

# **‘Getting Rid of Troublemakers’: The Right to Education and School Safety – Individual Student vs School Community**

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Listen, we have an obligation to provide for [the students’] safety first. When they’re 18 they can worry about some of these civil liberties issues.

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## **Abstract**

A child’s education plays a large part in determining his or her future. It is fundamental to the development of a child’s personality and it predetermines the exercise of many other fundamental human rights. The right to education is fundamental to each individual, but it must be recognised that in the school environment, as in society generally, that right must necessarily co-exist with the rights of each member of the community. This is the case particularly in the context of the responsibility of a school to maintain a safe educational environment for all students. A school may suspend or expel a student whose behaviour threatens school safety, but this action must be considered in light of the significant impact it may have upon that student’s right to education. Implicated also in school exclusion are other fundamental rights such as the right to natural justice, or procedural fairness. This paper examines the balance between competing rights in the context of school safety in New Zealand schools, and in comparison with other jurisdictions.

## **Introduction**

In New Zealand, as elsewhere, there are many rights issues attached to a school’s powers to discipline students. This is particularly the case in relation to school exclusion. Any form of exclusion from school has serious and far-reaching consequences for the student. Threatening behaviour may often be a symptom of underlying problems in a student’s personal life or home or social circumstances. All students have rights, not only the victim but also the student who engages in anti-social conduct. The reality is that a school must tread a fine line between its responsibilities towards all members of the school community. All students in the school must be able to pursue their education free from the anxiety engendered by harassment and fear of assault. A school that takes inadequate steps to eliminate dangerous or threatening behaviour may be in breach of a duty of care owed to its students. However, in excluding a student from school it may be said to be depriving them of education, or acting in a manner which is discriminatory.

In deciding on whether to exclude or reinstate a student school authorities should take a wider view than just the interests of that child, but the interests and safety of the school community as a whole. A New Zealand court has had to consider this balance thus far only in the case of the

discipline of a special needs child<sup>2</sup> as has been the case in Australia<sup>3</sup>. However, its importance has been clearly stated elsewhere, particularly by the English Court of Appeal in 1996<sup>4</sup> and later the House of Lords.<sup>5</sup> There it was emphasised that school authorities have a duty to consider the implications on the whole school community and on any specific victim, and not to look on it simply from the point of view of the student offender. This paper considers individual rights in relation to school exclusion. Secondly it examines the balance between the exercise of these rights and those of the whole school. It concludes by asking the question whether it is time for a serious cultural shift, away from punishment as the justification for school discipline towards measures based on student ‘ownership’ and accountability based on responsibility and the rebuilding of relationships within the school community.

## **The Rights of Students**

In New Zealand the rights of the individual student which are implicated in school exclusion may be outlined as follows:

- The right to good guidance and counselling; and the requirement that principals take all reasonable steps to ensure that parents are told of matters which, in the principal’s opinion, are harming a student’s relationships with teachers or other students. This is contained in s 77 *Education Act 1989 (NZ)*.
- The right to education which is contained internationally in Article 13 of the *International Covenant on Economic, Social and Cultural Rights* and Article 28(1) *United Nations Convention on the Rights of the Child (UNCROC)*. Within New Zealand it is contained in s 3 *Education Act 1989 (NZ)*. Contained within the provision of education must necessary be the power of schools to discipline students who are disrupting the school environment and the educational opportunity of other students.
- The right to natural justice (or due process) guaranteed by s 27(1) *New Zealand Bill of Rights Act 1990*. In the context of children, the right to be heard on matters affecting them is contained internationally in Article 12 *UNCROC*. A statutory right of students and parents to be heard during the suspension and expulsion procedure is provided for by s 16 *Education Act 1989 (NZ)*.

## **The Right to Good Guidance and Counselling**

Section 77 of the New Zealand *Education Act 1989* provides as follows:

The principal of a state school shall take all reasonable steps to ensure that –

- (a) Students get good guidance and counselling; and
- (b) A student’s parents are told of matters that, in the principal’s opinion,
  - (i) Are preventing or slowing the student’s progress through the school; or
  - (ii) Are harming the student’s relationships with teachers or other students.

This section places a positive duty on all principals within the state school system to consider the pastoral care of all students. Importantly, it may be argued that its effect is that a principal of a state school has a duty to consider many options in dealings with bullies and victims. Viewed from the aspect of the student whose behaviour is threatening the safety of other students, it

means that the principal must ensure as far as is reasonably possible that that student receives the help they need in respect of those problems. The second part of the duty is for the principal to ensure that the student's parents are involved in dealing with any such behavioural problems. A student who is acting in a manner which threatens school safety, either through harassment, bullying or physical violence, is certainly harming relationships with teachers or other students. Section 77 arguably requires a school to consider restorative responses before considering school exclusion.

## **The Right to Education**

Within New Zealand the right to education is provided by ss 3 and 8 of the *Education Act 1989* (NZ) as follows:

Section 3 — Right to free primary and secondary education —

Except as provided in this Act or the Private Schools (Conditional) Integration Act 1975, every person who is not a foreign student is entitled to free enrolment and free education at any state school during the period beginning on the person's 5<sup>th</sup> birthday and ending on the 1<sup>st</sup> day of January after the person's 19<sup>th</sup> birthday.

And:

Section 8 — Equal rights to primary and secondary education —

- (1) Except as provided in this Part of this Act, people who have special educational needs (whether because of a disability or otherwise) have the same rights to enrol and receive education at state schools as people who do not.
- (2) Nothing in subsection (1) of this section affects or limits the effect of Part II of this Act (which relates to enrolment schemes and the suspension, expulsion, and exclusion of students).

The combined effect of ss 3 and 8 is that all students, whatever their educational needs, are entitled to free state-provided education. This does not preclude a school from exercising its powers in relation to school exclusion. The exclusion from school of children with special needs whose behaviour threatens the safety of others is considered below.

Internationally, the right of every child to education was set out in Article 26 of the *Universal Declaration of Human Rights*, adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948.<sup>6</sup> This right is also set out in Article 13 of the *International Covenant on Social, Cultural and Political Rights* and in Article 28(1) of the *United Nations Convention on the Rights of the Child (UNCROC)*. The latter was ratified by New Zealand in 1993. It provides that education shall be provided on the basis of equal opportunity, and that states shall take measures to encourage regular attendance at school and the reduction of drop-out rates. The effect of international treaties on domestic law was considered in the context of *UNCROC* by the New Zealand Court of Appeal in *Tavita v Minister of Immigration*.<sup>7</sup> There Cooke J remarked that there are some international obligations that are so manifestly important that no Minister should fail to take them into account. In his view any discretion conferred by domestic statute could only be exercised in conformity with any relevant international instrument of which New Zealand was a signatory. It was however recognised that in many cases this would

involve striking a balance between the concerns of the State and the rights of the individual. It is clear that state schools, as state institutions, are under an obligation to take the principles of the Convention into account in the manner in which they provide education and in making decisions about their students.

### **Rights Related to School Discipline**

In New Zealand school exclusion measures are termed stand-down, suspension and expulsion. They could be invoked against a student who is causing or threatening harm to other students through bullying or harassment. They frequently are invoked against students who display evidence of drug use. In relation to school disciplinary measures in general the *UNCROC* sets the standard. It states that school discipline should be administered in a manner which is consistent with children's human dignity (Art 28(2)) and that children had the right to be heard on matters affecting them (Art 12). It is suggested that this philosophy overarches all disciplinary policies and procedures adopted by schools at least in those states which are signatories to the Convention. In New Zealand it is consistent with the words of Cooke J of the New Zealand Court of Appeal in *Tavita v Minister of Immigration*.<sup>8</sup>

#### *A New Zealand School's Power to Stand-down, Suspend, Expel and Exclude*

Deciding to stand-down or suspend a student is a response of last resort. These are serious decisions, which can have far-reaching consequences for the student (and other members of their family). They should be made only after considering all the implications for the educational future and life chances of the student.

12.7                      New Zealand Ministry of Education, 1999<sup>9</sup>

In New Zealand the *Education Act Amendment Act (No 2) 1998 (NZ)*<sup>10</sup> and the *Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999 (NZ)* set out a range of procedures which may be implemented by schools in the process of managing student behaviour. Depriving a child of schooling, whether it is short, long term or permanent, bears significant consideration because of the obvious impact on the right to education. Sections 13-18 of the *Education Act 1989 (NZ)* provide the framework for stand-downs, suspensions, exclusions and expulsions in state schools. Section 13 sets out the threefold purpose of the provisions for these as follows:

**Section 13 Purpose** — The purpose of the provisions of this Act concerning the stand-down, suspension, exclusion or expulsion of a student from a state school is to:

- (a) Provide a range of responses for cases of varying degrees of seriousness; and
- (b) Minimize the disruption to a student's attendance at school and facilitate the return of the student to school when that is appropriate; and
- (c) Ensure that individual cases are dealt with in accordance with the principles of natural justice.

Stand-down is the formal removal of a student from school for a specified period. Students may not be stood-down for more than 5 days in any school term, or ten days in any school year. After a stand-down period, students return to school. Suspension is the formal removal of a student from school until the school board of trustees decides the outcome of a suspension meeting. The board may decide to lift the suspension with or without conditions, to extend the suspension, exclude or expel the student.<sup>11</sup> Exclusion means the formal removal of a student under the age of 16 years from a particular school. There is a requirement on that school to arrange teaching elsewhere. Expulsion means the formal removal of a student over the age of 16 years from school. There is no requirement for the student to be enrolled in another school and they may or may not do so.

Pursuant to the *Education Act 1989 (NZ)* the grounds upon which a principal of a state school may stand-down or suspend a student are first, that the student has engaged in gross misconduct or continual disobedience which is a harmful or dangerous example to other students in the school; and secondly, that the student's behaviour is posing a danger to other students at the school. These provisions clearly evidence the primary justification for any school exclusion, that of school safety.

These provisions need to be read together with s 60A *Education Act 1989 (NZ)* which empowers the Minister of Education to publish statements of desirable achievements for providers of education under the state system. These are known as National Education Goals (NEGS) and National Administration Guidelines (NAGS) and they are incorporated within all charters of state schools. They provide that school boards are required to help all students realise their full potential by providing appropriate learning programmes and addressing barriers to learning while respecting cultural differences. Importantly they place a duty on a school board to ensure a physically and emotionally safe educational environment.<sup>12</sup>

### *The Right to Natural Justice*

Section 13(c) of the *Education Act 1989 (NZ)* states that the purpose of the provisions are to ensure that individual cases of the stand-down, suspension, exclusion and expulsion of a student are dealt with in accordance with principles of natural justice. This is reinforced by Rule 7 of the *Education (Stand-down, Suspension, Exclusion and Expulsion) Rules 1999 (NZ)* which states the guiding principles as:

**Rule 7 Principles applying to processes, practices and procedures** — Every participant in the processes, practices and procedures dealt with in sections 14 to 18 of the Act and these rules should be guided by the following principles:

- (a) The need for every participant to understand the processes practices and procedures;
- (b) The need for every participant to treat every other participant with respect, which includes recognising and respecting New Zealand's cultural diversity;
- (c) The need to recognise the unique position of Maori;
- (d) The need for every participant to be guided by the charter of the student's school;

- (e) The need for every participant to recognise that the Board has a responsibility to maintain a safe and effective learning environment at the student's school.

In addition, to comply with rules of natural justice in their application, policies and procedures adopted by schools must, in accordance with the school charter, contain certain aims in terms of s 63 of the *Education Act 1989 (NZ)*. They must reflect New Zealand's cultural diversity and the unique position of the Maori culture. This means in practice that the school principal and board of trustees, in first making the decision to take the action, and secondly, in conducting the board hearing, must have the above considerations uppermost in their minds. In the case of Maori they must bear in mind the principles of the Treaty of Waitangi, and specifically allow members of the student's 'whanau'<sup>13</sup> to attend the meeting. While generally there is compliance with these rules, there are cases where substance and process have been the subject of court challenge.

Section 27(1) of the *New Zealand Bill of Rights Act 1990* guarantees to all persons the right to natural justice. This requires that all persons or bodies performing a public judicial function, such as teachers, principals and boards of trustees, adhere to certain principles. Natural justice dictates that there must be both substantial fairness and procedural fairness. To be substantially fair, school authorities must be sure they have significant reasons to substantiate and ensure the accuracy of the grounds for the action. Secondly, the person or body taking the disciplinary action must be able to demonstrate procedural fairness. Dependent upon the type of action, this could be the school principal or the board of trustees. The procedures designed to ensure fairness are spelt out clearly in the Act and Rules set out above. Essentially, the student must be made aware of the reasons for the action being taken and be given an opportunity to respond. Primarily they must act fairly and reasonably. This begins with the school principal who must apply natural justice in deciding whether a student should be stood down or suspended in the first instance. The principal must decide first whether the grounds exist so as to justify the action in the interests of school safety. Secondly, principals must act procedurally fairly and reasonably, in their manner of taking the action. If the student is suspended a meeting of the board of trustees must follow<sup>14</sup> in order to decide the outcome of the action. While the board receives a report from the principal, the latter is in a sense 'bringing the charge' so they must consider that report impartially rather than accepting it as a recommendation. They must hear argument, they must act impartially and without bias, they must act reasonably and give reasons for their decisions. In the school context, where the action taken is designed to deprive the student for the time being of a fundamental right, adherence to fairness is of crucial importance.

Internationally the right of a child to be heard on matters affecting them and to be accorded natural justice is provided for in Article 12 *UNCROC* which provides that:

1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views being given full weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative of an appropriate body, in a manner consistent with the procedural rules of natural law.

### *New Zealand: Applications for Judicial Review of School Disciplinary Measures*

The cases where New Zealand courts have been asked to review school decisions relating to exclusion have involved school actions for breaches of school rules rather than threats to school safety. They are, however, significant in that they show the attitude of the courts moving towards intervention in school matters generally, and their insistence on adherence to rules of natural justice in school procedures. In the 1970s there were two cases in which students challenged their suspension and expulsion from school, *Rich v Christchurch Girls' High School Board of Governors (No 1) and (No.2)*<sup>15</sup>, and *Edwards v Onehunga High School*<sup>16</sup>. In *Rich*, the Court of Appeal had no hesitation in upholding the decision of the school authorities. They considered that the school board had the authority pursuant to the *Education Act 1964 (NZ)* (then in force) to require compulsory attendance at religious observances, and the Plaintiff's opposition to school authority was sufficiently grave to come within the grounds for suspension and expulsion set out in s 130(1). Furthermore they considered that there was no breach of natural justice by the attendance of the principal at the board meeting which confirmed the principal's action. In *Edwards*, the Court of Appeal dismissed the student's application for judicial review and upheld his suspension. In the judge's view, his behaviour, in ignoring the principal's direction that he cut his hair, constituted a serious and direct challenge to the authority of the school. The behaviour set such a bad example, it was held that it was in contravention of the maintenance of control and discipline within the school.

These decisions show an early reluctance on the part of the courts to inquire into and upset decisions made by school authorities in relation to the enforcement of school rules in areas such as religious observance and a student's appearance. However, it is significant that these cases took place prior to the enactment of the *New Zealand Bill of Rights Act 1990*, and the students' rights in question are those now guaranteed by that Act.

The more recent case of *Maddever v Umawera School Board of Trustees* involved the school's reprimand of a 10-year-old pupil who had punched another student. Williams J of the New Zealand High Court demonstrated a similar reluctance on the part of the court to upset the disciplinary decisions of school authorities when he said:<sup>17</sup>

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 the 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.

Jack Maddever was not suspended or expelled, but his parents did not feel the school had handled the matter in a satisfactory manner. It is thought that in this case the judge may have been influenced in his decision by the trivial nature of the incident which led to the action.

The case which is now considered to provide a benchmark for the principles to be applied in making decisions relating to suspension and expulsion is *M & R v Syms and the Board of Trustees of Palmerston North Boys High School*.<sup>18</sup> This case involved two high school students who had consumed a small amount of alcohol on a school ski trip in breach of school rules. The offending was out of character for the two students involved. The relevant school rules provided that any breach would result in immediate suspension. Both the rector of the school and the

board of trustees took the view that the rule must be applied absolutely and the students were suspended indefinitely. The students applied for an order to have the Board's decision overturned. McGechan J upheld the students' actions. He observed that what amounted to 'gross misconduct' under the *Education Act* needed to be considered in relation to the conduct in question in each case. Because exclusion procedures have significant impact upon a student's right to education, he believed it followed that the legislature would not have envisaged that the statutory controls would have been so open to 'outflanking' by school rules which, in effect, made any infraction, however minor, 'gross misconduct'.

The importance of the Court's decision in the present context lies in the observations of McGechan J in respect of the criteria for suspension, in particular that of 'gross misconduct'. He said:

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 students 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 ...

Whether or not a particular act amounts to 'gross misconduct' will always depend upon all the circumstances prevailing at the time ... The statute allows sufficient flexibility in the concept of 'gross misconduct' to meet situations and needs which may differ. Irritating as it may be ... it is necessary to carefully consider and weigh the circumstances of each individual case, on its own merits in reaching a decision.<sup>19</sup>

And:

Is the misconduct striking and reprehensible to a point where it warrants removal from school, despite resulting individual damage? All the individual circumstances must be weighed. There are no absolutes.<sup>20</sup>

McGechan J took the uncommon step of adding a postscript in which he said:

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 ...



iii. that even where gross misconduct and harmful and 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 extending suspension, or expulsion is warranted as a matter of discretion. At each of the latter discretionary states, special circumstances 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 ...<sup>21</sup>

Two subsequent cases confirm that the court will require a strict adherence to natural justice in such matters. In *S & D v M & the Board of Trustees of Auckland Grammar School*,<sup>22</sup> Smellie J began by stating the principles which apply to judicial review in the context of such a case. First, he said, there is a fundamental difference between review and appeal. In the former the court does not decide upon the merits of the case, but rather is concerned with the correctness of the decision-making process. Secondly, the court considers whether the relevant statutory law is complied with. In this case that required consideration of the grounds for expulsion and the procedure adopted by the Board under ss 13-18 of the *Education Act 1989 (NZ)*. Thirdly, the court was concerned to ensure, in a supervisory capacity, that rules of natural justice had been observed in terms of procedure. Here, that required considerations of fairness in the Board's procedure leading to the expulsion decision. Fourthly, in a subset of natural justice, the court is concerned to ensure that there is substantive correctness, in that the decision was based on accurate facts. While accepting that mistake of fact as a ground for judicial review was unsettled in New Zealand,<sup>23</sup> he was of the opinion that the rules of natural justice were aimed at decisions which were informed and accurate and this required them to be based on correct facts.

The judge pointed to the *audi alteram partem* rule which required that parties liable to be affected by a decision must be given prior notice of the charges or case against them and must have an opportunity to be heard upon it. He referred to the recent decision in favour of the student made in similar circumstances in *Malster v Manukau Polytechnic*.<sup>24</sup> He said he was in agreement with Morris J who said that as a finding of misconduct was so serious it should never be made unless: the student concerned is aware that the possibility of such a finding exists – and given the chance to address that possibility specifically.<sup>25</sup>

In the most recent case, *Thompson v Grey Lynn School Board of Trustees*<sup>26</sup>, Potter J accepted the view that the courts should rarely intervene in decisions, unless there is a clear breach of rules of fairness. She said:<sup>27</sup>

I confirm the approach approved in *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 and *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA) that the remedy of judicial review should be sparingly utilised in the context of the Education Act. There is no warrant for the court to intervene in procedural, managerial, or administrative matters unless the rights of students, and I would include, the rights of staff, are seriously threatened. School Boards of Trustees have extremely demanding and important statutory obligations and responsibilities to fulfil. The Act vests them with wide discretion to carry out their duties. The court should be very slow to intervene unless in the

manner of carrying out their duties they adopt procedures which have the effect of operating so unfairly that they affect the rights of those whose interests under the Act, the guidelines and the goals seek to protect.

However, Potter J warned boards of trustees:<sup>28</sup>

Statutory bodies such as the Board of Trustees must always be vigilant in the exercise of their power, duties and functions to observe the principles and rules of natural justice.

## **Achieving the Balance: the Comparative Jurisdictions**

### **The Australian View**

As is the case with New Zealand and the United Kingdom, provisions relating to school exclusion in Australia generally attempt to reconcile the serious ramifications of school exclusion as a disciplinary process on the students involved, with the responsibility on a school to maintain a safe environment. Concern with the fairness of the procedures employed in the exclusion process by many schools was highlighted in 1997 in New South Wales by a case before the Supreme Court: *DM v State of New South Wales*.<sup>29</sup> The student, DM, had been excluded from a government school by the principal, on the grounds that he had assaulted a female student with weapons. His challenge was on the basis that the decision to exclude him was outside the power conferred by the relevant legislation. He further argued that it was made contrary to the rules of procedural fairness. This argument was based on the facts which showed that the principal made the decision to exclude after reading reports of this and earlier incidents of harassment, such reports not having been disclosed to the student. The student's father appealed the decision to exclude to the Assistant Director-General of Education, who appointed an investigating officer to investigate the events leading to the decision and report on the findings. The investigating officer's report supported the principal's decision and appended the earlier reports. This later report was not disclosed to the student. A further report from the investigating officer upheld the view that the student had been accorded procedural fairness. It also remarked upon the aggressive and domineering attitude of the student's father. At issue before the Supreme Court was whether the student had been accorded procedural fairness. The judge held that a person whose rights may be affected by an administrative decision must be given the opportunity to respond to damaging material used against him or her. She relied on the requirements of procedural fairness in such situations as set out in the High Court of Australia decision in *Kioa v West*<sup>30</sup> and held that the principal had a duty to accord the student procedural fairness and this duty had been breached. She said that in making a decision to exclude a student (or in taking any disciplinary action which involves the imposition of a penalty) the decision maker must ensure that all matters which are material to the decision and which detrimentally affect the student must be brought to their attention in order that the student be given the opportunity to respond.

This decision serves to confirm a view held by many in Australia that provisions relating to school discipline processes do not sufficiently emphasise the need to adhere to principles of natural justice and frequently such principles are ignored. The Australian Law Reform Commission's Report on Children in Education affirms that due process is to be followed in school exclusion processes. It follows that students at public schools may be able to invoke natural justice claims under statutory judicial review provisions and the common law. It quotes from a national survey

of young people suspended or expelled from school conducted by the National Children's and Youth Law Centre which suggests that many students are not told of their rights during the disciplinary process or made aware of their right to challenge the decision.<sup>31</sup> The report clearly adheres to the view that the detrimental effects of exclusion so seriously impact upon a student's educational opportunities that the process should be subject to independent review.

However, while accepting the need for fairness in the disciplinary processes, school authorities have a responsibility to their whole community to address incidents of violence and bullying seriously. The importance of these dual responsibilities is stressed in the report of an inquiry conducted by the Australian Law Reform Commission<sup>32</sup>. It says:

Schools need to discipline certain students to ensure the safety of the school environment or to ensure that the child's behaviour does not jeopardise the learning opportunities of other students. It can be an important means of teaching children about their responsibilities to others and to the community. However, disciplinary processes must be consistent, clear and fair. Arbitrary punishment sends inappropriate messages to children about adult authority and the credibility of legal processes in general.<sup>33</sup>

In the recent case of *CF (by her tutor Joanne Foster) and others v The State of New South Wales (Department of Education)*,<sup>34</sup> the New South Wales Supreme Court was required to consider a challenge by three students to the validity of their suspension for drug use. They sought an interlocutory injunction to restrain the defendant from enforcing the suspensions on the basis that they had been denied the procedural fairness required by the common law and the departmental procedures for suspension and expulsion.<sup>35</sup> O'Keefe J saw no proper ground for the court's intervention in the period of suspension imposed by the principal, finding that it did not appear to be unreasonable or unjust. While finding that on some aspects the principal had not acted in accordance with principles of natural justice, for example, in not advising the students of their right to have an independent person present at the interview, in most respects he had acted in a fair and unbiased manner. The judge pointed to Clause 4 of the procedures which mandates immediate suspension of any student who is in possession of a suspected illegal drug, and was of the view that of utmost importance was the government policy which this reflected, that schools must be places which are absolutely free of drugs. In taking disciplinary action in such cases a school principal has to consider not only the interests of the particular students concerned by the interests of staff and other members of the school community generally. The judge said that for the court to intervene in the decision of the school principal it would have to be satisfied that he had acted in error, and this was not the case here. Accordingly, he refused to grant the interlocutory relief sought. This case clearly shows the attitude of one Australian court at least that the overriding consideration is that of the safety of the school community as a whole. While considerations of procedural fairness are obviously of importance in a school's invoking of the procedures for exclusion of students, any 'minor' infractions may not necessarily lead a court to upset a school's decision in this regard.

### **The US: Student Rights and the Overriding Concern for School Safety**

In comparison with New Zealand, the UK and Australia, schools in the US have, in the last decade particularly, seen major tragic incidents of school violence. The introduction of policies and procedures aimed at safety in the school environment is now overwhelmingly a prime concern of school authorities there. The dilemma facing public school administrators in the US

is whether to do too much in terms of searching students and school exclusions and risk claims of unconstitutional actions; or to do too little and risk negligence or other claims in tort, or claims under the anti-discrimination provisions of the US Constitution. Courts in the US for this reason provide the lead in judicial attitudes in considering what is often seen to be the competing interests of school safety and students' rights.

There students who violate school policy may be disciplined by suspension or, for more serious infractions, expulsion. In the context of education the requirements of due process, which correspond with natural justice rights, are based on the concept of education as a property right, the deprivation of which entitles every person to a fair hearing. Procedural due process requires that the person, in this case, the student, must be provided with an opportunity to be heard and the hearing must be conducted in a fair manner. Substantive due process requires that the school has a valid objective in depriving a student of that right, the reasons must be given and the student afforded the opportunity to address them.

The leading case in relation to suspensions is the decision of the US Supreme Court in *Goss v Lopez*.<sup>36</sup> Lopez, together with at least 75 other students, had been given ten-day suspensions by the school because of disruptive or disobedient conduct in the presence of a school administrator, following a disturbance in the school cafeteria. There was no hearing conducted, each student being given the opportunity to attend a conference at the school to discuss their future. When the school's action was challenged on the basis of lack of due process the school argued that this was required only when the school subjects the student to a severe detriment or grievous loss which was not the case here. They contended that since there was no federal constitutional right to a free public education, there was no corresponding right to due process. The Supreme Court disagreed. It said that under state law the students had a legitimate claim of entitlement to public education, and that that entitlement implicated both property and liberty interests protected by the due process clause of the Constitution. Justice White on behalf of the court said that as the State had extended the right to attend public schools to students that right was a legitimate property interest.

Specifically the court held that for a suspension of ten days or less the student must be given some kind of oral or written notice of the charges against him or her. If the charges are denied the student must be supplied with sufficient details in order that they be able to defend them. The court said that if the charges were sustained they could have substantial detrimental impact upon the student's future opportunities to pursue further education and employment, so to determine them unilaterally 'collides with the requirements of the Constitution'.

However, it has now been suggested<sup>37</sup> that there is a need for the Supreme Court to address due process requirements for long term suspensions and expulsions in light of two factors. First, the fact that one year expulsions are now mandated pursuant to the *Gun Free Schools Act 1994 (US)*, and schools now have zero tolerance policies for student action involving threats to school safety. The commentator points to the recent Illinois court ruling in *Fuller v Decatur Public School Board of Education School District 61*<sup>38</sup> which required the scrutiny of a school board's policy and implementation of expulsion procedures. The students concerned were expelled following a gang brawl. They argued that they had been deprived of due process, that they had been subject to racial discrimination and that the district's policy under which they were disciplined was 'void for vagueness'. In rejecting the students' arguments the court affirmed 'the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in schools'.<sup>39</sup> It found that there had been no denial of due process, no discrimination, and the school's policies were sound.

Arguably, this case demonstrates that, in the aftermath of Columbine<sup>40</sup>, there is a judicial reluctance to overturn the decisions of school authorities. Clearly, unless there is a blatant breach by the school, or the school policies are unconstitutionally vague, the courts' primary concern is seen to be to support the schools in actions to fulfil their responsibility for safety.<sup>41</sup> In *Goss* the court did acknowledge that there may be emergency situations which required instant removal of the child in the interests of safety. Where a student's presence 'poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process'<sup>42</sup> the student may be removed as soon as possible. The necessary notice and hearing should follow as soon as practicable. There are many examples where school authorities have utilised this ability to remove students who have weapons or who are likely to cause physical harm to others. Most states now have zero tolerance legislation which enables schools to search and remove students who are found to be in possession of weapons of any sort, in the interest of school safety, order and discipline. In one example the Eleventh Circuit Court upheld the immediate removal of a student, without having given her the opportunity to explain, after she injured a principal during an altercation.<sup>43</sup> In another case, a court in Texas upheld the immediate suspension of a student for selling marijuana on the basis that black market dealing with drugs was closely involved with physical harm.<sup>44</sup>

### **The United Kingdom School Exclusion: Individual vs Community**

The ratification of the *European Convention on Human Rights* and the enactment of the *Human Rights Act 1998 (UK)*<sup>45</sup> brings into focus the issue of the rights of students in the expulsion context. The European Commission on Human Rights decided in the case of *X v U.K.*<sup>46</sup> that exclusion is not per se a breach of Article 2<sup>47</sup> which provides the right to education. This view however, was held to be subject to two provisos: that expulsion should not be used lightly as a disciplinary measure, and the procedure engaged should not breach another Convention right. The right to natural justice as contained in Article 6 of the European Convention clearly applies.

In a recent case, *Ali v Lord Grey School*,<sup>48</sup> a student who had been suspended by the school principal, applied for damages for breach of the right to education contained in Article 2. The student had been suspended indefinitely for allegedly setting a fire at the school. Even though the police charges were withdrawn the principal would not allow the student back to the school and eventually he was removed from the school roll by the Local Education Authority. This was in breach of the prescribed procedure. The Court of Appeal held that even though there were legal errors in the school's treatment of Ali, and he may have been entitled to judicial review of the school's decision had he applied in time, there was no breach of the right to education during his period of suspension as he had been offered school work during that time. However, when the school failed to readmit him after the maximum indefinite suspension period (45 days) there was a denial of the right for which, in principle, damages may be awarded.

Courts in the UK also have considered the balance between competing individual and community rights in the school context significantly in two recent cases. In the first, *R v London Borough of Camden and the Governors of the Hampstead School ex parte H*,<sup>49</sup> a student with special educational needs had been subject to bullying and finally suffered physical injury as a result of a pellet fired from a gun of one of the perpetrators. The head teacher made the decision to exclude permanently two boys whom he considered were jointly responsible. Despite having letters from the victim's father stating the detrimental psychological effects the bullies' return to school would have on the victim, the committee did not ask him to be present at the meeting with the bullies and their parents. It was decided at that meeting that the boys would not be permanently

excluded. The victim's father applied for judicial review of that decision. The Queens Bench Division declined the application on the basis that the procedure used had not been substantially or procedurally flawed. The decision was appealed. Kennedy LJ, delivering the opinion of the Court of Appeal, stated the view that the affect the bully's reinstatement at the school would have on the victim was an important consideration. The board of governors made the assumption that the victim would not only remain at the school but come to terms with what had occurred. The judges believed this was not a valid assumption and the governors should have investigated this line of inquiry further before making their decision to overturn the permanent exclusion.

The second case is a recent decision of the House of Lords, *In re L (a minor by his father and litigation friend) (Appellant)*.<sup>50</sup> It concerned a sixteen-year-old male student who was permanently excluded from his high school for a violent and injurious assault on another pupil.<sup>51</sup> An independent appeal panel, convened by the Local Education Authority, directed that L be reinstated immediately. The teachers at L's school advised the head teacher that they were unwilling to teach or supervise L and that they would ballot for industrial action to be taken should this be required. The school imposed strict conditions on L for his return to school including that he be taught privately in a room isolated from the mainstream of the school. L sought judicial review. The majority of their Lordships upheld the decisions of the lower courts, dismissing L's application. They said that the reinstatement of an excluded pupil required the head teacher of the school to balance a number of considerations. It involved the head teacher's use of the resources at his disposal together with taking into account the interests of the entire school community. Lord Hobhouse of Woodborough said:<sup>52</sup>

... A school is a complex organic entity. Its function is to provide education. To succeed in fulfilling this function it is essential that the various human beings involved work successfully together as an educational identity. The relationships are not one-to-one as with a tutor and a solitary student. The teaching of the pupils has to be a collective activity in which the teacher and pupils interact successfully and individual pupils do not obstruct or imperil the education of others. It is a truism that one or two disruptive pupils can prevent the remainder from enjoying their right to a proper education; the assertion of a liberty by one may involve, for others, the denial of their rights. Similarly each pupil has the right to a safe environment; the assertion of a liberty by one or more pupils to socialise with and inflict violence on or to victimise or bully another will involve a denial of the rights of that other. The responsibility of teachers and the head teacher are owed to the body of pupils as a whole not merely to an individual pupil in isolation. The duties, including the duty to educate and to preserve safety, are underpinned by the more basic duty to maintain discipline. This is a duty of each teacher within his sphere of activity and of the head teacher overall. Part of the duties of the head teacher is punishment in support of the maintenance of discipline.

Permanent exclusion from the school, in the view of their Lordships was the ultimate disciplinary function which preferred the interests of the school community as a whole over the individual student. While reinstatement was a reversal of the termination of the school/student relationship, it may not be in the interests of the school community to treat the incident leading to the exclusion as if it never happened.

## Conclusion

It is clear that schools have a duty to maintain a safe educational environment which is conducive to students' learning. It is equally clear that in order to maintain such an environment for all children, school authorities must take action when this environment is threatened. However, if the action they take involves the exclusion from school of a student there are very important considerations to be borne in mind. In most comparative jurisdictions, legislation provides that schools, when excluding students of compulsory education age, arrange alternative education. However, in reality exclusion from school interrupts the student's exercise of their right to education temporarily, and frequently, permanently. Courts in Australia and New Zealand have emphasised, to varying degrees, the need for adherence to rules of natural justice and procedural fairness in the school exclusion process. The strongest words in this regard are from McGechan J of the High Court of New Zealand in *M & R v Syms and the Board of Trustees of Palmerston North Boys High School*<sup>53</sup> who stressed that in his view schools must consider each case on an individual basis rather than adhering strictly to school rules of conduct.

In view of the immeasurable impact on a child caused by exclusion from school, there is a strong argument that schools also have a duty to consider other, more restorative, options of dealing with 'troublemakers'. There are now a number of schemes such as peer mediation and school community conferencing operating in schools in New Zealand, Australia, and the comparative jurisdictions.<sup>54</sup> These measures concentrate less on punishment and more on the students taking responsibility for their actions. They work on the basis that in all but the most serious cases the detrimental effects of exclusion from school outweigh any positives, and that the school community is best served by processes which work towards the restoration of relationships.

Whatever policies and practices are adopted, the overriding consideration must be the maintenance of a careful balance between the rights of all members of the school community and the rights of individual students. There can be no doubt that nowadays, in the exercise of discipline in the form of school exclusion, school authorities tread a difficult and unenviable path. Perhaps it is now the time to take that path in a new direction.

## Endnotes

1. *Chicago Tribune*, Chicago, USA, 15 August 1999.
2. In *Skilton v Fitzgibbon and St John's School Board of Trustees*, Unreported Judgment of the High Court of New Zealand, Auckland Registry, Salmond J, M142/98.
3. *Purvis on behalf of Daniel Hoggan v State of New South Wales (Department of Education and Training)* [2003] HCA 62 (Unreported, Gleeson CJ, Kirby, Gummow, Heydon, Callinan, McHugh JJ, 11 November 2003 S423/2002) 65.
4. *R v London Borough of Camden and the Governors of the Hampstead School ex parte H* [1996] ELR 360.
5. *In re L (a minor by his father and litigation friend) (Appellant)* [2003] UKHL 9.
6. General Assembly Resolution 217 A (III) 10 December 1948.
7. [1994] 2 NZLR 257.
8. [1994] 2 NZLR 257, see above.
9. *Guidance for Principals and Boards of Trustees on Stand-downs, Suspensions, Exclusions, and Expulsions*, July 1999, 6.
10. Incorporated into s 13 and following sections of the *Education Act 1989 (NZ)*.

11. s 17A(2) *Education Act 1989 (NZ)* provides that a school principal must take all reasonable steps to ensure an appropriate education programme is provided to a student who is suspended.
12. The duty of school authorities to maintain school safety is further reinforced internationally by Article 19 *UNCROC*.
13. Includes any person who the student considers to be part of his or her family.
14. s 16 *Education Act 1989 (NZ)*.
15. [1974] 1 NZLR 1; [1974] 1 NZLR 21 respectively.
16. [1974] 2 NZLR 238 (CA).
17. [1993] 2 NZLR 478.
18. Unreported Judgment of the High Court of New Zealand, Palmerston North Registry, McGechan J, 5 December 1990, CP 302 & 303/90.
19. Above n 17, at p 19.
20. Above n 17, at p 28.
21. Unreported Judgment of the High Court of New Zealand, Palmerston North Registry, McGechan J, 5 December 1990, CP302 & 303/90, 58-59.
22. Unreported Judgment of the High Court of New Zealand, Auckland Registry, June 1998, Smellie J, M477/97.
23. On p 10 Smellie J referred to Court of Appeal decisions proffering various opinions in *Danganayasi v Minister of Immigration* [1980] 2 NZLR 130; *New Zealand Fishing Industry Association v MAF* [1988] 1 NZLR 544; and *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53.
24. Unreported Judgment of the High Court of New Zealand, Auckland Registry, 17 October 1996, Morris J, CP259/94.
25. n 21 at pp. 22-23.
26. Unreported Judgment of the High Court of New Zealand, Auckland Registry, 2000, Potter J, CP74/98.
27. n 25 at p. 16.
28. n 25 at p. 32.
29. Unreported Judgment, Supreme Court of New South Wales, Simpson J, 16 September 1997.
30. 159 CLR 550, 584-585.
31. Taylor, J. (1995) 'School Exclusions: Student Perspectives on the Process' National Children's and Youth's Law Centre, Sydney, Australia, 15. A 2001 report of the National Children's and Youth Law Centre entitled '*Suspensions and Expulsions in Government Schools — The Journey Towards Procedural Fairness*' also confirms that view.
32. ALRC 84, Children in Education.
33. n 31 at p. 13 para 10.63.
34. [2003] 58 NSWLR 135.
35. *Good Discipline and Effective Learning, Procedures for Suspension and Expulsion of School Students*, Appendix 1, December 1995.
36. 419 U.S. 565, [42 L. Ed 2d 725], 95 S.Ct. 729 (1975).
37. Doty, D. (2001) 'By the Book: *Fuller v Decatur Public School Board of Education School District 61* and the essential elements of student due process in K-12 expulsion proceedings' ELA Notes, Fall, 2001, pp. 16-21, 16.
38. 78 F.Supp.2d 812 (C.D. Ill. 2000).



39. 78 F.Supp.2d 812 (C.D. Ill. 2000), 821.
40. A school shooting at Columbine High School in Littleton, Colorado in April 1999 involved the murder and wounding of students and teachers by an armed student.
41. For example, *Rogers v Gooding Pub. Joint Sch. Dist. No.231* 20 P.3d 16 [152 Educ.L.Rep.303] (Idaho 2001); *Board of Sch.Trs. of Muncie Cmty.Schs. v Barnell by Duncan* 678 N.E.2d 799 [117 Educ.L.Rep.1101] (Ind.Ct.App 1997); *Peterson v Indep.Sch. Dist.No.11*, 999 F.Supp.665 [126 Educ.L.Rep.796] (D.Minn.1998).
42. 419 U.S. 565 (1975), 582-583.
43. *C.B. ex rel. Breeding v Driscoll* 82 F.3d 383 (11th Cir. 1996).
44. *Salazar v Luty* 761 F.Supp. 45 (S.D. Tex. 1991).
45. By this Act the European Convention became part of United Kingdom law.
46. Unreported, European Commission on Human Rights (Court), 4 October 1989.
47. Of the First Protocol to the European Convention on Human Rights.
48. [2004] EWCA Civ 382.
49. [1996] EWCA Crim 436.
50. [2003] UKHL 9.
51. Pursuant to the then current legislative provision, s 64(1) *School Standards and Framework Act 1998 (UK)*. For the purposes of discussion here the new legislative provisions are unchanged.
52. [2003] UKHL 9, at para 34.
53. Unreported Judgment of the High Court of New Zealand, Palmerston North Registry, 5 December 1990, CP 302 & 303/90.
54. See Cameron, L. & Thorsborne, M. (2001) 'Restorative Justice and School Discipline: Mutually Exclusive?' in Braithwaite, J. & Strang, H. (eds) *Restorative Justice and Civil Society*, Cambridge University Press, Cambridge, UK; Morrison, B. (2001) 'Social Reintegration and Shame Management for Bullies and Victims in ACT Schools: The PRISM Project' Research Project 6/97-98, Criminology Research Council, Australia.

