedom of religion – and the interplay between these rights.

Introduction

The Canadian Civil Liberties Association applauds the spirit and intention of Bill 13 to protect vulnerable students from the kind of bullying and harassment that can transform an important educational and developmental experience into a terrifying and traumatic experience, and to offer students some of the resources and protections they need when they are the subject of bullying.

The aggressive and hurtful behaviour that this bill seeks to prevent surely presents a fundamental roadblock to the mission of schools to educate their pupils and encourage their development as healthy and responsible democratic citizens. It is a matter of sound policy that schools, educators and students have the resources and tools at their disposal to address these challenges.\(^1\)

At the same time, CCLA notes that efforts to curtail unwanted student behaviour may impact students’ fundamental rights. The good intentions of legislators should be carefully

\(^{1}\) See also American Civil Liberties Union, Preventing Harassment and Protecting Free Speech in School (15 June 2003) online: American Civil Liberties Union <www.aclu.org>
crafted in order not to create overly restrictive provisions and unjustifiable restrictions of these rights. Moreover, these bills address two relatively recent developments: a concerted effort by legislators to define, respond to, and prohibit “bullying”; and attempts to define, respond to, and control off-campus electronic communications (and other behaviours). As such, **CCLA stresses the need to tread carefully, be mindful of countervailing considerations and fundamental rights, and not overreach in an attempt to legislate in these developing areas.**

**Fundamental Rights of Students**

CCLA recognizes the special circumstances of schools, and the need they may have to limit student rights in certain circumstances where, for example student actions may materially and substantially interfere with learning.

At the same time, it is critical that any proposed legislation be drafted in a manner that respects and protects the *Charter rights of students*. Students, along with every other individual in Canada, are guaranteed certain basic rights and freedoms, including: freedom of expression; freedom of association; freedom of thought, belief, and opinion; life and security of the person; and the fundamental right to equality. These rights and freedoms are essential for a healthy and functioning democratic society and are likewise essential in the education of healthy and functioning democratic citizens, as stated by the Supreme Court of Canada:

"Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined if the student's rights are ignored by those in authority."\(^3\)

---

\(^2\) The inclusion of the term “bullying” in s. 306, and the expansion of the school’s reach to activities “in other circumstances… [that will] have an impact on the school climate” were passed in 2007, and have been in force since 2008.

\(^3\) *R v M (MR)* [1998] 3 SCR 393, 166 DLR (4th) 261 at para 3 [*R v M (MR)*].
May 14, 2012 | CCLA Submissions to the Standing Committee on Citizenship and Immigration


It is a sad but well-known fact that some lesbian, gay, bisexual, and transgender youth are the target of horrendous bullying. Another tragic and well-established fact is the disproportionately high rate of LGBTQ teens who attempt suicide (approximately 4 to 7 times that of heterosexual teens). All of this has persuaded educators of all varieties that LGBTQ student need safe spaces, support, and acceptance. This likely underlies the reasoning of the Ontario Ministry of Education when it made special mention of gay-straight alliances (GSAs) in its policies, and required schools to support such groups. And it is surely the reason that this Legislative Assembly has taken the trouble to explicitly mandate that Boards support pupils who want to “establish and lead:”

“activities or organizations that promote the awareness and understanding of, and respect for, people of all sexual orientations and gender identities, including organizations with the name gay-straight alliance or another name”

CCLA supports the introduction of this provision, however is concerned about its wording. Because this clause includes the phrase “or another name,” certain school board trustees have stated that they do not intend to allow students to choose the name of their clubs. This response is unfortunately consistent with the current reported status in some of Ontario’s Catholic schools, and the recommendations made in the Respecting Differences Guidelines produced by Ontario Catholic School Trustees’ Association (OCSTA).

---

4 Bill 13, An act to amend the Education Act with respect to bullying and other matters, 1st Sess, 40th Leg, Ontario, 2011, cl 9 [Accepting Schools Act].
5 Andrea Houston, “Ontario minister of education vows GSAs will be mandated in all schools,” Xtra! (1 December 2011) online: Xtra! <http://www.xtra.ca>.
The decision as to how a student club is named should, barring any justified restriction, be determined by the members of that club. This is a matter of autonomy and student empowerment – which is after all the purpose of many student extra-curricular activities, and is certainly relevant for a group that has been otherwise marginalized, bullied, and disempowered. As the Supreme Court of Canada has pointed out, “… courts must give adolescents room to exercise their autonomy to the extent that their maturity allows…”7 It is also a matter of practicality to let students in a club choose the club name. They are best placed to do the outreach to other students, the most likely to be aware of linguistic trends around the use of different terms, and the most likely to be sensitive to the needs and nuances of their club which may be reflected in their club name. Thus, for example, one group of students advocating for a gay-positive club in their school would have chosen the name “Rainbow Club” over “Gay-Straight Alliance,” seeing the former as representative of diversity and more overtly inclusive of gay, lesbian, bisexual, transsexual and other students.

Furthermore, if the club is not allowed to use a name that reflects what it is about, its purpose could be subverted: how could it announce its events and be understood? How could it take effective action – like anti-homophobia education – in the school community? Any new student – possibly bullied, possibly in crisis – would need to know that such a group exists and that here, they can find the support they need.

To deny students the right to name their clubs as they choose, and to choose a name that deliberately avoids the very essence of the club by avoiding terms like “gay” or “rainbow” sends a message that in itself is intolerant, discriminatory, and unacceptable.

Finally, there is one simple yet highly significant point: the students in the club have the right to choose the name of their club, based on their fundamental and constitutionally

---

7 AC v Manitoba (Director of Child and Family Services), 2009 SCC 30, 2 SCR 181 at para 58 [AC v Manitoba].
protected freedoms. This is not a matter of choice for the schools, boards, or even for this Legislative Assembly. Our Constitution is the supreme law of Canada, and it contains provisions, subject to reasonable limits, that provide fundamental rights of all people in this country – including students. This principle has been affirmed by the Supreme Court of Canada in a variety of contexts. The rights to freedom of association, freedom of expression, and equality, as well as the right to life and security of the person, may all be engaged when students are prohibited from expressing the name of their group as they choose, and when discriminatory policies marginalize and silence LGBTQ students, potentially adding to their sense of rejection, isolation, powerlessness, and alienation. Such a response by the school may create in students the same feelings of fear, distress and psychological harm that Bill 13 wishes to address.

If a school wants to prevent the formation of Gay-Straight Alliances, it is the school authorities who would have to demonstrate a reason for this ban. But while freedom of religion may well protect the rights of students in a Catholic school in certain contexts, it would not justify the effective unreasonable and discriminatory ban on the name of an extra-curricular student club.

It is ultimately the responsibility of this Assembly to protect the safety and freedoms of young people in schools. Moreover, if certain school boards are violating student rights, and singling out LGBTQ students for discriminatory treatment, it is this Assembly’s responsibility to rectify the situation, and protect the youth from further harm to their dignity and potentially their safety. For these reasons, CCLA recommends that the words “or another name” be removed from clause 9 – sub-section 303.1(d) of Bill 13.

---

8 See for example R v AM, 2008 SCC 19, 1 SCR 569 at paras 3 and 35 [R v AM]; see also R v M (MR), supra note 3.
Transphobia and Gender Identity

There are several references to homophobia and sexual orientation throughout Bill 13, but only one mention of gender identity, and no mention of transphobia. (Bill 14 mentions none of the above, despite the well-known statistics on bullying of LGBTQ students, and despite being an “anti-bullying” bill). And yet, trans students are at a greater risk of verbal, physical and sexual harassment even than other sexual minority students. **Bill 13 should be amended to include “transphobia” and “gender identity,” respectively, where “homophobia” and “sexual orientation” are listed.**

Definition of Bullying

Bill 13 sets out certain disciplinary measures that may – and in some cases must – be imposed on a student if that student has bullied. In order to meet the definition of bullying, under clause 1 of Bill 13, a student’s behaviour must be “repeated and aggressive,” and it must “cause… harm, fear or distress to another individual” in a context “where there is a real or perceived power imbalance between the pupil and the individual.”

When, as here, the definition of bullying determines the types of behaviour and speech that could lead to discipline, it should be defined with internal constraints, and with a view to the fundamental rights of all students. The definition of bullying in Bill 13 contains many such constraints, including the need for “repeated” and “aggressive” behaviour, and the important element of a power imbalance between bully and victim. Nonetheless in our respectful view, this definition, and in particular the terms “fear” and “distress” could lead to the disciplining of students wishing to engage in discussion on matters of importance to them.

---

9 Bill 13, *Accepting Schools Act, supra* note 4, cl 1.
Imagine, for example, a class discussing current affairs and the issue of same-sex marriage in the US. If a student has a sincere religious belief that homosexuality is wrong and repeatedly and forcefully maintains that position in the context of classroom debates, her statements might be construed by a teacher as bullying in accordance with clause 1 of the bill. Conversely, a student who supports equality rights for LGBTQ peoples, may be accused of bullying for repeatedly raising with classmates allegations against certain religious organizations – such as the allegation that some religious institutions are exporting homophobic movements to Africa and South America. Likewise a debate club may find itself in hot water for debating certain contentious issues; a social studies class may be enjoined from discussing Israel, Palestinians or the Middle East; not to mention what might happen in a politics or world religions class. Even in the schoolyard, a student could face discipline for forcefully and repeatedly criticizing her own religion. All that is required is that another student who, in that context is in a “minority” position, experience “distress” or “fear.”

Given the possibility that legitimate expressions of thought or belief could be censured, CCLA submits that the definition of bullying should be revisited – at least with respect to discipline. Such a definition should be sensitive to minority voices and unpopular views. Such a definition should also protect students’ basic rights, and should make explicit mention of the rights of students to freedom of expression, association and equality.

At the same time, it is well established that certain students – including LGBTQ students – experience a disproportionate and sometimes debilitating level of hostility in

---

10 Bill 13, Accepting Schools Act, supra note 4, cl 1.
By narrowing the definition of bullying or harassment that is subject to discipline, one should not infer that teachers cannot respond to other behaviours that fall short of this threshold. There are a great deal of educational and behavioural approaches that an educator can and should employ in order to address negative behaviours when they first notice that it is or might be leading to a negative impact on others. Indeed, CCLA supports the many references in the bill to the establishment of policies, guidelines and training that allow and enable teachers to intervene early and effectively when they notice inappropriate student behaviour, before it escalates to the level of a punishable offence.\textsuperscript{12} It should be incumbent on school boards, administrators, social workers, teachers and staff to consider using various educational methods, whether or not the speech in question is subject to discipline. Thus, for example, educators should be alert to, and obliged to consider intervening (including teaching) in situations that do not approach the punishable threshold, such as those that may be non-aggressive and not targeted, but are insensitive, and create an uncomfortable environment.\textsuperscript{13} Use of the word “gay” as a pejorative term is one such example.

CCLA submits that in defining bullying for the purposes of a punishable offence under the bill, it is also important to explicitly note that the offence should only refer to behaviour affecting a pupil, as is the case in Bill 14.\textsuperscript{14} While there are occasional situations in which students harass teachers (and discipline for harassment may be appropriate), there is a risk of misuse or even abuse if student-to-teacher interactions could be defined as “bullying”.

\textsuperscript{12} See Bill 13, Accepting Schools Act, supra note 4, cls 3, 4, 7 and 8.
\textsuperscript{13} It is also interesting to consider the standard proposed by the American Civil Liberties Union, Preventing Harassment and Protecting Free Speech in School, supra note 1, which defines harassment as “conduct that substantially interferes with the education or physical or mental health of a student, or that threatens or intimidates a student.”
\textsuperscript{14} Bill 14, An act to designate Bullying Awareness and Prevention in Schools and to provide for bullying prevention curricula, policies and administrative accountability in schools, 1\textsuperscript{st} Sess, 40\textsuperscript{th} Leg, Ontario, 2011, cl 2.
Penalties and Disciplinary Measures Proposed by Bill 13

While CCLA supports the intention of Bill 13 to make schools safer, CCLA is concerned with the mandatory punishments introduced by the bill. This is particularly concerning where students’ freedoms may be violated, the subject matter is sensitive, the definition of bullying is overly broad, and the statutory response to bullying is relatively new. As stated above, all of these factors would lend themselves to a careful approach. **Where possible, schools should be encouraged to consider preventive, educational and rehabilitative strategies, and should not require mandatory suspensions.**

Mandatory Suspensions

Two sections in the *Education Act* deal with suspensions – s 306 and s 310.\(^{15}\) Whereas currently, under s 306 of the *Education Act*, a principal “shall consider” suspending a student who has been bullying, clause 10 of Bill 13 specifies circumstances where bullying will lead to automatic mandatory suspension, under s 310 of the Act.\(^{16}\)

First, a student would be automatically suspended 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.”\(^{17}\) Second, clause 10 changes any activity listed under s 306(1) of the Act – including bullying – into a mandatory suspension offence, if it is “motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor.”\(^{18}\)

\(^{15}\) *Education Act*, RSO 1990, c E-2 ss 306, 310 [*Education Act*].

\(^{16}\) Ibid.

\(^{17}\) [Bill 13, Accepting Schools Act, supra note 4 cl 10.]

\(^{18}\) Ibid.
The current requirement in s 306 – that principals consider “mitigating or other factors” that are involved in the bullying – is lost when an activity is changed in this way.\textsuperscript{19}

Thus, for example, if as mentioned earlier a student is repeatedly and aggressively criticizing her own religion (and may be doing so for personal or objectively truthful reasons) in a way that causes “harm,” “distress,” or “fear” to another student who is in a “minority” position, this may be viewed as expression “motivated by bias, prejudice or hate” based on religion, and would result in a mandatory suspension\textsuperscript{20} and all the harsher consequences mentioned below.

Harsher Consequences: Possibility of Expulsion and a More Limited Right of Appeal

Mandatory suspensions under s 310 involve harsher consequences than suspensions under s 306. For example, a s 310 suspension prompts the principal under s 311.1(1) to conduct an investigation to “determine whether to recommend to the board that the pupil be expelled.”\textsuperscript{21}

Also, there is a difference in terms of the student’s right to appeal a suspension. There is an immediate right to appeal a principal’s decision to suspend under s 306.\textsuperscript{22} There is no immediate right to appeal a principal’s decision to suspend under s 310 while he or she is considering expulsion.\textsuperscript{23} A student suspended under s 310 can only appeal the suspension if the principal does not recommend expulsion and does not also withdraw the suspension.\textsuperscript{24}

\textbf{CCLA is concerned that the proposed mandatory suspensions do not preserve the principal’s discretion to respond to a situation based on the circumstances.} Harsher penalties may have a disparate impact on minority groups, as discussed below. There may be

\begin{itemize}
\item \textsuperscript{19} \textit{Education Act, supra} note 15 s 306(2).
\item \textsuperscript{20} Bill 13, \textit{Accepting Schools Act, supra} note 4 cl 10.
\item \textsuperscript{21} \textit{Education Act, supra} note 15 s 311.1(1).
\item \textsuperscript{22} \textit{Education Act, supra} note 15 s 309(1).
\item \textsuperscript{23} \textit{Education Act, supra} note 15 s 311(3).
\item \textsuperscript{24} \textit{Education Act, supra} note 15 s 311.2.
\end{itemize}
May 14, 2012 | CCLA Submissions to the Standing Committee on Citizenship and Immigration

many situations of real-life bullying that require prevention and rehabilitation through education, not mandatory suspension.

**The Disparate Impact on Minority Groups**

The proposed disciplinary measures are especially worrisome considering the potential impact on certain minority groups, especially racialized students and students with emotional or developmental disabilities. This is especially problematic in the context of mandatory suspension, and the CCLA is concerned these measures will have a disproportionate impact on these groups.

This concern is in part based on the Toronto District School Board’s (TDSB) experience with zero-tolerance school safety policies. The Ontario Human Rights Commission made submissions to the TDSB’s Safe and Compassionate Schools Task Force, which cite a Harvard University report that found that racialized students and students with emotional and developmental disabilities were disproportionately impacted by zero-tolerance disciplinary policies in the US education system.\(^25\) This report also suggested that students from these groups were suspended “for more ‘subjective’ offences, such as being disrespectful or questioning authority, where there is greater leeway for racial stereotyping and bias to enter into the decision-making process.”\(^26\) There is a similar risk in clauses 1 and 10 of Bill 13 in terms of assessing whether an act constitutes bullying, and whether it was motivated by hate, prejudice, or bias.\(^27\) Regarding students with disabilities, students seem to be disciplined for “behaviour that


\(^{26}\) *OHRC Submissions to TDSB*, supra note 25 at p 6.

\(^{27}\) Bill 13, *Accepting Schools Act*, supra note 4 at cl 10.
may be beyond their control” without due consideration of the duty to accommodate. The Commission’s submissions identified the impact of increased suspensions and expulsions of students in the form of “negative psychological impact, loss of education, higher dropout rates and increased criminalization and anti-social behaviour.”

As a result, we must tread carefully in creating new disciplinary and in particular mandatory discipline measures. In light of these potential risks, CCLA submits that in introducing disciplinary measures for bullying, Bill 13 should provide for a requirement that schools periodically monitor how students from minority groups are impacted and whether there is a disproportionate impact on certain groups.

---

28 OHRC Submissions to TDSB, supra note 25 p 9.
29 OHRC Submissions to TDSB, supra note 25 p 7.
Summary of CCLA’s Recommendations to the Standing Committee on Social Policy

Re: Bill 13, Accepting Schools Act

1. The Canadian Civil Liberties Association applauds the spirit and intention of Bill 13 to protect vulnerable students from the kind of bullying and harassment that can transform an important educational and developmental experience into a terrifying and traumatic experience. It supports the Bill’s intention to offer students the resources, tools and protections they need when they are the subject of bullying.

2. CCLA stresses the need to tread carefully, be mindful of countervailing considerations and fundamental rights, and not overreach in an attempt to legislate in developing areas such as defining, responding to, and prohibiting “bullying” and defining, responding to, and controlling off-campus (electronic and other) communications and behaviours.

3. While CCLA recognizes the special circumstances of schools, we would also emphasize that it is critical that any proposed legislation be drafted in a manner that respects and protects the Charter rights of students, including: freedom of expression, freedom of association, the right to equality, and the right to life and security of the person.

4. CCLA strongly endorses the introduction of a requirement that school boards support pupils who want to “establish and lead… activities or organizations that promote the awareness and understanding of, and respect for, people of all sexual orientations and gender identities…,” however is concerned with the wording of this provision.

5. CCLA recommends that the words “or another name” be removed from clause 9 – subsection 303.1(d) of Bill 13 for the following reasons:
   a. As a matter of autonomy and student empowerment, the decision as to how a student club is named should, barring any justified restriction, be determined by the members of that club.
   b. Subject to reasonable limits, the students in the club have the right to choose the name of their club, based on their fundamental and constitutionally protected freedoms.

6. A tragic and well-established fact is the disproportionately high rate of bullying of LGBTQ teens, and of LGBTQ teens who attempt suicide (approximately 4 to 7 times that of heterosexual teens). In light of this, if certain school boards are violating student rights, and singling out LGBTQ students for discriminatory treatment, it is this Legislative Assembly’s responsibility to rectify the situation, and protect the youth from further harm to their dignity and potentially their safety.
7. Trans students are at a greater risk of verbal, physical and sexual harassment even than other sexual minority students. Bill 13 should be amended to include “transphobia” and “gender identity,” respectively, where “homophobia” and “sexual orientation” are listed.

8. Given the possibility that legitimate expressions of thought or belief could be censured under Bill 13, CCLA submits that the definition of bullying should be revisited – at least with respect to discipline – with the following considerations in mind:
   a. Because the definition of bullying determines the types of behaviour and speech that could lead to discipline and could potentially include Charter-protected expression, it should be defined with internal constraints, and with a view to the fundamental rights of all students.
   b. Such a definition should be sensitive to minority voices and unpopular views.
   c. Such a definition should also protect students’ basic rights, and should make explicit mention of the rights of students to freedom of expression, association and equality.
   d. CCLA’s recommendation to restrict the definition of bullying or harassment that would be subject to discipline does not preclude teachers from responding to behaviours that fall short of a punishable threshold.

9. It should be incumbent on school boards, administrators, social workers, teachers and staff to consider using various educational methods to address bullying, whether or not the speech in question is subject to discipline. Thus, for example, educators should be alert to and obliged to consider intervening (including teaching) early and effectively in situations that do not approach the punishable threshold before it escalates to the level of “bullying”, such as with respect to behaviours that may be non-aggressive and not targeted, but are insensitive, and create an uncomfortable environment.

10. CCLA submits that in defining bullying, the offence should only refer to behaviour affecting a pupil, as is the case in Bill 14. Student-to-teacher harassment is a separate issue.

11. CCLA submits that Bill 13’s impact on students’ freedoms, and the relatively recent nature of the statutory response lends itself to a careful approach. As such, schools should be encouraged to consider preventive and rehabilitative strategies, and should not require mandatory suspensions.

12. CCLA is concerned that the proposed mandatory suspensions and the harsher consequences that flow from them, do not preserve the principal’s discretion to respond to a situation based on the most appropriate disciplinary or educational approach for the circumstances.

13. Harsh and mandatory penalties may have a disparate impact on minority groups.
14. Given the risk that mandatory discipline will disproportionately impact students from minority groups, CCLA submits that in introducing disciplinary measures for bullying, Bill 13 should provide for a requirement that schools periodically monitor how students from minority groups are impacted and whether there is a disproportionate impact on certain groups.