

**A Special Review of
Bill 39, Education Amendment Act (Concussions), 2012
by CMP Concussion Management Partners Inc.
Released on March 27, 2012**



**INTRODUCTION
by Robert Kirwan, President & CEO**

Bill 39 2012, An Act to amend the Education Act with respect to concussions, was introduced by the Ontario Minister of Education, Laurel Broten, on March 6, 2012. Once it is put into law this Bill will amend the Education Act by adding a section under Part XIII.1 dealing specifically with Concussions.

This special report is an in depth review of the proposed legislation. Our intent is to examine each of the sections of the Bill and present some of the possible implications and outcomes that should result from its passage. I wish to advise that this review is the “opinion” of CMP Concussion Management Partners Inc. and is being offered to generate discussion and increase awareness among the general public.

CMP Concussion Management Partners Inc. was established in order to address the critical need at the secondary school level for a practical, effective, coordinated approach in dealing with sport-related injuries that result in brain trauma concussions among student-athletes. We promote a partnership approach to concussion management that will enable student-athletes to enjoy the positive benefits of participating in their favourite sports activities while at the same time knowing that if they happen to suffer an unfortunate injury to their brain, there is a protocol in place which will manage their injury in the most complete manner possible to promote the greatest level of recovery.

The actual wording and language of Bill 39, if and when it is passed by the Ontario Legislature, may contain provisions and clauses that are slightly different from what was presented on March 6, 2012. The comments and opinions provided in this review were based on information that was known to us on March 27, 2012.

A SPECIAL REPORT BY CMP CONCUSSION MANAGEMENT PARTNERS INC.

The actual wording of Bill 39, An Act To Amend The Education Act, will be found in enlarged bold print on the following pages.

The comments and opinions from CMP Concussion Management Partners Inc. will be found in regular print and will begin in each case with the word, “NOTE”.

PART XIII.1

Concussions

Minister's policies and guidelines

321. (1) The Minister may establish and require boards to comply with policies and guidelines respecting head injuries and concussions in pupils, including policies and guidelines,

NOTE: This means that once Bill 39 is passed, the Minister of Education will have the authority to introduce policies and guidelines at the Minister's discretion, without the need to consult with the members of the legislature for approval. Keep in mind that policies and guidelines are basically "statements of principle" that are to be used to "guide" the decision-making process of a local school board. However, under section (4) below, the Minister is given the authority to establish "regulations" as well without returning to the legislative assembly for approval. Regulations are much stronger than mere "statements of principle". Regulations become the "law" and are expected to be followed as written.

It is therefore most probable that the Minister is prepared to leave this matter in the hands of the school boards and is hopeful that school boards will comply with the "intent" of the policies and guidelines. However, if school boards are not compliant, the Minister has the option to exercise his/her power and be much more forceful through the introduction of regulations. There is obviously a very fine "legal difference" between what one is "obliged" to do through regulations and what one is "expected" to do through policies and guidelines. It is anticipated that school boards will comply with the policies and guidelines rather than force the Ministry to establish regulations.

(a) respecting the distribution of information to pupils, parents, guardians, board employees and volunteers about the prevention of head injuries, the identification of symptoms of concussions and the management of concussions;

NOTE: This means that the Minister may establish policies and guidelines that require school boards not only to distribute information to all of the named partners, but furthermore, may indicate how this information is to be distributed. While it doesn't give any indication that the content of the information will be forced upon school boards, it does state clearly that the information will need to address the areas of prevention, identification of symptoms and management of concussions. This is clearly a message that the Minister may be providing school boards with the basic content that must be known by the various partners and that the Minister wants to make sure that school boards ensure that the message is getting out to the right people.

It is expected that the Minister will leave local school boards with a great deal of discretion with respect to the curriculum that will be provided for the partners. School Boards will always have the opportunity to enhance the material that is determined to be "compulsory", but there will have to be some sort of "standard curriculum" that ensures all partners have the same basic information.

Our expectation is that the Ministry will develop specific "Guide Books" for parents, teachers, principals, coaches, and student-athletes. These guide books should be available online and may also be provided in print form. Each school will likely be required to make sure that the guide books are distributed to all partners each year.

The main challenge in this section will likely deal with the issue of “prevention” of head injuries. This is an area where there is much debate. In fact, in many cases prevention is linked to equipment, and yet with the current budget restraints that school boards find themselves under, the Ministry may need to inject funding to allow school boards to purchase better equipment. Rule changes are another consideration, yet this leads to another area that may need to be prepared carefully.

Prevention will be a long-term goal, so it is hoped that the Ministry doesn’t get too focused on this area. Concussions will never be prevented or eliminated. We may be able to reduce the risk of injury, but the reality is that concussions can occur during accidental contact with team mates in non-contact sport or recreational activities. The focus should be more on the prevention of subsequent concussions that occur because a student-athlete is returned to physical activity before the original concussion has healed.

The challenge with the prevention of second concussions is that up to 80% of all student-athletes who suffer a concussion are either not aware of their injury or they do not report the injury to their coach or parent. Once the Bill is passed and school boards begin to implement a concussion management program, it is expected that the number of recorded concussions will increase five to seven times, simply because of our ability to identify concussions more accurately.

Information that is distributed under this section of the Bill must include very specific protocols for the identification of concussions. As well, there must be some very clear direction from the Ministry of Education as to how the entire process is initiated. Section (1) (d) below deals with outlining the responsibilities of each partner in the program. This should be something that is contained in the individual Guide Books.

(b) respecting when a pupil who is suspected of having sustained a concussion is to be removed from or prevented from further participating in intramural or inter-school athletics or any part of the health and physical education curriculum;

NOTE: This section is a fairly predictable part of the Bill. It means that if a pupil is suspected of having sustained a concussion, the Minister can indicate when the pupil is to be removed from play. We all know the answer to this matter. The player must be removed immediately.

This is now going to be stated very clearly in the regulations and guidelines. What will need to be determined is who makes the decision and how the decision is arrived at. For example, what criteria will be used to establish “suspicion of having sustained a concussion”.

Identifying a concussion is very difficult. The Minister will have to indicate clearly that “any suspicion” will trigger the protocol. There cannot be a “degree of suspicion” or it will leave the decision open to interpretation, and since most of these decisions must be made during a practice or game, there should not be any confusion as to whether the suspicion is warranted. Therefore, while the answer is pretty straightforward, the criteria we use to arrive at the answer may not be quite so simple.

There are universally accepted signs and symptoms that indicate the likelihood that a concussion has been sustained, but we need to know who is going to be given responsibility for making that call and what signs are going to be determining factors. Is there a “degree” of dizziness? Does the pupil have to be a little bit dazed or clearly dazed? Will it merely take a check to the head that initiates the protocol? Will simply doing a sideline test be enough to disregard the initial suspicion, or will the player need to be cleared by a physician? The main challenge here is that there are so many opinions

and theories surrounding the identification of concussions that it is going to be difficult for any group of individuals to come to a consensus.

There are many who feel that a medical doctor is the only person who can diagnose a concussion. However, someone else is going to have to determine if there is enough evidence to warrant suspicion of a concussion so that the student-athlete is removed from play and taken to see a doctor. The best way to be sure that we are catching all of the signs and symptoms is to give parents, teachers and coaches alike, the responsibility to be on the lookout for these signs and symptoms and then give them the authority to make the determination without having to justify or debate the merits of their decision.

(c) respecting the return of a pupil who has or may have sustained a concussion to intramural or inter-school athletics or to any part of the health and physical education curriculum, or his or her return to learning;

NOTE: This section gives the Minister the authority to be very specific as to when the pupil will be permitted to return to physical activity. That will include which of the partners must be required to give written clearances before the pupil is returned to play. At the present time, the accepted practice is to have a doctor give this clearance. However, studies are providing evidence to support the fact that a concussion is a process that involves a variety of functional deficiencies that include not only physical, but also cognitive, mood and visual areas of the brain.

Therefore, when establishing policies and guidelines respecting the return to physical activity, the Minister should not only require clearance from a physician, but also clearances from the parent, the school, and the pupil him/herself. At the present time, we expect that at the very least, the regulations will require a doctor's clearance before returning to play is permitted. However, unless the Minister indicates that clearances are required from at least the parent and the school, we still may be putting the student-athlete at risk of returning before the first concussion has healed. A doctor cannot determine if all functionality is back to normal based on a ten minute visit. The doctor can determine if there are any bone fractures, internal bleeding or swelling of the brain. But a doctor cannot tell if the student-athlete is having trouble sleeping or if he has a mood disorder that is different from before.

Another thing that is interesting in this section is that there is a very specific mention of "returning to learning". This is going to be particularly challenging. We feel that the parent should be the person who decides when symptoms have subsided enough to permit their child to return to school. This will usually be within a day or two of the injury. However, once the student-athlete has returned to school, it will be necessary for teachers to have access to a very comprehensive guide for that deals with the accommodations that may be necessary during the rehabilitation period. These accommodations are designed to prevent further injury and to reduce the return of symptoms from activities in the classroom. It may take weeks or months before a student-athlete is ready to return to physical activity, but we do not recommend that the student-athlete stay out of school for the entire period of time. We feel that the student-athlete is able to begin returning to his/her full academic level of responsibilities by gradually increasing the cognitive demands of the classroom. This must be a gradual, step-by-step progression much the same as the step-by-step progression is followed when returning to competition.

In this case, we would anticipate that when reference is made to "returning to learning" the Bill means returning to pre-injury learning levels and expectations. In that case, it will be the classroom teacher who is the best judge as to when the student is able to handle the normal rigours and

workload of the classroom, including testing, homework, assignments, etc. Up until that time the classroom teacher will allow the student-athlete to function at a lower level of expectation than normal and also to be accommodated without the fear of losing his/her academic year. A concussion is a temporary learning disability and should be treated as such by classroom teachers.

(d) respecting the responsibilities of board employees, classes of board employees, or other persons who are involved in intramural or inter-school athletics or any part of the health and physical education curriculum in relation to the prevention of head injuries, the identification of symptoms of concussions and the management of concussions;

NOTE: This section is pretty broad in scope. It will likely deal with "who" will be required to assume responsibility for the implementation of the various policies and guidelines in the regulations. For example, the CMP Student-Athlete Concussion Management Program identifies the school Principal as the School CMP Leader, and designates the Principal as the person who is in charge of overseeing the implementation of the program at that school. We also indicate that the School Principal is to establish a School CMP Leadership Committee consisting of the Vice-Principal, Phys. Ed. Department Head, and any other person who the Principal feels is qualified to assume a leadership role in the implementation of the program.

We then indicate that all coaches must be trained by one of the School Leadership Committee members. For each school team or activity, one of the trained coaches must be designated as the School CMP Head Coach, and that person will be responsible for ensuring that the program is implemented accordingly for the team. The CMP Head Coach is responsible for training all student-athletes on the team and for administering the neuropsychological testing. We are very clear and thorough in elaborating on the roles and responsibilities of each of the partners in the concussion management program and we anticipate that the Minister will be just as thorough. Unless these responsibilities are clearly spelled out the entire identification and rehabilitation process will be paralyzed as people hesitate to step forward to take charge. In order to be an effective program everyone must know their job and must then execute accordingly.

The CMP Student-Athlete Concussion Management Program has clearly established who does "what and when" in order to remove any potential for confusion. Everyone has a role to play and when everyone does what they are supposed to do, the process works well. In addition, however, we have included failsafe mechanisms that will allow for "backup" in case someone falls short of their responsibilities. The "partner approach" is dependent upon everyone knowing their responsibilities and then following through. We hope that the Bill's policies and guidelines are clear in this regard.

(e) specifying other persons, in addition to board employees, who have responsibilities described in clause (d);

NOTE: This seems to imply that the Minister is going to reserve the right to be very particular in terms of who will be permitted to work with the pupils. For example, what roles will community volunteer coaches have in the whole process? For example, the CMP Student-Athlete Concussion Management Program makes it clear that community volunteer coaches may work in any capacity with the team, but they will not be qualified to provide the training or supervise the neuropsychological testing of student-athletes. Those tasks must be done by the School CMP Head Coach or one of the School CMP Coaches who are also licensed, certified teachers on staff. The Minister may also want to be specific as to what is expected from medical practitioners and neuropsychologists with respect to providing medical and clinical consultation reports.

It is entirely possible that the Minister will require community volunteer coaches to be trained and/or qualified in some very specific manner in order to be able to work with the student-athletes. Right now volunteer coaches often do not require any qualifications to work with a school team, but school principals must accept responsibility for the well-being of all students while they are involved in school-sanctioned activities.

This section also gives the authority to the Minister to address the use of athletic trainers at the secondary school level.

(f) respecting any other matter that a board’s policies and guidelines must address;

NOTE: This is an open-ended “catch-all” statement meaning that the Minister can identify any other matter that he/she feels should be included in a board’s policies and guidelines. One would expect that this statement is limited to the board policies and guidelines that deal with concussions; however, this is not what the language states.

In fact, it would seem that the Minister is leaving this open so that if there are any other policies and guidelines that the board currently has in place that must be changed or amended to comply with the conditions of Bill 39 and its regulations, then the Minister has the right to direct the board to make those necessary changes and amendments.

(g) respecting any requirements that must be included in a board’s policies and guidelines.

NOTE: This section is another open-ended “catch-all” phrase that permits the Minister to order a board to include specific requirements in its own board policies and guidelines. This may end up dealing with requirements for training and qualification of coaches, student-athletes, etc. Under this statement it won’t simply be a matter that must be addressed, as is stated in (f), but rather it will be a “requirement” that must be included.

We are especially pleased to see this statement in Bill 39. For example, when a school decides to implement the CMP Student-Athlete Concussion Management Program, there are very specific requirements that must be adhered to at all levels. If a student-athlete doesn’t bring in a signed permission slip from the parent, then the student-athlete is not allowed to play – end of discussion. The goal of Bill 39, as is the goal of CMP, is to always ensure the well-being of the student-athlete, and that means that certain requirements must be followed at all times.

This is also the section of the Bill where the Ministry may require school boards to utilize neuropsychological testing as part of their concussion identification and management program. The research is clear that identification of concussions is much more successful if the pupil has been assessed with a baseline neuropsychological test that can be compared to any post-injury test that is done if a concussion is suspected. This is one of those requirements that will have cost implications, so the Ministry will need to be aware of the budget limitations of school boards.

We anticipate that the Ministry of Education is going to recommend the use of neuropsychological testing based on the Physical Education Safety Guidelines developed by the Ontario Physical and Health Education Association (OPHEA) in partnership with the Ontario School Boards’ Insurance Exchange (OSBIE), the Ontario Association for the Supervision of Physical and Health Education (OASPHE), the Canadian Intramural Recreation Association – Ontario (CIRA), and the Ontario Federation of School Athletic Associations (OFSAA). In that guideline it is stated that “A concussion is more successfully evaluated if the student/athlete completes a neuropsychological baseline evaluation prior to beginning the sport season.” If the Ministry of Education intends the Bill

to provide the highest standard of care possible for pupils enrolled in secondary schools, then it stands to reason that the policies and guidelines will require neuropsychological testing of some kind. The most reliable form of such a test is a computer based test done by ImPACT.

ImPACT is a computer-based battery of tests developed specifically for assessing sport-related concussion. The computer program measures multiple aspects of cognitive functioning, including attention span, working memory, sustained and selective attention time, response variability, and several facets of verbal/visual memory. This will register a “baseline” record of abilities of student-athlete with which to test against should they suffer a possible brain injury during the season.

While there are other neuropsychological tests on the market, the important thing for the Minister to consider is “who” will be assessing the results of the tests. The professional most qualified to do this is a neuropsychologist or a sport medicine specialist who is familiar with sport-related concussions. The Minister should make it clear that simply using neuropsychological tests is not enough. The results must be assessed and evaluated by someone who is properly qualified.

(2) The Minister may specify in a policy or guideline established under subsection (1) a date or dates by which boards must establish policies or guidelines under subsection (3), or parts of them.

NOTE: The Minister is going to give school boards time to develop their own policies and guidelines. Given the serious nature of concussions, we would hope that the deadline is sooner rather than later. However, we would expect that the earliest you will see any policy implemented will be the beginning of the 2013-2014 school year.

The challenge here is with the Ministry. For example, the Ministry is going to have to develop specific policies and guidelines first and then communicate those to the individual school boards. It may take some time for the Ministry personnel to develop their policies, and then they are going to have to give the school boards time to develop theirs. Deadlines will need to take into consideration time for pilot programs and evaluation.

Unfortunately, with up to 80% of concussions going undetected, this means that a lot of our student-athletes will be in grave danger of suffering long-term life-altering serious consequences from brain trauma while the experts are sitting around the table trying to come to a consensus. This is why we are encouraging school boards to implement a program similar in scope to the CMP Student-Athlete Concussion Management Program immediately as an interim step so that students can be protected without delay. We are confident that the elements of the CMP program will be extremely compliant with the Ministry policies and guidelines. In fact, we are certain that our program will establish a higher standard than the Ministry will be coming up with. Therefore, individual school boards will serve their own students best if they come up with a solid program of their own and then make any necessary adjustments once the Bill is passed and the Ministry develops their policies, guidelines and regulations.

Board’s policies and guidelines

(3) Every board shall establish policies and guidelines respecting head injuries and concussions in pupils, and the policies and guidelines must,

NOTE: This simply means that there won’t be any choice. Every board shall be required to establish their own set of policies and guidelines that deal with head injuries and concussions in pupils. We would expect that the School Board Associations or even the Ministry of Education will offer a basic template from which to follow so that the process will be much easier to complete.

(a) be consistent with the policies and guidelines established by the Minister under subsection (1) and with any regulations made under subsection (4); and

NOTE: This means that the school board must make sure that its own policies and guidelines are in line with the intent and meaning of the Ministry policies, guidelines and regulations. It also means that there will likely be some sort of evaluation process so that the Ministry can approve board policies and guidelines. This is why we feel that some kind of “template” would be helpful so that the basic elements are included at all school boards.

(b) address the matters listed in clauses (1) (a) to (f) and include any requirements described in clause (1) (g).

NOTE: Once again, this simply states that the board policies and guidelines must include “everything” that will be contained in the Ministry policies and guidelines and not simply be “consistent with”. Of course one would expect the wording to be different, but this seems to be another way of telling school boards that they are expected to follow the Ministry direction in this regard.

What is interesting is that the Bill differentiates (1) (g) from the rest of the obligations of the board with respect to policies and guidelines. The Board policies and guidelines must merely “address” the matters mentioned in (1) (a) to (f). However, they must “include” requirements described in (1) (g). We are not sure why this has been stated again since it was pretty clear that this was already an expectation of the Bill.

Minister’s regulations

(4) The Minister may make regulations governing all aspects of head injuries and concussions in pupils, including regulations relating to any matter listed in clauses (1) (a) to (e).

NOTE: There is a very open-ended mandate for the Minister to establish regulations that deal with “all” aspects of head injuries and concussions in pupils. What is of interest here is that it not only gives the Minister the authority to establish regulations for matters listed in clauses (1) (a) to (e), but also for any other aspect of head injuries and concussions that come up in the future.

This also means that for (1) (f) and (g), the Minister must be expecting to provide policies and guidelines for which it hopes that school boards will use in making any changes anticipated in (1) (f) and (g). The Minister is also recognizing that it may not have the power to establish regulations that address changes that may be required to any other policies and guidelines that do not relate to head injuries and concussions. This simply recognizes the impact of head injuries and concussions on the entire board operation.

General or particular

(5) A regulation made under subsection (4) may be general or particular.

NOTE: This simply gives the Minister more leeway when it comes to making regulations.

Not regulations

(6) Policies and guidelines established under this section are not regulations within the meaning of Part III (Regulations) of the Legislation Act, 2006.

NOTE: This merely points out that the policies and guidelines are statements of intent that the Minister expects school boards to follow, but is an admission that they do not have the same weight as regulations. The implication seems to be pretty clear that if the school boards do not adhere to the policies and guidelines then regulations will follow.

No liability if person acts reasonably and in good faith

(7) A board employee or volunteer who is involved in intramural or inter-school athletics or any part of the health and physical education curriculum is not personally liable in a civil proceeding for an act or omission if the person acts reasonably in the circumstances, in good faith and in accordance with the Act, regulations and with any policies and guidelines made under this section.

NOTE: This is one of the most important sections of this entire legislation. It makes it very clear that as long as a person acts “reasonably in the circumstances, in good faith and in accordance...” then that person cannot be held liable in a civil proceeding for any act or omission. This is pretty good immunity for anyone involved in sport-related activities at a school.

However, it is also a pretty clear warning to school boards that unless the board complies with “all” aspects of this legislation, then their employees and volunteers might be at risk for civil liability. The Bill has now set the “standard” by which all legal cases will be measured. It implies that due to the seriousness of head injuries and the ever increasing public awareness that is being generated, there may be civil cases coming forward for acts and/or omissions when it comes to concussion identification and management.

This is one of the main reasons why we think this legislation is going to come sooner rather than later. It also has implications for private schools which must comply with the directions from the Ministry of Education. Their own policies and guidelines will be judged according to the Act, regulations and any policies and guidelines that fall under the Act and regulations.

Commencement

4. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Short title

5. The short title of this Act is the Education Amendment Act (Concussions), 2012.

EXPLANATORY NOTE

The Bill amends the Education Act. Part XIII.1 of the Act is renamed “Pupil Health” and a new section is added to it. The new section authorizes the Minister to make policies and guidelines respecting head injuries and concussions and sets out a list of matters that this power includes. The section requires boards to establish policies and guidelines respecting head injuries and concussions and requires boards to address the specified matters. The Minister is also given authority to make regulations about the same matters. The section describes when board employees or volunteers will not be liable in a civil proceeding for their acts or omissions.

NOTE: This is merely a summary of what the Bill does.

CMP Concussion Management Partners Inc. is a Canadian corporation that provides Student-Athlete Concussion Management Program services to secondary schools in Canada and the United States.

For information about this review or the company, contact Robert Kirwan, President & CEO at (705) 969-7215.

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Mr. Kirwan is a member of the Ontario College of Teachers who has a Masters Degree in Education Administration. He retired from a 28 year teaching career in 2001 and currently operates a private practice as an education, training and staff development consultant providing services to organizations and corporations in Ontario. He was elected in 2010 as a Trustee and serves as a member of a School Board in the Province of Ontario.	Since 1998, Dr. Czarnota has been applying the latest concussion management guidelines and research to help athletes recover as fully and as quickly as possible. He is a Credentialed ImPACT consultant who has worked extensively with the O.H.L., the W.H.L., the N.O.J.H.L., Team Canada’s World Junior Men's Under 20 national team. and other teams and organizations in Canada and the USA.