

From: "David M Webb" <>
To: <panel_e@legco.gov.hk>
Date: Wednesday, January 28, 2015 09:54PM
Subject: Article on school suspensions

To: Polly Yeung
Clerk to Education Panel

Dear Miss Yeung,

I hereby submit to the Education Panel, for members' attention, the attached article titled "Occupy school suspension order was invalid" which we published on Webb-site.com on 13-Jan-2015.

The article raises an important issue for the Panel to consider, specifically that the Education Bureau acted beyond its statutory powers when it purported to suspend classes across two districts of Hong Kong on 28-Sep-2014. If the Government wishes to have such powers, and the legislature chooses to grant them, then that should be a matter for legislative amendment as it was when the "bad weather" provision was added to the Education Ordinance in 2001.

Regards

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Attachments:
Occupy school suspension order was invalid.pdf

Occupy school suspension order was invalid

13th January 2015

Webb-site Reports has investigated the Government's actions during the "Occupy" protests and finds that it lacked the legal powers to order district-wide class suspensions, and was therefore acting outside the rule of law. Cast your mind back to Monday 29-Sep-2014, the day after the tear gas flew and the "Occupy" protests began in Admiralty, Mongkok and Causeway Bay. At 02:59, the Education Bureau issued an [announcement](#) that:

"As the traffic was seriously disturbed by 'Occupy Central' movement yesterday (September 28) afternoon, the Government anticipates that public transport may continue to be affected in the vicinity of Wan Chai and Central and Western areas. To safeguard students' safety, the Education Bureau announced that classes of all kindergartens, primary schools, secondary schools and special schools in the Wan Chai and Central and Western districts would be suspended today (September 29). Schools should remain open and arrange staff to look after students who might arrive."

You'll notice the sleight of heavy hand there, conflating transport disruption with "student's safety". Does the Government have the legal power to order a whole district's schools to suspend classes in this way? After all, you can imagine the outcry if the Government ordered businesses to close, and remember that some of the affected schools were private, fee-charging businesses. However, there are children involved here, so there might be special powers. So we checked the Education Ordinance.

[Section 83\(1\)](#) of the Education Ordinance states that

"The Permanent Secretary may, if it appears to him that -

(a) there is any danger or risk of danger to persons in any school premises...

by order in writing served on the management authority of the school -

(i) suspend the operation of the school in the school premises or any part of the school premises...; or

(ii) prohibit the use of any place for the purposes of a school...; or

(iii) give such directions and make such requirements as he thinks necessary.

You might think that "danger" and "risk of danger" are the same thing, but set that minor drafting issue aside. This clause doesn't apply in the Occupy case, because none of the school premises was close to Admiralty (certainly not within tear gas range), so there was no danger to persons "in school premises", and secondly, there was no "order in writing served on the management authority" of the schools concerned, just a general broadcast, which would not satisfy the requirements of Section 83(1). Thirdly, any such notice given to a school under sub-sections (i) or (ii) above must also be published in the [Gazette](#), and no such notice was published.

The broadcast covered a huge chunk of HK Island, including schools up on The Peak, kilometres away from the protest zone. See the lists for [Wanchai](#) and [Central & Western](#) - we count 68 kindergartens, 52 primary/special schools and 34 secondary schools, or 154 schools in total. There was no suspension order for schools in Yau Tsim Mong District (which includes Mongkok) or Eastern District (which includes Causeway Bay).

Alright, you might be thinking, how does the Government order schools to close during typhoons and heavy rainstorms? The answer can be found in the next sub-section, 83(1A), which says:

"(1A) Notwithstanding subsection (1), if it appears to the Permanent Secretary that there is any immediate danger or immediate risk of danger to persons in any school premises due to bad weather, he may, by making public announcements on radio, television or newspapers or by such other means as he thinks fit, suspend the operation of the school in the school premises." (our underline)

That power was inserted by the Education (Amendment) Ordinance 2001, after the Government realised that its "actual practice" of announcing suspensions during typhoons lacked any statutory basis. They explained this on page 4 of [this briefing](#) dated 20-Dec-2000. Clearly that clause doesn't empower the suspensions during Occupy either. "Bad traffic" is not the same thing as "bad weather". If anything, slower traffic reduces road deaths and injuries, so it is not a safety issue either.

So on 4-Oct-2014, *Webb-site Reports* wrote to the Government asking them, exactly what was the legal basis for the suspension order? The Education Bureau (**EDB**) responded on 6-Oct-2014 claiming that Section 83

allows that "the Permanent Secretary may, by making public announcements on radio, television or newspapers or by such other means as he thinks fit, suspend the operation of the school in the school premises". Nice try, but we knew that they were quoting selectively from Section 83(1A), which only applies to "bad weather". We challenged them on this, and there was deafening silence, so we prodded them again on 16-Oct, and they responded over a month later on 19-Nov-2014 that "our reply is under preparation".

Still silence. The protests were cleared. Christmas came and went. Still no answer. So we poked the EDB again on 28-Dec-2014, and this time we copied the Ombudsman, complaining about the 83-day delay without any good reason under the toothless [Code on Access to Information](#), which provides for a normal 21-day response deadline. That seemed to get them moving. The next day they said "we are seeking advice from Director (sic) of Justice and would let you know the result as soon as possible". Finally on 30-Dec-2014, presumably with legal advice from the Department of Justice, they said:

"As you would appreciate, the "Occupy Central" movement involved illegal activities of an unprecedented large scale right from the start. Faced with such a situation, one of the key concerns of the Education Bureau was naturally students' safety.

The decision to make public announcement of class suspension at the initial period of the "Occupy Central" movement was made out of real and legitimate concern for students' safety. At the time, the traffic conditions in Wanchai and the Central and Western Districts ("Affected Areas") and their vicinity were seriously affected due to, amongst others, blockage of main roads in the Affected Areas. Besides, there was a degree of uncertainty as to how the situation might develop and one simply could not exclude the possibility that the situation might further deteriorate.

In the circumstances, the Education Bureau took the view that there might be danger or risk of danger to students studying in the schools within the Affected Areas if classes were not suspended. For this reason, the Education Bureau made public announcements in respect of class suspension on 29 September, 2-3, 5-7 October 2014, but schools were asked to remain open and arrange staff to look after students who might nonetheless return to their schools. Given the exigency of the circumstances prevailing at the time, public announcement was the most effective means to inform the public (especially the students and their parents) as well as the relevant schools of the aforesaid views of the Education Bureau."

That response still does not give any statutory basis for doing what they did, and you will note that they are now trying to backtrack and say that the Education Bureau was merely informing the public of its "views". Clearly the announcement was not just views, but purported to give an order, saying that classes "would be suspended". We also asked the English Schools Foundation for their take on this, and on 6-Oct-2014 Belinda Greer, CEO, told Webb-site by e-mail: "the decision to suspend classes is in line with the directive from EDB".

Ironically, one of the effects of the Government pronouncement was to allow thousands of students from 34 secondary schools time to attend the protests in Admiralty. Secondary schools [resumed classes](#) on Monday 6-Oct-2014, Primary Schools the [next day](#), and kindergartens the [day after](#). It wasn't until 14-Oct-2014 that the first affected road was re-opened, [Queensway](#), so whatever disruption there was to traffic was not enough to prevent all the affected schools from operating.

In our view, the Government found it politically convenient to go into panic mode and shut down the system, causing massive inconvenience to parents and guardians who had to make other arrangements to look after them. You will note that the Government was careful not to actually order closure, only suspension of classes - but in practice many of them did close their doors. The children didn't get the education their parents had paid for, and the school buses which are mostly paid a term in advance did not run.

It wasn't the first time that the Government had gone beyond its powers in the Education Ordinance in purporting to close or suspend schools. On 11-Jun-2009, after the first local human swine flu case with no identifiable link (i.e. they couldn't show that it was imported), the EDB [decreed](#) that all kindergarten and primary schools would be suspended for 14 days, effectively cutting the school year short by 2 weeks, and meaning that many students had to forego end-of-year and in some cases end-of-school celebrations.

Conclusions

Whatever you think about the reasons for ordering school closures or class suspensions, the Government must act within its powers under the rule of law, and not purport to use powers that it does not have. It could have suggested, recommended or advised schools to suspend classes, but if it wants to give orders, then it must have powers to make those orders. The Education Ordinance lays out clear procedures for directly ordering an individual school management to close or suspend classes on the grounds of safety in that school's premises, or for broadcasting general suspensions of all schools during bad weather, but not for any other purpose. If the Government wishes to amend the Education Ordinance to expand its powers, then it should take the

matter to the Legislative Council in the usual way, not flout the rule of law.

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