

## Legal Matters Relating to School Guidance and Discipline Work

## Legal Liabilities of IMC/SMC - An Administrative Perspective and the Implications for Teachers when handling students' discipline

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## Outline of this presentation

### A. Legal Basics for HK educators

1. The Law around us
2. Our school system and the key players
3. Separate legal entity
4. *In Loco Parentis* – what does it mean?

### B. Freedom and Rights

### C. Professional liability and the Law of Torts

### D. Selected Issues

1. Corporal Punishment
2. Search and Seizure
3. Negligence
4. Supervision and Discipline
5. Property and Privacy
6. Special Educational Needs
7. Complaints and remedies

## A. Legal Basics for HK Educators 1. The law around us

- Sources of Law (see HK Basic Law, Art.8 & Art.73)
  - ... the Common Law, rules of equity, ordinances, subordinate legislature and customary law shall be maintained.
  - ... legislature to enact, amend or repeal laws ....
- The Government
  - Executive, legislature and judiciary
- English Common Law (普通法) & Equity (衡平法)
  - Key features ....
  - *Ratio Decidendi* (判決理由) and *Obiter Dictum* (附帶意見)
  - The Doctrine of Precedent (遵循先例原則)
- The Courts and Legal Personnel
- Hong Kong Statutes (成文法規) – **Ordinances** (條例)
- *Criminal Law* (刑事法) versus *Civil Law* (民事法)  
(see next slide)

## Differences between Criminal Law and Civil Law

	<b>Criminal</b>	<b>Civil</b>
Nature	Deal with crime (wrong-doings against the society) and the legal punishment of criminal offences	Deal with disputes between individuals or organisations, in which compensation is awarded to the claimant
Burden of proof	Lies on the government	Initially lies on the claimant
Standard of proof	Beyond reasonably doubt Nearly 100%	Preponderance of evidence Balance of probabilities over 50%
Purpose	<ul style="list-style-type: none"> <li>• Maintain good public order in the society</li> <li>• Punishment by Imprisonment and/or fines</li> </ul>	<ul style="list-style-type: none"> <li>• Compensation/Redress</li> <li>• Punitive damages</li> <li>• Injunction</li> </ul>
examples:	Theft, assault, robbery, trafficking in controlled substances, sexual abuse, murder, etc	Negligence, malpractice, property disputes, divorce, child custody proceedings, defamation, personal/psychiatric injury, etc.

## A. Legal Basics for Educators

### 1. The laws around us <sup>(cont'd)</sup>

#### Related Ordinances include:-

- Employment Ordinance Cap.57
- **Education Ordinance Cap.279**
- **Education Regulations Cap.279A**
- Sex Discrimination Ordinance Cap.480
- Personal Data (Privacy) Ordinance Cap.486
- Juvenile Offenders Ordinance Cap.226
- Intellectual Property Cap.528
- Buildings Ordinance Cap.123
- ..... other relevant Ordinances *and some important documents* (including *Code of Aid, Administration Guide*, ... although they are not ordinances)

## A. Legal Basics for Educators

### 1. The laws around us <sup>(cont'd)</sup>

Other very important sources:-

- Code of Aid
- Compendium to Code of Aid
- Supplement to Code of Aid
- Administration Guide
- Code for the Education Profession of Hong Kong

**What are their status in the eyes of the law?**

## A. Legal Basics for Educators

### 2. School system and the Key Players

- Types of school (*funding mode, levels, ... etc.*)
- Governing bodies
- School Premises (*see Cap.279 & 279A*)
- Education Bureau + Regional Education Office
- School Sponsoring Body (SSB)
- **School Management Committee (SMC)** and **Incorporated Management Committee (IMC)**
- PRINCIPALS, teachers, parents and STUDENTS
- Other players - SSW, EP, PSLO, ....

## A. Legal Basics for Educators

### 2. School system and the Key Players <sup>(cont')</sup>

Education Ordinance (Cap 279)

Section 32 Management committee to manage school  
Section 40AD Incorporated management committee to manage school

Section 58 Functions of principal  
*"Principals are responsible for discipline ... have authority over ... pupils"*

Section 74 Power of Permanent Secretary to order attendance at primary or secondary school

## A. Legal Basics for Educators

### 3. *Separate legal entity*

- the IMC shall be responsible for any legal liability relating to management of the school.
- managers shall not incur any legal liability in respect of anything done in the performance of their function as a manager if they have acted in good faith.
- insurance policy to indemnify the liability of IMCs and their managers from any claims against their wrongful acts in performing their duties in school management.
- management liability, vicarious liability and employment practices liability."

## A. Legal Basics for Educators

### 4. *In Loco Parentis* (替代家長)

- Latin meaning "in the place of a parent"
- " ... *the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster.*"  
 see Williams v Eady (1893) for details
- Often refer to the legal responsibility of a person or organization to take on some of the functions and responsibilities of a parent
- It also allows schools to act in the **best interests** of the students as they see fit ...

## B. Freedom and Rights

### 1. International Covenant on Civil and Political Rights (ICCPR) (公民權利和政治權利國際公約)

- Freedom of Speech
- Freedom of Expression
- Protection against discrimination
- ... and others

### 2. UN Convention on the rights of a Child (UNCRC)

- Art.3 ... best interests of the child ...
- Art.28 ... school discipline ... consistent with ... human dignity

### 3. The Basic Law of HKSAR

- Art.27 ... freedom of speech, ... free of association, of assembly ...
- Art.28 ... arbitrary or unlawfully arrest, detention ... or unlawful search ...

## C. Professional Liability and The LAW of TORTS

- What is a Tort (侵權法)?
  - ✓ Intentional Torts (assault, battery, false imprisonment, ....)
  - ✓ **Negligence Liability (疏忽責任)**
  - ✓ Defamation
  - ✓ ....
- Protection Against Lawsuits
- You and the IMC
- Other related Torts
  - ✓ Occupiers' liability
  - ✓ Vicarious liability
- Insurance
  - Mandatory (*can you name a few?*)
  - Top-ups (*these are IMC's discretion*)

## D. Selected Issues

1. Corporal Punishment
2. Search and seizure
3. Negligence
4. Supervision and Discipline
5. Property and Privacy
6. Special Educational Needs
7. Complaints and remedies

## 1. Corporal Punishment

- In school context, corporal punishment may be defined as the use of such physical contact as striking, paddling, or spanking of a student by an educator.
  - Ingraham v Wright (1977)*
- The court said "... *cruel and unusual punishment ... in violation of human rights*"
- Corporal punishment is **strictly prohibited** in Regulation 58 of the Education Regulations (教育條例) 1971 (amended 1991):
  - "No teacher shall administer corporal punishment to a pupil."
- A myth: School Principal or his/her delegate, usually discipline master may administer. *Right or Wrong!*
- The law clearly states that no degree or kind of corporal punishment is acceptable or lawful.

## 2. Search and Seizure

- *General principles*  
(see *School Administration Guide* for details)
  - ✓ *Delegated authority*
  - ✓ *Reasonable, appropriate and lawful*
  - ✓ *Consent*
  - ✓ *Child's dignity and privacy*
  - ✓ *Police School Liaison Officer*
  - ✓ *Legal advisor*
- *Search of a student's belongings*
  - ✓ *Privacy issue, NOT recommendable unless it is inevitable and judged to be lawful*
- *Search of a student's body*
  - ✓ *Highly NOT recommendable*

## 2. Search and Seizure (cont)

1. Balance between the student's right to privacy and the need to maintain school safety.
2. Reasonable Suspicion
  - *In loco parentis* – in the place of a parent
  - *New Jersey v T.L.O. (1985)*
3. Probable Cause and Student Consent
4. Individual versus Random Searches
5. Preventive Search

*Ehlenberger (2002) "Understanding the Law" Pages 31-35, Educational Leadership, Volume 59 Number 4*

## 3. Negligence

- It is classified under the **Law of Torts** and it is generally accepted as the most wide-ranging among the numerous torts.
- *Claimant (C) v Defendant (D)*
- Civil proceedings (民事訴訟)
- The main purpose is for **compensation**
- In order to be successful in a negligence claim, the claimant (C) must prove:
  1. D owed C a duty of care;
  2. D was in breach of that duty;
  3. the breach of that duty caused damage and;
  4. the damage was not too remote (foreseeable).

### 3. Negligence (con't)

#### What duties does a school owe its students?

"School authorities...must strike some balance between the meticulous supervision of children every moment of the time when they are under their care, and the very desirable object of encouraging the sturdy independence of children as they grow up"

**Jeffrey v London County Council (1954)**

### 3. Negligence (con't)

- **Standard of Care**
- **Causation**
- **Contributory Negligence (分擔疏忽)**
- **Egg-shell Skull Rule (蛋殼頭蓋規則)**
- **Related issues:**
  - ◆ **School safety**
  - ◆ **Personal injury and property damage**
  - ◆ **Inflicted emotional distress**
  - ◆ **An incident happened – what next?**
  - ◆ **Precaution**
  - ◆ **Insurance**

### 4. Supervision & Discipline

- School policies regarding supervision
- School Rules – how legitimate?
- School uniforms *Mandla v Dowell Lee (1983)*
- Supervision of students with Disabilities
- School-related activities, e.g. field trip
- Suspension & Expulsion
- Serious Student Behavioural Problems
  - ✓ Drug related, sex related,
  - ✓ Gambling, Gang activities, ...
  - ✓ Bullying

#### Code of Aid for Aided Schools (Release 1.11) 15.2 Suspension and Expulsion of Students

- (a) As a general principle, students admitted into an aided school should normally be allowed to complete the full course of that school. Students must not be expelled solely on the ground that they are academically weak. When action to expel a student has to be considered, the Incorporated Management Committee, and school should also observe that:
  - (i) students admitted into an aided primary school should be allowed to complete the six-year course; and
  - (ii) students admitted into an aided secondary school in the junior secondary course (Secondary 1-3) must not be expelled under the age of 15 years. (updated on 1 September 2010)
- (b) No student should be expelled without substantiated reasons and proper warnings and notice to parents, and without the approval of the Permanent Secretary if a student is aged under 15.
- (c) While Incorporated Management Committees as well as principals are expected to be prudent in exercising their authority over the suspension and expulsion of students, the Permanent Secretary may, in accordance with the authority vested with him in the Education Regulations, regulate and intervene in such matters as he determines appropriate.

#### Education Regulations (Cap 279A) Regulation 96 Expulsion and suspension of pupils

- (1) If in the opinion of the Permanent Secretary the behaviour of any pupil is undesirable or improper or contrary to the good of the school or the other pupils he may, in his absolute discretion, require the principal to expel such pupil from the school or to suspend him for such time and under such conditions as the Permanent Secretary may specify.  
(L.N. 268 of 1990; 3 of 2003 s. 14; 27 of 2004 s. 61)
- (2) Nothing in paragraph (1) shall prejudice the right of a principal or supervisor to expel or suspend a pupil from the school.

### Disciplinary action

- Should not be arbitrary
- Should not be contrary to the established school regulations or rules
- Based on rules or principles that are announced and known by all students
- Must be fair, just and "reasonable"
- Must be *humanistic and educational in nature*
- Procedural justice (or due process) to be observed
- Appeal mechanism (see the JR case of ESF (2004))

## "Reasonableness"

- ... broadly construed to apply to regulations that maintain and advance the **educational process**.
- School and classroom rules cannot be so broad or vague, cannot be too narrow and tight
- *In Loco parentis* is bound by two standards: **reasonableness** and **good faith** without malice.

## 5. Property and Privacy

- When students bring **illegal items** to school, e.g. drugs or weapons, do you have an obligation to respond?
- When students bring **bothersome items** such as water pistols or comic books, how will you respond?
- School may make rules that forbid students to bring certain items into the school setting, if the items are deemed to interfere with **educational process**.
- School may need to develop **procedures for confiscation** and later return of most items.
- Absent reasonable rules, educators run the risk of being accused of **"trespass of private personal property"**.
- What about **locker and desk searches**? Reasonable cause?

## 5. Property and Privacy (cont)

- Intellectual Property Ordinance (Cap.528)
- Personal Data (Privacy) Ordinance (Cap.480)
  - ✓ Check [here](#) for details
- School policies and guidelines

## 6. Special Educational Needs

- Diversity of students
- Physical or psychiatric disorders, emotional problems, or learning disorders. ....
- These children are entitled or **have the right** to an education.
- Potential issues: -
  - Confidentiality – most student records must be regarded as **confidential**
  - Privacy – personal data, data user, 6 data protection principles
  - Discrimination

## 7. Complaints and Remedies

- Enhancing home-school communication through various means
- Fair, open and transparent school rules
- Procedures for handling complaints
- Resolving complaints through **mediation**
- Non-legal alternatives
- Insurance

## Report to the Police ..., yes or no?

- Nature of the incident
- Possibly a crime, violence, ... etc.
- How serious? Someone seriously hurt? Valuable belongings?
- Under what circumstances?
- Parental consent? Yes or no?
- Advice from PSLO (警察-學校聯絡主任)
- Act honestly and prudently
- Possible consequences

***Teachers as  
professionals ....***

We must act in **Good Faith** and for  
the **Best Interests** of our students.

***THANK YOU***

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