Australia New Zealand Education Law Association Conference 1999: Education Law in the Age of Human Rights

An increasing awareness of human rights in New Zealand and comparable jurisdictions has led students, parents, teachers and schools to question their respective rights within the education sector. The Australia New Zealand Education Law Association ("ANZELA") conference this year focused on implications of the emerging importance of rights. This commentary notes two key areas of contention that arose during the conference with respect to students' rights - the right to retain access to education, and the rights that may legitimately be insisted upon within the educative framework.

The Right to Attend School and Exclusion

The right to education is guaranteed to New Zealand citizens and residents between the ages of 5 and 19.[1] Further, Articles 28 and 29 of the United Nations Convention on the Rights of the Child, ratified by New Zealand in 1993, oblige States to provide education to all children.

The most common way the right to education may potentially be denied to young people is through their exclusion from school. Several conference papers were devoted to the law surrounding the suspension of children from school, in the pre-conference summit. In particular, speakers addressed new suspension laws (implemented on 12 July), their shortcomings and alternatives to exclusion.

(a) Exclusion Legislation

Under the Education Act 1989, a student could be given only one short specified suspension in a school year, which could last from one to three days.[2] After such a suspension, if the school wished to exclude the student again, the only option was an unspecified suspension.[3] A Board of Trustees hearing would decide whether to lift the suspension (with or without conditions), extend the suspension of a student under 16 or expel any older student.[4]

Since 1990, the rate of exclusions from New Zealand schools has grown from 4,401, to 11,929 in 1998.[5] The Education Amendment Act (No. 2) 1998 was passed partially in an attempt to address this increasingly high rate.[6] The new provisions

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1 Education Act 1989, s 3.
2 Education Act 1989, s 13.
3 Education Act 1989, s 13(2).
4 Education Act 1989, s 16.
5 Ministry of Education statistics, cited in Fleming, "A Suspension by any other name? Changes to school discipline in New Zealand" in Conference Materials.
6 Education Legislation Amendment Bill, iv.

replace the specified suspension with a stand-down mechanism. Students may be stood down for up to ten days in a school year, over more than one period. This is designed to give schools more flexibility in behaviour management.

The term "suspension" is reserved for suspensions of an unspecified duration. Once the Board decides it does not wish the student to return to the school, it may expel a student over the age of 16 or "exclude" a child not yet 16.[7] The Board may also lift or extend the suspension with or without conditions. While it was always possible to make a return to school conditional, the conditional extension is new. The conditions must be aimed at facilitating the student's return to school, and while it is in place, the school is under a duty to provide on-going education.

(b) Problems in the Law

While most of these changes are positive, it was argued at the conference that they fail to address the reasons why such high numbers of New Zealand students are being denied the right to education. One such problem is the disparity of suspension rates between comparable schools, suggesting that often exclusion may not be the last resort it is designed to be. While many schools will go to great lengths to help students remain at school, many take the first opportunity to rid itself of a problematic student. Schools remain unaccountable for their exclusionary decisions.

Aggrieved students may take judicial review, but this is a time and money-consuming option. In addition, the courts have been reluctant to intervene in educational matters, "even in cases where pupils' rights are concerned".[8] The other alternative is to request that the Ombudsman conduct an investigation. However, the Ombudsman has only recommendatory powers and the process is, once again, lengthy. Several speakers commented on the need for a more practical avenue of appeal. Independent review of exclusion decisions is successfully provided for in the United Kingdom, Australia and most States of the United States of America. The absence of such an opportunity, according to one speaker, "highlights the poor protection which is given to New Zealand students, and the ease with which the statutory right to schooling can be lost within this country".[9] The inevitable conclusion is that despite changes to the law, schools with high exclusion rates will continue to suspend large numbers of students.

(c) Alternatives to Exclusion

Papers were also presented on how the right to education might be better protected, by proposing alternatives to the exclusion mechanism. An area of particular interest was the restorative justice conferencing model used in schools in Queensland,

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7 Education Amendment Act (No. 2) 1998, s 15.

8 *Maddever v Umawera School Board of Trustees* (1993) 2 NZLR 478.

9 Fleming, supra note 5 at 27.

Australia.[10] The model finds its origins in New Zealand's family group conference, legislated for in the Children, Young Persons and their Families Act 1989. Conferencing seeks to address the causes of the behaviour problem and repair the damage done, rather than put the problem "out of sight, out of mind". It brings together the victim and offender, along with their families and supporters, and a facilitator. Each person is given an opportunity to speak about how the incident has affected him or her, and an agreement is reached as to how the offender's behaviour can be changed in the future.

The idea of bringing together the victim and offender and resolving the problem may seem overly idealistic. However, the Queensland trial found that all participants were highly satisfied with the conferencing model, with victims feeling safer and offenders feeling a greater sense of acceptance and understanding. Moreover, schools felt the conferences were beneficial, and reported changing from a punitive to a more restorative approach for all disciplinary matters following their participation in the trial.[11] Several schools in New Zealand have implemented a school community conferencing model of behaviour management, with similar positive results.

From the point of view of preserving the right to education, conferencing is preferable to traditional punitive exclusion, as it provides an opportunity to resolve behavioural problems while allowing a student to stay in school. Such a model is also beneficial to the community. Youth Court Judge Carruthers once observed that 80 percent of offenders he saw in his court were out of school, either due to truancy or suspension.[12] Like the traditional punitive response to criminal activity, exclusion as a response to unacceptable behaviour at school can have a counter-productive effect. New Zealand was the first country to recognise that a family group conference would be more effective in changing the behaviour of young people. It is hoped that the ANZELA conference will encourage more schools to consider applying restorative justice techniques to deal with inappropriate student conduct.

Rights Within School

Rights that students may insist upon within school relate closely to the right to attend school. For example, a student may insist that her freedom of expression allows her to wear a tongue stud to school, and that she is entitled to refuse to remove it, despite being threatened with suspension. Another example might be the student who refuses to submit to a drug test, and is consequently denied the opportunity to participate in certain activities, or is excluded from the school. The extent to which the New Zealand Bill of Rights Act 1990 limits the school's power to regulate student

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[10] Cameron & Thorsborne, "Restorative Justice and School Discipline: Mutually Exclusive?" Conference materials, 87.

[11] Queensland Department of Education statistics (1996) cited in Cameron & Thorsborne, ibid 89.

[12] Wilson, "Education Review Tribunal: An Idea Whose Time Has Come" (1997) Youth Law Review 12.

activity and behaviour has not yet been brought before the courts in New Zealand. This was a central issue in the ANZELA conference.

(a) Drug Testing in Schools

In the absence of case law in New Zealand's jurisdiction, it was beneficial to have speakers from the United States presenting papers on the effect courts have given Constitutional rights within American schools. Charles Russo's keynote address explained American case law on drug testing in schools. The schools' arguments in favour of requiring students to undergo drug tests are the same as those expressed by some schools in New Zealand - drugs are an increasing problem in society and their use must be deterred. The arguments against drug testing are also similar - everyone has a right to privacy, and to be free from unreasonable searches, as guaranteed in the Fourth Amendment to the United States Constitution, and s 21 of the New Zealand Bill of Rights Act 1990.

In *Todd v Rush County Schools*,[13] it was argued that a school policy of conducting random urinalysis tests of all students engaging in extracurricular activities violated that provision. A previous case, *Veronia School District 47J v Acton*,[14] held that student athletes had a lower expectation of privacy because of the nature of the activity they were voluntarily involved in. In this case though, the protesting student was a member of the school band, and the trial Court agreed that there was a legitimate expectation of privacy at stake. However, that Court, and the Seventh Circuit, upheld the Board of Education's policy because a legitimate concern over drug use in the school was identified. Because participation in extracurricular activities was considered a privilege, and the tests were accompanied by well-developed procedural safeguards, random drug testing was justified.

Conversely, in *Willis v Anderson Community School Corporation*,[15] the Seventh Circuit held it was unconstitutional for a school to suspend a student for refusing to submit to urinalysis where there was no reason to suspect he had been using drugs. Willis had originally been suspended for fighting, but had faced further suspension and possible expulsion for his refusal to undergo tests. The school had had no reason to believe Willis was under the influence of drugs at the time of the fight, and the Court rejected the argument that such a belief would have been reasonable merely because of the link between drug use and violent behaviour. Nor was the Court prepared to uphold the policy purely on the basis of deterrence. The suspicionless search was unconstitutional.

Clearly, in the United States, schools may demand that their students submit to drug testing if they can establish that the need to detect and deter drug use in the school community outweighs the students' expectations of privacy. In New Zealand, a similar standard would have to be met in order to satisfy the requirement that the

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13 983 F. Supp. 799 (S.D. Ind. 1997). 133 F.3d 984 (1998): cert denied. 119 S. Ct. (1998).
14 515 U.S. 646 (1995).
15 158 F.3d 415 (7th Cir. 1998).

search was "reasonable". The issue is of great importance because of the grave implications that a refusal to submit or a failed test could bring. An unreasonable search would be a breach not only of the student's rights under the New Zealand Bill of Rights Act 1990, but could lead to exclusion, and thus the denial of the right to an education.

Representatives of Youth Law/Tino Rangatiratanga Taitamariki reported that schools are now frequently demanding that students submit to urinalysis as a condition of return to school after an unspecified suspension. The legality of such demands is questionable, particularly when the initial reason for suspension was unrelated to drug use. As for exclusion decisions themselves, independent review of conditions imposed are impractical, adding weight to the call for a special body to be established to ensure schools act legally and fairly towards their students.

Conclusion

The ANZELA conference raised a number of contentious issues surrounding the content of student rights at school, and the practicality of ensuring those rights are upheld. Approximately 300 people were in attendance from many different countries, and from various professions from the legal presence of judges, lawyers and legal academics, to school and tertiary teachers and other people who work closely with students. Such a range allowed for a diverse range of perspectives to be expressed in a way that could not have been achieved among a purely legal or purely educational group. From such a group, a realistic picture was drawn of rights in education at present, and the shortcomings of their enforcement were identified. More importantly, a number of solutions to such problems were communicated to a large group with the power to implement changes for the benefit of students, schools, and the wider community.

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