

Student Discipline by School Principals and Board of Trustees: Powers, Procedures and Remedies

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I Introduction

This paper will attempt two possibly inconsistent goals: the provision of down-to-earth practical advice for participants in student disciplinary processes conducted under Part II of the Education Act 1989; and a reasonably detailed analysis of the relevant legal principles and in particular the potential remedies for wrongful suspension or expulsion. I will try to draw upon my six years' "front-line" experience as a school trustee, while at the same time attempting a critical analysis of the legal concepts which underlie the disciplinary process.

As a concept, student discipline is obviously broader than the formal steps of suspension and expulsion under the Education Act. On the one hand, a wide range of measures, informal and formal, falling short of actual suspension or expulsion can be seen as disciplinary in nature. These may range from a telling off to more serious measures such as that perennial favourite, detention, or loss of privileges. On the other hand, there may be informal measures taken by a board or a principal, without any attempt to follow the statutory procedures, which effectively bring about a de facto (or "kiwi") suspension or expulsion of a student. This paper will concentrate on formal suspension and expulsion, but will also where appropriate examine the law relating to student discipline generally.

In relation to disciplinary action and in particular suspension and expulsion, three broad issues will be examined. These are:

- the extent of the substantive disciplinary powers of school boards, principals and staff
- the procedural requirements for exercise of disciplinary powers, including the conduct of disciplinary hearings
- remedies for wrongful exercise of disciplinary powers

II The substantive disciplinary powers of school boards, principals and staff

Student discipline, patently, involves an interference with the basic freedoms if not the rights of the student subjected to it. This interference may be transitory and relatively trifling, as where the student is given a telling off for some minor misdemeanour. Or its consequences may be very serious indeed, as with long-term suspension or expulsion. As

a general rule, anyone who interferes with the rights or freedoms of another must be in a position to justify, and indeed put to forward a legal foundation for, their actions. That is no mere theoretical statement. New Zealand today is a much more culturally diverse, rights-oriented and indeed litigious society than it was, even ten years ago. These days, it cannot be assumed that an exercise of presumed authority against a student by a teacher or a Board will necessarily go unchallenged, either by the student or by the student's parents.¹

Like many if not most social institutions, schools need a degree of discipline. Of course, the application of discipline in schools as in other spheres is or should be for the most part an exercise in common sense. And where common sense reigns, the law will generally be coincident. But, as the two papers already presented by Paul Rishworth demonstrate, there may be situations where rights and interests compete, or the common sense of the matter is not plain or at any rate hotly disputed. If only to deal well with such cases, schools boards and their employees need to be aware that there are distinct legal limits on their powers of student discipline. The extent of, and limits on, these powers can be usefully discussed under two headings: first, the extent of statutory powers conferred by the Education Act; and secondly, the extent of the powers (if any) conferred by the "in loco parentis" principle.

1 Disciplinary powers under the education act

As is well known, the Education Act 1989 devolved on state schools a greatly increased measure of control over their management and administration. As a consequence, the overall powers of school boards of trustees and school principals within their respective areas were considerably broadened.²

Under s 75 of the Act, the board of trustees of a school has, "[e]xcept to the extent that any enactment or the general law of New Zealand provides otherwise, ... complete discretion to control the management of the school as it thinks fit". Specifically as to bylaws, s 72 provides that, subject to any enactment, the general law of New Zealand, and the school's charter, a school's board may make for the school any bylaws the board thinks necessary or desirable for the control and management of the school. Section 76 provides in relation to school principals:

76 Principals — (1) A school's principal is the Board's chief executive in relation to the school's control and management.

(2) Except to the extent that any enactment, or the general law of New Zealand, provides otherwise, the principal —

(a) Shall comply with the Board's general policy directions; and

1 I will use the expression "parents" for convenience to include solo parents and care givers.

2 For a detailed analysis of this topic, see my April 1993 paper, "The Powers, Duties and Accountability of School Boards of Trustees" in *Education and the Law in New Zealand* (Legal Research Foundation, Auckland) at p 62 - 98. What follows is a bare summary of some of the key points made in that paper.

- (b) Subject to paragraph (a) of this subsection, has complete discretion to manage as the principal thinks fit the school's day to day administration."

I have discussed elsewhere both the inter-relationship between the powers of a board and the managerial discretion of a principal, and the overall scope of the powers to manage and make bylaws (or rules) in the light of the restrictions which may arise out of other enactments, the general law of New Zealand, and a school's Charter.³ No doubt also, Paul Rishworth will have addressed these issues in his paper. Perhaps the most important point for present purposes is that, while the words "complete discretion to control the management of the school as it thinks fit" are clearly broad in scope and likely to receive a liberal interpretation from the Courts, it cannot be assumed that they will empower Boards and their employees to take disciplinary action, with or without the backing of school rules dealing with the particular topic at issue, where the effect is to interfere with the rights or freedoms of a student recognised by law. This is especially so in the case of fundamental rights and freedoms such as those recognised by the New Zealand Bill of Rights Act 1990.⁴

Three further matters clearly relevant to issues of student discipline can be briefly dealt with at this stage. First, from age five until the end of the year a student turns nineteen, and admittedly subject to a range of exceptions, every person who is not a "foreign student" is "entitled to free enrolment and free education at any state school".⁵ It plainly follows that decisions as to suspension and expulsion in particular, and arguably lesser disciplinary decisions as well, involve interference with a statutory right, and are for that reason entitled to receive very careful consideration by principals and boards; and the right in question, a measure of legal protection. Secondly, s 77 of the Education Act provides that the principal of a state school shall take all reasonable steps to ensure that students receive good guidance and counselling, and that a student's parents are told of matters which are preventing or slowing progress or are harming relationships with teachers or other students. The extent of a school's previous compliance or non-compliance with this obligation in relation to a student who is subject to disciplinary processes is clearly a relevant consideration, when suspension and expulsion decisions fall to be made.⁶ Thirdly, given the relevance of a school's Charter to its management and to student discipline, it should be borne in mind that the National Education Guidelines which form part of the core elements of every school Charter specify, as part of a code of conduct for school boards, that trustees shall "ensure that all students are provided with an education which respects their dignity, rights and individuality, and which challenges them to achieve personal standards of excellence and to reach their full

3 See note 2 above.

4 While the point is not yet settled, there is a strong argument that the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") applies to school boards by virtue of s 3(b) of that Act. See the discussion in my earlier paper footnote 2, above at p 79 - 82.

5 Education Act, s 3; see also s 8.

6 For example, it would be open to the student or his or her parents to argue that a principal's failure to comply with the s 77 duty had prejudiced the student and that, as a consequence, disciplinary action should not be taken, or at least should be postponed if this is legally possible.

potential”. The duty to respect the student’s dignity, rights and individuality applies with full force in the context of decisionmaking concerning student discipline.

Specific disciplinary powers of school boards of trustees and of principals in relation to suspension and expulsion are contained in ss 13 - 18 of the Education Act. Section 13(1) provides:

- (1) Subject to subsection (2) of this section, the principal of a state school may suspend any student, for a specified period not exceeding 3 days or for an unspecified period, if, in the principal’s opinion, -
 - (a) The student’s gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school; or
 - (b) Because of the student’s behaviour, it is likely that the student, or other students at the school, will be seriously harmed if the student is not suspended.

The actual procedures required to be followed will be examined later. As is well known, the Act draws a distinction between students under sixteen, who may only be “suspended”, and students sixteen and over, who may be “expelled”. Sections 16 and 17 respectively empower school boards to deal with each of these alternatives. Curiously, as regards substantive grounds for continuing a suspension or expelling as the case may be, these provisions contain no reference to any criteria or grounds for a board’s decision. However, it is plainly implicit in Part II of the Education Act read as a whole that a Board’s decision as to extension (or indeed lifting) of suspension and expulsion must address the same criteria as are laid down for the initial principal’s suspension under s 13(1). As McGechan J stated in *M & R v Syms and the Board of Trustees of Palmerston North Boys’ High School*⁷:

Sections 16 and 17 relating to Board powers make no internal mention of “gross misconduct” or “harmful or dangerous example”, or indeed the other criteria stated in s13. However, it is clear that the powers of Boards are not untrammelled. Principals may suspend only where s13 conditions such as “gross misconduct” and “harmful or dangerous example” exist. Principals report to Boards on those suspension circumstances. The Boards then proceed to lift such suspensions; or extend such suspensions, or expel, as a consequence. The “gross misconduct” and “harmful or dangerous example” pre-requisites which empower and restrict a principal, apply likewise to powers and consideration at Board level.

Thus, the substantive grounds for the exercise of the respective powers of suspension and expulsion for both principals and school boards are those contained in s 13(1). Extrapolated from the two categories contained in s 13(1)(a) and (b), these grounds are:

⁷ High Court, Palmerston North Registry, CP 302 & 303/90, unreported, 5 December 1990 (hereafter the Palmerston North Boys’ High School case”), at p 45.

- (i) the student's gross misconduct is a harmful or dangerous example to other students;
- (ii) the student's continual disobedience is a harmful or dangerous example to other students;
- (iii) the student's behaviour is such that it is likely that the student or other students will be seriously harmed if the student is not suspended or expelled as the case may be.

It is proposed to examine each of these three grounds in turn.

Gross misconduct amounting to a harmful or dangerous example to other students

This ground obviously raises two questions. First, has the student been guilty of "gross misconduct". Secondly, if so, is the gross misconduct a "harmful or dangerous example to other students"?

In the *Palmerston North Boys' High School* case, McGechan J defined the term "gross misconduct" and its application to particular circumstances as follows:⁸

First, the statutory criterion is not simple "misconduct". It is "gross" misconduct ... if the stated criterion was simple "misconduct", any infraction at all of standards of proper conduct, whether laid down by school rules or more general standards of accepted behaviour, however minor, would place a student at risk of suspension and expulsion. Such a situation would not have been intended. The legislature inserted the qualifying adjective "gross", with its connotations of the striking and reprehensible to ensure a child is not suspended or expelled for relatively minor misconduct.

Second, the underlying scheme into which the criterion "misconduct" fits must be kept in mind. The classification "gross misconduct" is to provide a criterion by which the principal and ultimately board may (not must) eliminate the presence of a disruptive or dangerous student. That is achieved by the removal of the student from the school. "Gross misconduct" envisages misconduct of a character sufficiently grave to warrant removal of the child from the school, permanently, and notwithstanding damage which may well be done to that child."

I start from ... two generalities (i) the use of the word "gross" is intended to indicate misconduct striking and reprehensible to a high degree (ii) the phrase is to be construed in the light of its purpose, namely description of conduct sufficiently seriously to warrant removal of the child notwithstanding risk of individual damage. When will particular conduct qualify?

At extremes there are no major difficulties. ...

It is the intermediate situations, between the identifiable extremes, which cause difficulty. In my view, in these intermediate situations there cannot be preordained absolutes. Whether or not a particular act amount to “gross misconduct” will always depend upon all the circumstances prevailing at the time. Take as an example petty theft, whether from the school, staff or fellow students. Doubtless it is misconduct. It is a crime. But is it striking and reprehensible to such a degree as to warrant suspension and expulsion? A moments thought shows a mass of variables arise. Is theft a merely occasional problem, or an endemic and serious problem, for the particular school, at the particular time? Is theft of the type which occurred disrupting the efficient functioning of the school, or bringing it into public disrepute? Was the theft an isolated one, unlikely to recur, or part of an ongoing course of misconduct? What was the value, or importance, of the items stolen? Were there aggravating features such as associated damage, or sale of the item for profit? The list is endless. Testing the matter by character, and potential to warrant exclusion of the student, one theft may cross the line into “gross misconduct” and another may not The statute allows sufficient flexibility in the concept of “gross misconduct” to meet situations and needs which may differ. Irritating as it may be to those who prefer ready-reference to thought, it is necessary to carefully consider and weight (sic) the circumstances of each individual case, on its own merits, in reaching a decision, whether the particular conduct amounts to “gross misconduct”. Is the misconduct striking and reprehensible to a point where it warrants removal from the school, despite resulting individual damage? All the individual circumstances must be weighted (sic). These are no absolutes.

The two elements, “gross misconduct” and “harmful or dangerous example” to other students, obviously shade into one another. Given the stringency of the test of “gross misconduct” and the requirement that it be “striking and reprehensible”, such conduct once accurately identified is by its very nature likely in the generality of cases to constitute a harmful or dangerous example to other students. But it must be stressed that the analysis is a two-step one. It cannot simply be presumed that a particular act of gross misconduct will necessarily operate as a behavioural example to other students, or that (if it does) the example will be a “harmful or dangerous one”. For instance, there may be cases where the student’s mental state at the time of the misconduct was such that no properly informed person could view it as setting an example to others, at all.

Continual disobedience amounting to a harmful or dangerous example to other students

There is no reported authority as to the meaning of “continual disobedience” for the purposes of s 13(1)(a). The 1989 Act changed the expression from that used in the Education Act 1972, where the phrase was “incorrigible disobedience”. That expression was considered by the Court of Appeal in *Edwards v Onehunga High School*.⁹ This case involved repeated defiance by the student of a school rule relating to boys’ hair length. A challenge to the board decision to expel the student was rejected. There was no attempt to analyze the content of the term “incorrigible disobedience”. McGechan J in the

Palmerston North Boys' High School case regarded this and the earlier case of *Rich v Christchurch Girls' High School (No. 1)*¹⁰ as “very obvious cases. They do not much assist in the drawing of boundaries.”¹¹

While there may not be much in it, “continual disobedience” may well be a slightly lower standard than “incorrigible disobedience”. The emphasis in the former phrase is on the repeated nature of the disobedience, down to the time when the suspension or expulsion decision is to be taken. “Incorrigible disobedience”, on the other hand, may have required an issue as to likely future disobedience as well as past repeated disobedience to be addressed.

In any event, what is plain is that the disobedience must be “continual”, or repeated. That is, a single isolated act of disobedience, no matter how serious, cannot be dealt with by way of this ground - although it may of course amount to “gross misconduct”. While in *Edwards* the repeated disobedience related to the same subject matter, there seems no reason in principle why a series of acts of defiance in relation to entirely different subject matters cannot constitute “continual disobedience”.

Again, as with the first ground, the finding of “continual disobedience” is only the first step. It is necessary to go on to consider whether the continual disobedience, as found, is such as to amount to a harmful or dangerous example to other students.

Behaviour likely to cause serious harm to the student or other students if the student is not suspended or expelled

This ground, unlike the two previous grounds, looks to the likely future impact of a student's continued presence at the school, in terms of “serious harm” either to the student or to other students.¹² For this ground to be established, it is necessary:

- (i) that the student have engaged in some form of “behaviour”;
- (ii) that by reason of that behaviour, it is likely, if the student is not suspended (or expelled), that the student “will be seriously harmed”; and/or
- (iii) that by reason of that behaviour, it is likely, if the student is not suspended (or expelled), that other students at the school “will be seriously harmed”.

Plainly, the “behaviour” in question need not amount to either “gross misconduct” or “continual disobedience”. An obvious example would be that of a student showing

10 [1974] 1 NZLR 1 (CA). This case involved a protest against religious observance at school assemblies and a call to other students to do likewise. The school board's decision to expel was upheld by the Court of Appeal on the basis that the students' actions were a deliberate challenge to authority and thus constituted “gross misconduct”.

11 At p 25. But, as to the present-day merits of the two decisions, see my paper, note 2 above, p 71- 2.

12 See the brief discussion of this ground in *C v H & Another*, High Court, Masterton Registry, CP 3/93, 23 April 1993, Greig J.

behavioural symptoms of serious mental disturbance such that he or she could reasonably be considered at risk of self-harm or alternatively harm to other students, the likely harm being serious in either case. However, it should be noted that, as with the first alternative under s 13(1)(a), the gravity of suspending or expelling a student is also implicitly stressed under this ground, by the requirement that the harm in contemplation be **serious harm**, and that the risk of such harm, if the student is not suspended or expelled, be “likely” (as distinct from merely a possibility).

The evaluative standard for decisionmaking concerning suspension and expulsion

A further issue arises as to the evaluative standard or standards whereby the initial suspension decision of the principal and the subsequent decision of the school board as to lifting or extending of the suspension or expulsion (as the case may be) are reached. Section 13(1), set out above, gives the principal a discretion to suspend “if, in the principal’s opinion” either of the specified grounds exists. By contrast, the parallel powers of a school board to deal with a student who has been suspended for an unspecified period lack any reference to the formation of an “opinion” by the board. Section 16(1) simply uses the word “may”, while s 17(1) imposes a duty to adopt one of two specified alternatives.

The issue of whether in law, the principal’s discretion is formulated in subjective terms (so that it is the assessment or opinion formed by the principal, rather than the objective facts of the matter, which is important) was left open by McGechan J in the *Palmerston North Boys’ High School* case. However, His Honour indicated a preference for a subjective approach to the two elements of s 13(1)(a), that is the existence of both “gross misconduct” and of a harmful or dangerous example to other students. His Honour commented:¹³

I think it likely that under the urgency and stress of a suspension decision, often allowing little time for reflection, and with the assumed expertise of the principal in such matters, the legislature more probably intended to allow the principal the expedient of reliance on his own opinion, subject only to administrative law control. However ... I am not required to determine the point for the purposes of this case, and leave it open.

Even if that tentative preference is the correct approach to the application of the principal’s discretion to suspend (and its subsequent reviewability by way of judicial review), as the outcome in the *Palmerston North Boys’ High School* case itself shows, that does not mean that the principal’s discretion is unfettered and can be exercised in an unreasonable manner. At a practical level, it is suggested that it is much fairer and safer for a principal approaching a suspension decision to do so in as objective and judicious a manner as possible, and in particular with full consciousness of the implications for the student of the decision being taken.

13 At p 29 - 30.

As we have seen, in the case of the decision as to suspension or expulsion to be made by a school board, there is no reference to the formation of an opinion, and this language, when contrasted with that applying in the case of the principal, may well support the existence of a wholly objective test of evaluation. In the *Palmerston North Boys' High School* case, McGechan J considered this issue and left it open; but again His Honour was unable to resist a passing comment:¹⁴

Some of the factors which point to a subjective character for the decision in the case of principals seem less applicable [to the board's decision as to suspension or expulsion]. At this final determination stage, with no appeal open, the legislative expectation could be that decision would be on the relatively more demanding and standardised "objective" basis.

In *Rich v Christchurch Girls' High School*, McCarthy J was prepared to assume without necessarily deciding that when issuing rules or instructions governing the behaviour of students, a school board was required to act reasonably, and that the validity of school rules was subject to a "test of reasonableness".¹⁵ In *Edwards v Onehunga High School*, the Court of Appeal held that the test of the actions of the board in that case was an objective rather than a subjective one, coupled with a presumption that the board had acted within its (rule-making) powers.¹⁶ Thus there is support in earlier authority for the adoption of an objective standard of evaluation with regard to school board decisions as to suspension or expulsion.

The impact of school rules on disciplinary decision making

Reference has just been made to the power of a school board to make bylaws for the control and management of the school, subject to any enactment, the general law of New Zealand and the school's Charter; and further subject (it would appear) to an overall test of reasonableness. School rules formally promulgated by a school board are likely, in the absence of contrary indication, to be treated as having been made pursuant to the bylaw making powers. But it is possible that some school rules may be laid down as board policies, or be issued by the principal. The making of rules in either of these ways would seem to be perfectly permissible pursuant to the general powers of board and principal under ss 75 and 76 respectively. However, plainly, any such rules falling short of formal bylaws would have to comply with the same standards as bylaws, as regards their content.

Assuming that there is in place a proper and valid school rule which a student has breached, what is the significance of breach as regards suspension or expulsion of the student?

14 At p 45.

15 Above, p 6 (Richmond J concurring).

16 Above, p 243 - 4. As Jan Breakwell in her paper, "Control and Management of Schools - Disciplinary Powers of Boards of Trustees", in *Education and the Law in New Zealand*, footnote 2 above, p 103, points out, there is a separate route to the same conclusion, on the basis that the Bylaws Act 1910 applies to school board bylaws (by virtue of the definition of "local authority" in that Act), with the consequence that unreasonableness is a ground of invalidity pursuant to s 8(2) of that Act, as well as repugnancy to the laws of New Zealand and excess of authority.

That question was decisively and comprehensively answered by McGechan J in the *Palmerston North Boys' High School* case:¹⁷

[I]t follows from the predominance of the statutory criterion, and the need to consider each case on its own merits in all the circumstances, that classification as “gross misconduct” cannot be determined by mere school rules or practices. ... I am satisfied the legislature did not envisage statutory controls as open to an outflanking by the device of school rules which direct that trivial infractions or perhaps even all infractions shall constitute “gross misconduct”; and/or enable suspension or expulsion. Parliament would not have intended that a school by mere passage of a rule that some minor matter amounts to gross misconduct could empower itself to expel for a triviality. A matter either is “gross misconduct”, as envisaged by the statute, or it is not. Idiosyncratic school rules or practices do not control suspension or expulsion. However, school rules and practices do have a relevance; and it may be considerable in some cases. The existence of a school rule as to the conduct in question may well demonstrate the importance of the matter involved, and its significance to the proper functioning of the school, matters which bear on the questions at issue. Moreover, an infraction (and particularly knowing infraction) of an express school rule can carry overtones of challenge to authority which aggravate the seriousness of that which occurred. Rules do not predetermine. Rules are, however, circumstances to be taken into account, along with all other circumstances in reaching an ultimate conclusion whether misconduct is or is not “gross” misconduct. Where the rule is an important one to the school, and the breach was flagrant, those circumstances may properly carry considerable influence in the ultimate decision.

In the *Palmerston North Boys' High School* case, two students aged thirteen and sixteen years had consumed small quantities of beer (not exceeding half a can in either case) while on a school sports trip. The two boys were of previous good character, and had not been involved in the supply of the beer, but, rather, had been somewhat fortuitously involved on a social occasion where students from another school were consuming it. This was expressly forbidden by school rules. Both boys were indefinitely suspended by the Rector (principal), and the school board in due course resolved that the older be expelled, and the other's indefinite suspension be extended. The Rector at the time of suspension had taken the view that the surrounding circumstances, the relatively small amount involved and the boys' previous good character were irrelevant in the face of a proved breach of a clear school rule. The school board's approach was essentially along the same lines.

McGechan J held that, while the conclusion that the conduct in question was “gross misconduct” was open to the Rector, he had not gone about his statutory task of determining the issue in a proper way. His view that breach of the rule concerning alcohol consumption triggered automatic suspension and a recommendation for removal was characterised as “simple and remorseless”. As a result he had failed to give consideration to other relevant factors, and had effectively pre-determined the issue which he was required to decide on the merits of the individual cases. As a consequence, the Rector had committed error of law both in his approach to what constituted “gross misconduct” and

in effectively failing to exercise his discretion, by seeing himself as bound to enforce the school rule as to consumption of alcohol. Thus his decision to suspend the two boys was held invalid.

So far as the decisions of the school board were concerned, McGechan J accepted a submission that the board's powers under ss 16(1) and 17(1) were dependent on a valid prior principal's suspension. This means that an earlier invalid principal's suspension will deprive a school board of jurisdiction to extend a suspension or to expel. However, McGechan J qualified this by noting that relief by way of judicial review is discretionary, pointing out (consistent with established legal principle in other areas) that, if the Court was satisfied that, despite errors by a principal in relation to a suspension, the matter had later been fully and appropriately considered by the school board with no ultimate injustice resulting, the Court might in those circumstances exercise its discretion against the granting of relief.¹⁸ However, in the present case, "the board like the Rector regarded consumption of alcohol as per se gross misconduct in this case as in others, without all circumstances being brought into consideration in any real way", and thus "fell into the same error as the Rector".¹⁹

Disciplinary action for student behaviour out of school

An issue as to which there appears to be no legal authority in this country relates to the extent of the power to discipline a student for behaviour occurring off the premises of the school and/or out of school hours. In the *Palmerston North Boys' High School* case, the behaviour occurred away from school, but on a school trip. Moreover, the school rules in question expressly dealt with the behaviour in question. There appears to have been no challenge to the power of the school to make and enforce such a rule.

In principle, both the general power to control the management and administration of the school and the specific disciplinary powers can properly be seen as extending beyond both the physical confines of the school itself and the times when the school is open. The need for control and management of a school and for student discipline clearly does not stop at the school gate. Aside from school sporting trips, many situations of off-school behaviour can be postulated where a power to discipline can properly be implied: misbehaviour by a student on the way to or from school; misbehaviour while in school uniform whatever the time or place; and misbehaviour which by reason of its particular subject matter or context demonstrates a substantial link or connection with, or significantly reflects on, the school. (For example, out of hours bullying or abuse by one student of another where the bullying or abuse is connected with or arises out of a relationship formed at school).

It is suggested however that there are limits, at least where disciplinary action is contemplated on the grounds of gross misconduct or continual disobedience. Where the actions in question have no substantial connection with the school, or to put it another

18 At p 42 - 3.

19 At p 51 - 53.

way, where the student cannot remotely be said to have been acting at the relevant time as a student of the school, then these grounds for disciplinary action would appear to be unavailable. Schools are not empowered, I suggest, to act as full-time guardians of their students. On the other hand, it may well be that, as a matter of law, the alternative ground for disciplinary action recognised by s 13(1)(b) of the Education Act, based on the likelihood of serious harm to the student or other students, will not require any link to a school context at all.²⁰

School discipline under the Education Act generally

The Education Act expressly empowers principals to suspend, and school boards to lift or extend an indefinite suspension, and to expel. These powers plainly occupy the entire field, so far as suspension or expulsion of a student is concerned. That is, there is no power available to a principal or a school board to pursue a course which effectively results in suspension or expulsion of a student, other than in terms of the relevant provisions of the Education Act. De facto or “kiwi” suspensions or expulsions are plainly not authorised and are illegal.

While suspension and expulsion are expressly dealt with, it would be wrong to conclude that the Education Act does not likewise empower lesser disciplinary measures. Reference has already been made to the general powers of school boards and principals in relation to the control and management of the school. It is plainly implicit in these general powers that school boards and principals possess general powers of discipline for the purposes of controlling and managing the school. As already noted, these powers are subject to any other enactment, the general law of New Zealand, and (arguably) an overall standard of reasonableness. Thus, in *Edwards v Onehunga High School Board*, in upholding the validity of a board resolution governing the length of hair for boys and of disciplinary action taken by the board to enforce it, the Court of Appeal stated:²¹

It appears to this Court that “control and management of the school” are wide and substantial topics including in their scope, of course, the control and management of pupils. The behavioural checks necessary, let alone desirable for such control in the day to day running of the school may be infinite and incapable of complete codification; but it certainly appears to us that a reasonable governing of appearance and dress fall properly within the ambit of matters authorised to be so controlled.

This reasoning can be taken as applying equally to the powers of management and administration of the school vested by the Act in a school principal. Furthermore, as a body corporate, a school board has to act through agents, as for many practical day-to-day purposes does a school principal. School staff, although not explicitly empowered to exercise disciplinary powers (falling short of suspension and expulsion), must be seen

20 For example, it would appear likely that a student who was found to be a repeat sexual offender out of school hours could be dealt with on this ground, notwithstanding a complete lack of any connection between the offending and status as a student of the school

21 Above, p 243.

as implicitly authorised to exercise the lesser disciplinary powers, on a delegated basis. Thus the lesser disciplinary powers of school staff other than the principal must likewise be seen as flowing from the Education Act, and (it follows) be exercisable subject to the same qualifications as the express powers of the board and the principal.

2 The *In Loco Parentis* principle

In the older case law and in areas of doubtful authority to act in a disciplinary capacity, reliance is sometimes placed on a venerable common law doctrine known as “in loco parentis”. In its original form, the doctrine, as the latin suggests, postulated a derivation of disciplinary authority on the part of a school teacher from the “common law” disciplinary powers of the student’s parent or parents. Either explicitly or by implication, it was said, the parent had delegated his or her authority in relation to discipline to the student’s teachers, while under their care and control.

There do not seem to be any modern cases dealing with the doctrine. The authorities which do exist are largely concerned with administration of corporal punishment on the one hand, and the imposition (for the student’s benefit) of a teacher/school duty to take reasonable care for the student’s safety. As to the former, corporal punishment has of course been abolished in our schools; and as to the latter, the modern law of negligence imposing on a school or a teacher a duty to take reasonable care for the safety of students in its/their care would not, it is considered, depend as a matter of principle on the notion that the teacher must be taken as standing in the shoes of the parent. Nonetheless, it has been argued that the in loco parentis doctrine “does still provide some residual implied authority to teachers where the teacher/pupil relationship exists but where it is not so clear that the school’s authority extends [so that] the doctrine cannot be entirely dismissed and could still be relevant in the pre-school, private school and out-of-school activity areas”.²²

However, a doctrine dating back to at least the eighteenth century and founded upon the premise that, in “choosing” to send a child to school, a parent thereby voluntarily surrenders disciplinary authority to the child’s teachers plainly has little connection with the modern reality of compulsory schooling and comprehensive regulation of the powers and activities of state schools and to a significant extent, private schools as well. Not only is it a fiction in the modern context to speak of the parent voluntarily entrusting the child to the school (or teacher) and thereby delegating his or her parental disciplinary authority; but in modern legal theory, not even the concept of parental authority survives without significant qualification. Thus in *Gillick v West Norfolk Health Authority*²³, the House of Lords held, in the context of access by girls under sixteen to advice concerning contraception, that parental rights of control of a child who is a minor are “dwindling rights”, which exist in law only insofar as required for the child’s benefit and protection. Where that justification does not exist or whether the child is sufficiently mature to

22 See Jan Breakwell, footnote 16 above, at p 105 - 6. For general discussion of the in loco parentis principle, see Trindade and Cain, *The Law of Torts in Australia* (1985) p 209 - 11; *Hansen v Cole* (1890) 9 NZLR 272; *Ramsay v Larsen* (1964) 111 CLR 16, 29, 34 - 35.

23 [1986] AC 122.

exercise the right himself or herself, the parental right may well be subservient to that of the child.²⁴

Given the comprehensive provision which has been made in respect of the disciplinary powers of school boards and school principals (and by implication, school staff generally), it is suggested that, at least as regards schools subject to the Education Act, school disciplinary powers have been wholly codified by enactment, and that the common law in loco parentis doctrine has ceased to apply. Given the overall width of those powers as already outlined, there should be no practical difficulty with that. Likewise, given also the carefully introduced qualifications upon those powers arising out of other enactments, the general law and a school's Charter, there is I would argue no room for expansion of disciplinary powers beyond those contemplated and permitted by the Education Act. Especially, by invoking a doctrine which has long since outlived its original justification and usefulness, and which is, at best, a substitute for principled analysis in those difficult, "grey areas" of school discipline where it is most likely to be invoked.

III The procedural requirements for exercise of disciplinary powers, including the conduct of disciplinary hearings

To this point we have been examining the substantive disciplinary powers of school boards, principals and staff. Of equal if not in the vast majority of cases greater practical importance are the procedural steps whereby disciplinary powers such as those of suspension or expulsion may lawfully be exercised. In ss 13 - 17 of the Education Act, the manner of exercise of the disciplinary powers of suspension and expulsion are regulated in some detail. As is well known, the broad scheme is as follows.

Principal's suspensions

Under s 13(1), set out above, a principal of a state school may suspend a student for a specified period not exceeding three days or for an unspecified period if in the principal's opinion one or more of the specified substantive grounds exists. Under s 13(2), a principal may not however suspend for a specified period a student who has previously been suspended from the school since the preceding 31st of December. That is, a second suspension within the school year must be a suspension for an unspecified period. Where a student is suspended, he or she is neither obliged nor permitted to attend the school, and the principal "shall take all reasonable steps to ensure that [the student] has the guidance and counselling that are reasonable and practicable in all the circumstances of the suspension".²⁵ Under s 14, there are a number of notice requirements imposed on the principal.

The maximum three day period for a principal's suspension for a specified period does

24 The in loco parentis doctrine is persuasively criticised by H Crook, "In Loco Parentis: Time for a Reappraisal?" November [1989] Fam. Law 447. See also "Schools and Searching for Drugs", Auckland District Law Society Public Issues Committee, 18 July 1991.

25 Section 13(3), (4).

not include the day of the suspension, nor any day on which the student would not have had to attend school in any event. Accordingly, three full school days is the maximum period. At the end of this period, the suspended student is entitled to return to the school; but procedures exist under s 15 of the Act for the parents of the suspended student to meet the principal in the interim and seek the lifting of the suspension. The principal has power to lift the suspension at any time before it is up.

Powers of boards in relation to students under sixteen

Section 16 of the Act deals with the position of a student under sixteen who has been suspended for an unspecified period. Under s 16(1), the school board has the power to lift the student's suspension at any time before it expires, either unconditionally or subject to "any conditions it wants to make", or to "from time to time extend the suspension (for a period determined by the Board when extending the suspension) if it has not already been lifted or expired". Under s 16(3), the suspension for an unspecified period of a student under sixteen is deemed to have been lifted at the close of the seventh day after the day of the suspension, if it has not by then been either lifted or extended by the school board. It follows that, if the board does not meet and resolve either to lift or to extend the suspension before the seven days is up, the board has no power to deal with the disciplinary matter at all.

Section 16 also provides for certain notice requirements and rights of attendance and participation in favour of the student's parents. The school board may not lift or extend the suspension without taking all reasonable steps to satisfy these notice requirements, and without considering both the requisite principal's written report on the circumstances of the suspension and "everything said by any parent or parent's representative at the meeting". In the event that the board does decide to extend a suspension for an unspecified period, s 16 imposes certain further requirements as to advice to the Secretary of Education and the placement of a student at another school.

In the case of a student under sixteen, therefore, it is permissible effectively to remove the student permanently from the school by resolving, on proper grounds, to extend the original principal's suspension (being a suspension for an unspecified period). This is in practice the same as an expulsion, except that the name of the student so dealt with remains on the suspending school's register of students while the suspension continues in force, unless the student is enrolled at another registered school or exempted under s 22 of the Act.²⁶

The options open to a school board dealing with the suspension of a student under sixteen for an unspecified period are therefore two-fold. First, the Board may lift the suspension at any time before it expires, either unconditionally or subject to conditions. Any conditions imposed must be both reasonable as to content and a reasonable (or if it is preferred, proportionate) response to the conduct under consideration. A condition commonly imposed is that the student enter into a contract with the board or the principal

26 See s 16(9), (10); contrast s 17(3).

as to future good behaviour and observance of school rules. Such a condition will seldom if ever be unacceptable; but (just as in the case of breach of school rules) subsequent breach of the contract, while plainly of relevance, cannot be permitted to lead to a “per se” approach to discipline by either principal or board in subsequent disciplinary proceedings.

Secondly, the board may from time to time extend the suspension for a period determined by the board. The board’s power is to extend for a period determined by it at the time. Although in a sense the board is extending what was originally a suspension for an unspecified period, it appears from the wording of s 16(1)(b) that the board cannot itself extend for an unspecified period, but must extend for a specified period. If the board fails to specify the period, then the decision to suspend may well be invalid.²⁷ This difficulty can be got around, if it is appropriate to do so, by the Board resolving to extend the suspension for a period coinciding with the student’s reaching the age of sixteen.²⁸ The board’s power to extend the suspension may be exercised from time to time (until the student turns sixteen), so that upon expiry of the specified term, the matter will need to be addressed again by the board, with notice to the student, unless (it would appear) the student has ceased to be on the school’s register by virtue of s 16(9).

Powers of boards in relation to students sixteen and over

In the case of a student aged sixteen years or over who is suspended for an unspecified period, s 17 empowers (indeed, requires) the school board either to “lift the suspension (unconditionally or subject to any conditions it wants to make) or expel the student”. Again, there are requirements as to notice of hearing and consideration of the principal’s written report and the representations made on behalf of the student.²⁹

Effect of suspension/expulsion

Students who are suspended or expelled by a school board remain entitled to apply to be enrolled at either that school or another state school. The suspending/expelling school is under no obligation to enrol such a student: s 18(1); but various forms of assistance with re-enrolment of him or her at a school, including if need be the giving of directions to enrol the student at another school or indeed even the suspending/expelling school, may if necessary be provided.³⁰

It is accepted that the foregoing brief summary of the statutory provisions does not set out in detail, far less step-by-step, the procedures to be followed in relation to suspensions and

27 In *H v C and A*, High Court, Hamilton Registry, CP 11/94, 24 March 1994, Penlington J, it was argued for the suspended student on an application for interim relief that his suspension by the board was invalid on the grounds that it was for an unspecified period. This argument was discussed at p 11 - 12, but not ruled upon.

28 The position is then governed by s 16(10), although this provision is somewhat ambiguous as to its effect, and it may well be that its meaning is that, at the time when the suspended student turns sixteen, there is a requirement to deal with him or her at that stage pursuant to s 17 of the Act.

29 Section 17(3) deals with the position as regards the school register of such a student.

30 See ss 16(5) - (8), 18 and 18A of the Act.

expulsions. For detailed guidance as to the step-by-step procedures, reference should be made to (i) the Ministry of Education's Draft 1996 Guidelines and Flow Charts for Suspensions and Expulsions in State Schools, and (ii) the extensive resource materials published by the Youth Law Project, including "A Fair Hearing: A Resource Book on School Expulsions" (1995). These materials set out the processes in considerable detail and with much helpful comment. The former will be already in the possession of schools, and the latter should be. I see no reason to attempt to duplicate this material. Instead, it is proposed to highlight some of the key procedural issues and difficulties which may arise.

The overriding duty to act in a procedurally fair manner

A number of the steps required by ss 13 - 17 of the Education Act are directed to ensuring procedural fairness. It is important to stress that compliance with these statutory minima will not necessarily be enough. The procedure at each stage must be fair and, where there is an obligation to provide the student with a hearing, then the procedure and the decision making must be conducted in a procedurally fair manner. This has long been a requirement of the common law, but the position as regards school boards and school principals is made even clearer by the New Zealand Bill of Rights Act 1990, s 27(1) of which provides:

Right to justice - (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

In my 1993 paper I summarised the key principles of natural justice relevant to schools, and will repeat them here. They are:

- (i) The right to adequate notice of hearing. This includes adequate advance notice of the time and place of hearing - giving persons affected adequate time to prepare for it; adequate detail as to the "charges" faced or issues to be discussed; and disclosure by the board or principal of information which may be prejudicial to the party concerned.
- (ii) The right to a procedurally fair hearing. This includes affording persons concerned a full opportunity to state their case; and may well in the context of many of the more important decisions to be taken by boards or principals include a right to legal representation (if requested).
- (iii) The right to a hearing and a decision free of bias and prejudice. As well as the obvious duty of a decision-maker to refrain from taking a decision until all parties have been heard, this involves a board ensuring that, to the extent permitted by law, board members who are "too close to" a particular issue do not participate in the hearing and in particular the decision-making.³¹

31 For discussions of bias or predetermination in the context of school boards of trustees, see *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478, 497 - 502; *NZPPTA v Kelston Boys' High School Board of Trustees (No. 1)* [1992] 2 ERNZ 793; *NZEI v Auckland Normal Intermediate School* [1992] 3 ERNZ 243, 269 - 271.

The extent to which these principles will apply to particular stages of the disciplinary process, and the rigor with which a court of law will apply them, will necessarily be dependent on the circumstances. It has not yet been decided whether a principal contemplating a suspension under s 13 of the Act is required to provide the student with a hearing of some sort – at least to the extent of outlining to the student what he or she is accused of and seeking the student’s explanation. But as a general rule, this is very likely to be the case. While there may be rare exceptions³², principals contemplating the discretion to suspend would be well advised to offer at least this minimum form of hearing, and sometimes even a more extensive hearing, before exercising their discretion. Equally, the argument is open that certain forms of disciplinary action falling short of suspension or expulsion – for example, significant loss of privileges such as entitlement to represent the school in a sporting capacity - may require compliance by the principal or the board as the case may be with the principles of natural justice.³³ Again, there is no decided case which deals with the matter, but prudence if not basic fairness would suggest that at least minimum hearing procedures should be afforded to the student affected.

Evidence at school board disciplinary hearings

A school board making a decision as to suspension or expulsion must by virtue of s 16(2) and s 17(2) consider, before deciding, both the principal’s written report on the circumstances of the suspension given pursuant to s 14(2) and “everything said” by any parent or parent’s representative at the board meeting. Obviously, however, the board is not limited to consideration of this material and indeed, in an appropriate case, may well be required by the principles of natural justice/fairness to go significantly beyond it.

The student’s parents must of course be provided in advance with a copy of the principal’s report pursuant to s 14(2), preferably at the same time as the report is provided to the board. Any other written material concerning the matter which is to be provided to the board should also be provided, preferably in advance of the hearing, or at least at the time of the hearing. In the latter case, the parents and the student should be given an opportunity to read and digest the material before proceeding further with the hearing.

Most student disciplinary hearings are relatively straightforward from an evidential point of view. The principal’s report will set out the results of an investigation conducted by the principal personally or on his or her behalf, and will state the conclusions reached by the principal and the reasons for those conclusions. The student for his or her part will not seriously dispute the essential facts or the conclusions reached by the principal, although the placing of a different emphasis may well be attempted. In such a case, the board’s task is largely limited to evaluating undisputed facts in relation to the statutory criteria, and reaching a discretionary decision, first as to “guilt”, and then as to “penalty”. (Note that, unless “guilt” in terms of the substantive grounds is effectively conceded, it

32 For example, where the student has absconded from school immediately following on the commission of some serious offence and his or her whereabouts is unknown.

33 Contrast, however, the views of Williams J in *Maddever*, above footnote 31, discussed later at call to footnote 39.

will usually be necessary for the board to hold its hearing and to make its decision, in two stages: the first directed to the issue of "guilt" in terms of the substantive criteria for suspension or expulsion; and the second (if necessary, and usually after hearing again from the student and his or her parents or representative as to "penalty", as to the appropriate course to be adopted in the particular case.)

While the vast majority of disciplinary hearings will no doubt proceed along the foregoing lines, a few will pose greater difficulties of management. The suspended student may for example vehemently deny the allegation of wrongdoing in question, and the establishing of "guilt" may turn on one teacher's or student's word against that of the suspended student, without supporting evidence capable of tipping the balance either way. I suspect that, in such cases, the common practice is for the principal or some other member of staff, who has interviewed the witnesses on either side, to report as to the conflicting versions and express a preference for who is telling the truth. That may well work as an expedient in some cases, and I would not suggest that it is legally impermissible. A disciplinary body such as a school board is not necessarily bound by law to hear evidence direct, and can, at least under some circumstances, act on purely hearsay evidence and indeed on opinions, providing it does not abrogate its functions to another. However, particularly where the disputed "offence" is a serious one and the student's continued future at the school is genuinely at stake, a school board or disciplinary sub-committee may have to go further, and actually hear the witnesses first hand.³⁴ Certainly, were the suspended student to insist on such a course being followed, awkward though it might well be, the safer course would in my opinion be to hold a full hearing, although perhaps not extending to unfettered questioning of witnesses on either side. Any school board that gets itself into that situation would be well advised to retain its own legal adviser to advise it as to the blow-by-blow conduct of the hearing.

The need for a board policy on student discipline

The Ministry of Education Draft Guidelines recommend that boards have a written policy dealing with suspension and expulsion. I would agree, and would recommend that such a policy deal with three main issues.

First, the policy can, and I would suggest should, establish a separate disciplinary committee pursuant to s 66(1) of the Education Act. If such a step is not taken, then as a matter of law the school board itself is required to deal with all suspension and expulsion decisions under ss 16(1) and 17(1) of the Act. Not only is this cumbersome, but it may give rise to difficulties in relation to notice and quorum, if the full board has to be assembled on every occasion. Flexibility is achieved if a smaller disciplinary committee is established, with power given to both board and committee to resolve that a particular case be dealt with or reviewed or be considered by the board of trustees as a whole.

Secondly, it is recommended that the policy incorporate a delegation of the principal's power of suspension under s 13 of the Act to some other staff member such as the deputy

34 Contrast *R v Hull Prison Board of Visitors, ex parte St Germain* (No. 2) [1979] 3 All ER 544; Wade & Forsyth, *Administrative Law* (7th ed 1994), p 537 - 40.

principal, to deal with the possibility of absence of the principal due to illness or other cause. Such a delegation is authorised by s 77I(1) of the State Sector Act 1988.

Thirdly, it is I suggest a good idea to incorporate in the disciplinary policy itself at least the “bare bones” of the statutory steps and the statutory criteria, so that the policy itself contains a reminder to principal and board of the matters to be attended to and addressed. With the traditional disclaimer of “all care and no responsibility”, I am providing as an appendix to this paper a draft policy on student discipline, for consideration by school boards which do not as yet have a policy in place.

IV Remedies for wrongful exercise of disciplinary powers

In my 1993 paper for the Legal Research Foundation³⁵ I reviewed in some detail the accountability in general terms of boards of trustees, with particular reference to the various procedures available under the Education Act; the remedy of complaint to the Ombudsmen; judicial review; and (briefly) civil liability in damages. I also touched upon the possibilities for use of mediation and Alternative Dispute Resolution in disputes involving school boards. In the present paper I can obviously leave the last of these topics in the much more capable and thoughtful hands of Judge McElrea. Nor do I propose to repeat the detailed analysis of remedial issues and in particular the principles of judicial review of school boards already attempted in my earlier paper. I will simply try to update my earlier analysis where appropriate, and to concentrate more specifically on the remedies available in the area of student discipline. I do so by looking first at the avenue of complaints to the Ombudsmen; secondly at judicial review of disciplinary decision-making; and thirdly, at damages remedies against school boards with particular emphasis on claims for breach of the New Zealand Bill of Rights Act 1990 (“the Bill of Rights”).

1 Complaints to the Ombudsman Concerning Disciplinary Decisions

In my 1993 paper I discussed at length the decision in *Maddever v Umawera School Board of Trustees*,³⁶ and Williams J’s statement in that case (at p 503) concerning recourse to the Ombudsman in preference to judicial review:

There is a strong argument for saying that [resort to the Ombudsman] is a much preferable remedy in many cases, even though the Ombudsmen have the power only to report and comment. ... The technical legal procedures for judicial review are a cumbersome way of dealing with issues of the kind which arose in this case which can be much more effectively investigated after a complaint to the Ombudsman.

I went on to discuss a limitation in the Ombudsmen Act 1975 on the jurisdiction of the Ombudsmen to investigate matters of administration involving the actions of boards of trustees themselves, as distinct from the committees, sub-committees, officers and employees of boards of trustees. The Ombudsmen in their June 1992 Annual Report had

35 See note 2 above; at p 84 - 93.

36 Note 31 above.

noted this limitation on their jurisdiction, and pointed out their lack of power to make recommendations in respect of actions of boards of trustees.

I urged that the Ombudsmen Act be amended by placing school boards of trustees among the categories of organisations subject to the full jurisdiction of the Ombudsmen. Whether for that reason or some other, it is pleasing to note that the law was amended with effect from 19 January 1994. The result is that the Ombudsmen now possess a full supervisory jurisdiction over school boards of trustees. The Ombudsmen may therefore investigate any decision or recommendation made or any act done or omitted "relating to a matter of administration and affecting any person or body of persons in his or its personal capacity" by a school board of trustees or one of its committees, officers or employees.

It appears that in the wake of the legislative amendment to the Ombudsmen Act, complaints are being made to that office concerning suspensions and expulsions in increased numbers. Unofficial figures for complaints received in the Auckland office supplied to me reveal thirty-two complaints in 1994, and the same figure in 1995. Furthermore, it appears that the decided complaints demonstrate that school boards and principals continue to fall into error concerning suspension and expulsion decisions and procedures, in significant numbers. In the March 1995 *Ombudsmen Quarterly Review*, the Ombudsmen comment:

The Ombudsmen's recent experience in reviewing decisions to expel or suspend a child has shown that some Boards of Trustees do not appear to be aware of the procedural requirements of the Education Act.

This comment is supported by a number of illustrations.

There can be no doubt that an Ombudsman's investigation will generally produce a high quality examination of a complainant's grievance. However, such investigations are generally very time-consuming, often taking months rather than weeks. There is no power residing in the Ombudsmen to bring about an interim reinstatement of the suspended or expelled student, and one suspects that as a consequence of this, the eventual outcome is not infrequently of little practical benefit to the student, who may well have been obliged to enrol at another school in the interim. Furthermore, there is the inherent difficulty that the Ombudsmen's powers are recommendatory only. An Ombudsman's recommendation can be, and at least in one school expulsion case has been, ignored by the school board concerned.

2 Judicial review of disciplinary decisions by school boards and school principals

This is a topic of considerable complexity. As I stated in my 1993 paper, in broad terms, an administrative authority is bound to act "in accordance with the law, fairly and reasonably"³⁷. Judicial review is the process whereby executive and administrative

37 *NZ Fishing Industries Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 552, per Cooke P.

authority is called to account for the legality, fairness and reasonableness (or as some prefer, rationality) of its actions.

As my earlier paper noted, school boards of trustees are in general terms amenable to judicial review. However, as analysis of the various school board decisions under challenge in *Maddever* shows, not every decision of a school board or a school principal will be subject to judicial review. Broadly speaking, decisions which affect the rights or responsibilities of another – specifically, a student – will be amenable to judicial review, while decisions which do not do so in any real way, or which have a high policy content without significant repercussions at an individual level, may well not do so.

The most common form of judicial review is that brought pursuant to the Judicature Amendment Act 1972. Judicial review in terms of this legislation turns on the existence of a “statutory power” or “statutory power of decision” falling within the terms of the 1972 Act’s definitions of those terms. In the context of student discipline, it is clear, and indeed supported by the authority of the *Palmerston North Boys’ High School* case, that both the initial suspension decision of a school principal under s 13 of the Education Act and the subsequent school board decision as to suspension or expulsion under ss 16 and 17 as the case may be, constitute an exercise of statutory power or statutory power of decision and are therefore subject to judicial review upon the usual legal grounds briefly touched upon above.

A separate and distinct issue arises as to the availability of judicial review in respect of disciplinary action falling short of suspension or expulsion. As already argued, disciplinary action which amounts to an effective suspension or expulsion whether temporary or permanent and which fails to follow the prescribed statutory procedures is clearly open to challenge, by reason of the very failure to comply with what the law requires.

The question whether disciplinary action falling short of legal or de facto suspension or expulsion may be the subject of judicial review is a difficult one, and can only be touched on briefly here. I have earlier argued that the disciplinary powers of school boards, principals and staff must be seen as drawn either expressly or by implication from the provisions of the Education Act relating to management and control of schools by boards and principals. Thus there is, it is argued, no room for the invocation of common law powers of discipline such as those bound up in the old “in loco parentis” principle. On that basis, it is argued that *all* disciplinary decisions deciding or affecting the “rights, powers, privileged, immunities, duties or liabilities of” a student, or his or her eligibility to receive a benefit, whether legally entitled to it or not³⁸ are, in principle, amenable to judicial review. Added support for this argument can be gained from s 27(2) of the Bill of Rights, which states:

Every person whose rights, obligations or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

38 The words are drawn from the definition of “statutory power of decision” in s 3 of the Judicature Amendment Act 1972.

To a degree (perhaps) against that, however, is the analysis of Williams J in *Maddever*, distinguishing between “serious or major” matters “affecting the status or the educational options of the child” on the one hand, and “purely administrative and managerial functions” in relation to “day-to-day decisions” of boards and principals on the other, the former being amenable to judicial review (at least on natural justice grounds) and the latter, not reviewable at all.³⁹

As already noted, there is a basic, albeit qualified, right to free enrolment and free education at a state school. The expression “free education” is not to be construed narrowly, and must be seen as extending across the whole range of school activities and curriculum. Any substantial interference with the right to free education by a disciplinary penalty falling short of suspension or expulsion but (for example) withdrawing privileges must, in principle, probably even on Williams J’s formulation, be open to judicial review. Whether the line is to be strictly drawn at that point, so that minor disciplinary decisions and penalties are entirely excluded from judicial review, cannot confidently be stated, although *Maddever* provides some support for the view that they will be. One suspects that the point is likely to remain academic, because of the principle of non-intervention as a matter of discretion next referred to.

Relief by way of judicial review is in the Court’s discretion. What this means is that, even if there is a reviewable decision and some kind of legal error such as a breach of natural justice is made out, the Court may still in its discretion decide to grant no relief. Established grounds for declining to grant relief include that the legal error was technical only or did not result in injustice in any real practical sense, and that the issues raised are essentially minor or trivial, or have become academic.⁴⁰ In addition, in the education sphere the Courts have clearly stated an unwillingness to intervene in relation to the managerial and administrative decisionmaking of school boards and school principals. In the course of an extensive discussion of this issue, Williams J in *Maddever* described the non-intervention principle in the following terms:⁴¹

I think there is a strong case for saying that the remedy of judicial review should be sparingly utilised in the context of the Education Act 1989. ...

Against [the] statutory background it seems clear that outside of those areas where the status or educational options of the child are involved and specific rights are explicitly recognised (for examples ss 10, 14, 15, 18, 19 and 21 ...), there is no warrant for an expansive approach to judicial review. Accountability of school boards is to be secured through other methods of oversight. In this statutory setting, the Courts should respect the evident “trade-off” between reduced judicial review in return for wider public (ie parent) participation in school board decision making ... Therefore, in other than the sensitive designated areas I have mentioned, supervision of the managerial performance of school boards by way of judicial review, should be infrequent. ...

Against this background, it seems clear that except in rare cases it would be wrong

39 At p 496, 498. See also my analysis and comments in my 1993 paper, footnote 2 above at p 89 -91.

40 There is a lengthy discussion of the relevant principles in *Maddever* at p 502 - 510.

41 See p 504, 506 - 9.

for the Court to intervene too readily in cases brought against boards of trustees in relation to purely managerial or administrative matters not seriously affecting the rights of students. ... if such matters become contentious they should be negotiated, mediated and resolved at the local level. ...

Indeed even in cases where pupils' rights are concerned it seems to me, with respect, that there is need for very considerable judicial caution. In the sensitive area of education there is a significant risk that the Courts will in administering judicial review, unwittingly impose their own views on educational issues when they have no special competence for that task and the legislature has made it tolerably clear that such matters are not primarily judicial issues but rather issues of educational policy for school boards operating against the broad backdrop of the national educational guidelines.

There can be no doubt that this passage accurately expounds a longstanding and indeed appropriate judicial philosophy of reluctance to intervene in the affairs of schools. But, with reference to judicial review of disciplinary decisions affecting students, the qualifications to the principle of non-intervention clearly signalled by Williams J need also to be stressed. There is also, in the disciplinary context, "another side to the coin" so far as Court intervention is concerned, identified by McGechan J in his judgment in the *Palmerston North Boys' High School* case:⁴²

No one should underrate a school child's capacity to perceive and feel personal injustice. The Court must be conscious not only of a public interest in orderly education, but also of a need to protect the individual child, and that child's confidence it can receive justice from authority.

So far as I am aware, the *Palmerston North Boys' High School* case is the only school discipline case which has gone to a substantive hearing. While the Court did intervene to overturn suspension and expulsion in that case, it did so only in the face of clear if not overwhelming grounds and after detailed and careful consideration of the various discretionary factors. The Court was at pains to stress (in a postscript) the limits to its decision, in the following terms:⁴³

It is important there be no misunderstanding in the educational world. This is not a decision that a school cannot pass rules prohibiting alcohol, or a decision that consumption of alcohol by a student cannot be gross misconduct. It is not a decision that a school principal and Board cannot find gross misconduct and harmful or dangerous example, and proceed to suspend for an unspecified period, or extend suspension or expel, if a student is involved with alcohol. Indeed, it is not a decision that the conclusion reached by the principal and Board in this case was "wrong" in an absolute sense; but merely that those involved went about making the decision in some respects in the wrong way. Rather, this decision holds.

42 At p 55.

43 At p 57 - 9.

(i) that "gross" misconduct involves misconduct striking and reprehensible to a high degree which warrants removal of the student from the school despite damage which would result to the student. Whether conduct attains that level will depend on all the circumstances of a particular case.

(ii) that schools may have a general policy towards alcohol and drugs, but cases of alcohol and drug use must not be resolved automatically in accordance with such policy. Principals and boards instead must carefully consider all the circumstances of each individual case before deciding whether or not individual alcohol related conduct amounts to gross misconduct. It may be troublesome, but it must be done.

(iii) that even where gross misconduct and harmful or dangerous example have been found to exist, principals must not suspend automatically. Principals must pause and consider whether in all the circumstances of the particular case, suspension for an unspecified period is warranted as a matter of discretion. Boards must consider whether, in all the circumstances of the particular case, uplifting of suspension (conditionally or otherwise) or extended suspension of expulsion is warranted as a matter of discretion. At each of the latter discretionary states, special circumstances and considerations of humanity and mercy may be brought into account.

These statutory approaches are designed for the protection of children. They are not to be sacrificed to administrative or disciplinary efficiency, or some supposed need for absolute certainty. Results must not be fixed; they must instead be fair.

Given the significant limits on availability of judicial review and the reluctance of the Courts to intervene in such matters, one can safely predict that for the foreseeable future, attempts to challenge disciplinary decisions by way of judicial review will be rare, and successful challenges even rarer. Nonetheless, boards and principals should strictly keep within the limits of the law as regards their disciplinary actions and should be scrupulous to observe the principles of natural justice, at all levels. They should do so not because they fear judicial review as a practical possibility, but because fairness and good public administration require this.

3 Claims for damages or compensation as a consequence of student discipline, with particular emphasis on remedies for breach of the Bill of Rights

Boards of trustees are bodies corporate, and are able to be sued as such⁴⁴. Boards of trustees and their staff are therefore accountable in the Court of Law in respect of any civil wrongdoing which they may commit. Individual trustees are however under no personal liability for the acts or omissions of the board of which they are a member, provided the act or omission in question was in good faith in pursuance or intended pursuance of the functions of the board.⁴⁵

It is possible to envisage specific civil wrongs being committed by a board or its employees in a disciplinary context. The two most likely candidates are assault

44 Education Act, Sixth Schedule, clause 1.

45 Ibid, clause 4.

(involving the unjustified use of force on or indeed physical contact with a student) and false imprisonment (involving the unjustified detention of the student against his or her will). Trespass to goods or conversion are also possibilities where items belonging to students are the subject of a disciplinary confiscation.

In addition to these traditional “common law” heads of potential liability, there is the Bill of Rights dimension, aspects of which have already been discussed by Paul Rishworth. In 1994, in a major decision known as *Simpson v Attorney-General [Baigent's Case]*,⁴⁶ the Court of Appeal held that the Courts have a jurisdiction to grant “effective and appropriate” relief, including monetary compensation, as a remedy for breach of rights enjoyed under the Bill of Rights. On the basis that the Bill of Rights applies to school boards,⁴⁷ it must follow that schools who in the course of disciplinary proceedings against a student breach that student’s rights under the Bill of Rights may leave themselves open to a claim for redress including payment of compensation.⁴⁸ Nor should such a claim be seen as purely a hypothetical possibility. Quite recently proceedings issued against the Crown, an Auckland school board and a number of its staff alleging assault and breach of rights under the Bill of Rights arising out of a strip searching of students on suspicion of possession of stolen property were settled out of Court on payment of compensation to the students concerned.

Paul Rishworth in his papers has addressed some of the provisions of the Bill of Rights which may give rise to difficulties in an educational context. School boards and school principals especially, as the professional advisers to boards, need to be very conscious of the content of the rights contained in the New Zealand Bill of Rights Act 1990. There is no doubt that we are becoming as a consequence of the Act and indeed for other reasons a much more rights-oriented society, and it is appropriate that educational establishments should be in the vanguard of this or at the very least should not lag behind, far less fall into default. It is therefore suggested that careful attention should be paid, both when addressing the content of school rules and policies and when dealing with disciplinary issues as they arise, to the specific rights now enjoyed by students as well as other New Zealanders, under the Bill of Rights, including in particular the following:⁴⁹

46 [1994] 3 NZLR 667. For an in depth analysis of this decision and its implications, see my essay, “The Remedial Jurisdiction for Breach of the Bill of Rights” in *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*, Huscroft and Rishworth eds (Brooker’s 1995), p 401 ff.

47 See note 4 above.

48 There is however a substantial unresolved issue as to whether the Crown is the appropriate defendant to the exclusion of all others, in a claim for redress for breach of rights under the Bill of Rights. Dicta in *Baigent* (see especially per McKay J at p 718) can be interpreted as identifying the Crown as the appropriate defendant where breach of the Bill of Rights is alleged - although it does not necessarily flow from this that, especially where the actual perpetrator of the breach is a person or body bound by the Bill of Rights by virtue of s 3(b) of the Act, the Crown should be the sole defendant. In *Hobson and Another v Harding and Others*, High Court, Auckland Registry, CP 312/95, 6 March 1995, Thorp J seems (apparently in the absence of any significant argument on the point) to have taken the view that the Crown is the only appropriate defendant. For analysis and a contrary view, see my essay referred to in note 46 above at p 416 - 421.

49 I have emphasized key portions as appropriate.

9. **Right not to be subjected to torture or cruel treatment** - *Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.*
13. **Freedom of thought, conscience, and religion** - *Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.*
14. **Freedom of expression** - *Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.*
15. **Manifestation of religion and belief** - *Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.*
16. **Freedom of peaceful assembly** - *Everyone has the right to freedom of peaceful assembly.*
19. **Freedom from discrimination** - (1) *Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.*
- (2) *Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.*
20. **Rights of minorities** - *A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.*
21. **Unreasonable search and seizure** - *Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.*
22. **Liberty of the person** - *Everyone has the right not to be arbitrarily arrested or detained.*
23. **Rights of persons arrested or detained** - ...
- (5) *Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.*

The right to freedom from discrimination established by s 19 of the Bill of Rights is a potentially important right in the context of management of schools generally, and student disciplinary decisionmaking in particular. The Human Rights Act 1993 substantially expanded the grounds of unlawful discrimination, which now comprise: sex; marital status; religious belief; ethical belief; colour; race; ethnic or national origin; disability;

age; political opinion; employment status; family status; and sexual orientation.⁵⁰ While not all of these grounds will be relevant in a school context, there is potential for at least some of them to be infringed in a disciplinary context.⁵¹

It is clear that redress (and in particular monetary compensation) for breach of the Bill of Rights is discretionary. However, given that a breach of fundamental rights would be at issue, it by no means follows that the Courts will adopt the same reluctance to intervene in the internal management of schools in Bill of Rights cases as has been expressed in the judicial review context. Given also that there is no obstacle to raising an alleged breach of the Bill of Rights upon complaint to the Ombudsmen, there are sound practical reasons as well as ones of principle, for boards to ensure full compliance with rights contained in the Bill of Rights.

A difficult legal issue on which there appears to be no case-law in the New Zealand context is whether a claim for damages (as distinct from judicial review claiming declaratory relief and perhaps reinstatement) can be brought for wrongful suspension or expulsion of a student. There is an argument that, as the right to the observance of natural justice is now embodied in the Bill of Rights, a suspension or expulsion of a student in breach of natural justice could be the subject of a claim for compensation on the basis of the *Baigent* principle.⁵² Remedies under the Bill of Rights aside, the present law would appear to be that, in the absence of breach of a duty of care owed to the student for particular reasons (for example, to avoid negligent misstatement in advice provided by the school to the student), the mere fact that a suspension or expulsion is legally invalid or that the student's right under the Education Act to be enrolled and to receive an education has been breached will not of itself give rise to a right to claim damages against the school board or principal.⁵³

V Conclusions

Statistics provided by the Minister of Education earlier this year showed an increase in the total number of suspensions of school students from 5,082 in 1992 to 8,850 in 1995.

50 Section 21 of the Human Rights Act 1993, which is too lengthy to reproduce here, expands on a number of these terms to a considerable extent. It should also be noted that while s 19 of the Bill of Rights does not explicitly say so, it is arguable whether the various exceptions and qualifications to practical application of the rights to freedom from discrimination on the stated grounds set out in the Human Rights Act would also be implied (perhaps by operation of s 5 of the Bill of Rights) into s 19.

51 Breach of s 19 of the Bill of Rights in a disciplinary context is likely also to amount to a breach of s 57 of the Human Rights Act 1993, which specifically applies to discrimination in or by educational establishments. In that event, alternative remedies would also be available pursuant to the Human Rights Act, and the disciplinary action could be challenged by this means also.

52 See the discussion in my essay on the remedial jurisdiction for breach of the Bill of Rights, note 46 above at p 438 - 9.

53 The topic is a substantial and difficult one, and space does not permit discussion of it. Malicious action in the course of suspending or expelling a student – “malice” being a term of art in this context – may well supply an exception to the general proposition just stated. For a recent detailed discussion of the right of a student to claim damages against a local authority for the provision of sub-standard education or for negligent decisionmaking in an educational context, see the House of Lords decision in *X and Others (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

There was a decrease in the number of expulsions from 120 in 1992 as against 112 in 1995, but those figures are clearly influenced by the increasing of the school leaving age, with consequent effect on the age of eligibility for expulsion, from fifteen to sixteen as from the beginning of 1993. A breakdown of the annual statistics for the same period based on ethnicity shows a depressingly high percentage of suspensions and expulsions of Maori and Pacific Island students by contrast with European and other ethnic groups.⁵⁴

The overall increase in suspensions over a three year period must be seen as worrying, although it is impossible to say whether the increase is because principals and boards are becoming more ready to suspend and expel, or there has been a deterioration in the standards of behaviour, or both. Perhaps we should be concerned about this very lack of information, and consequent ignorance of the true reasons for both the overall spiralling trend and the ethnic imbalance. Certainly anecdote would suggest that some school boards suspend and expel much more readily than others, and appear to view the suspension/expulsion process as another means of purging the school role of undesirables and serious under-achievers. It would appear that many students on the receiving end of an adverse suspension or expulsion decision prefer simply to move on to the next school, rather than fight the outcome. No doubt the delay and the lack of binding outcome involved in a complaint to the Ombudsmen on the one hand, and the major expense and uncertainty of High Court litigation on the other, leave such students with little incentive to pursue redress.

It is suggested that what this means is that we cannot deduce from the relatively low number of challenges to board suspension and expulsion decisions that the present system as clarified by judicial decision is working properly - just as we cannot, given the present limitations on our state of knowledge, necessarily jump to the conclusion that it is not. Be all that as it may, the exhortation to schools to "administer for excellence" which was a theme of the 1989 "Tomorrow's Schools" reforms should clearly not be seen as limited to student academic, cultural and sporting excellence.⁵⁵ It applies with at least equal force to the quality of dealings by school boards and their staff with students who fail to live up to the standards set and as a consequence come into contact with the school disciplinary processes. A striving for excellence in, and if possible, constructive alternatives to, the administration of student discipline within a school should, it is suggested, be high on the list of priorities for school board members and staff alike.

54 See written Parliamentary Answer by Minister of Education, 30 January 1996, reported in March 1996, Volume 19 *The Capital Letter*, Part 7 at page 2.

55 See *Maddever*, note 31 above at p 505.

APPENDIX**DRAFT POLICY ON STUDENT DISCIPLINE**

The Board of Trustees of the..... School hereby resolves:

- (1) In the case of absence from duty of the principal of the school and also on the occurrence from any cause of a vacancy in the position of principal of the school, the [deputy principal of the school for the time being] is hereby directed by the board of trustees in terms of section 77I(1) of the State Sector Act 1988 to exercise and perform from time to time as may be required the powers and duties of the principal of the school under sections 13 to 16 inclusive of the Education Act 1989.
- (2) To constitute and appoint pursuant to section 66(1) of the Education Act 1989 a special committee of trustees, to be known as the Disciplinary Committee, to deal with and determine all matters of student discipline (including suspension and expulsion of students) which are the responsibility of the board under the Education Act 1989.
- (3) To delegate to the Disciplinary Committee all the powers and functions of the board under Part II and in particular section 14 - 18 inclusive of the Education Act 1989.
- (4) The standing membership of the Disciplinary Committee shall be the following: all members of the Board [except for the student representative on the board].
- (5) For particular sittings of the Disciplinary Committee, the board Chairperson shall allocate either three or four members of the Committee to sit, as required and on rotating basis. Any two members of the Disciplinary Committee shall constitute a quorum.
- (6) Notwithstanding the foregoing, either the Board or the Disciplinary Committee constituted for a particular sitting may resolve that a particular matter or matters of student discipline shall be dealt with, or reviewed or reconsidered, by the Board of Trustees as a whole.
- (7) In every case, as soon as is reasonably practicable after suspending a student, the Principal shall provide the Disciplinary Committee, and ultimately the Board, with a full written report on the circumstances of the suspension.
- (8) The Principal shall take all reasonable steps to ensure that a student suspended from the school has the guidance and counselling, both in general and in relation to the particular circumstances giving rise to the suspension, that are reasonable and practical in all of the circumstances of the suspension.

- (9) Where a student has been suspended from the school for an unspecified period, the Disciplinary Committee or the Board as the case may be shall not lift or extend the suspension (in the case of a student under sixteen years) or lift the suspension or expel the student (in the case of a student who has turned sixteen), without taking all reasonable steps to give the student's parents reasonable notice of:
- (i) The time and place of the meeting where the Disciplinary Committee or the Board will decide whether to lift or extend the suspension or to expel the student as the case may be; and
 - (ii) The fact that any parent or the student may attend the meeting (with or without a representative), and that any parent, the student and the representative may speak about the suspension, and whether it should be lifted or extended, or the student expelled as the case may be.
- (10) The Principal in deciding to suspend a student and the Disciplinary Committee and the Board in the exercise of their functions shall not impose or extend a suspension or expel (as the case may be) unless satisfied that:
- (a) The student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school; or
 - (b) Because of the student's behaviour, it is likely that the student, or other students at the school, will be seriously harmed if the student is not suspended or the suspension is not extended or the student is not expelled (as the case may be).
- (11) Notwithstanding that a breach of School Rules may be involved, each case shall be considered and decided on its individual merits.