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BROWN, R.E.: School suspensions and expulsions ...

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**SCHOOL SUSPENSIONS AND EXPULSIONS FROM  
NEW ZEALAND STATE SCHOOLS**

**LLB(HONS) RESEARCH PAPER  
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This paper assesses the conflict between the right to education and the powers given to school principals and Boards of Trustees of state schools under the Education Act 1989 which enable them to suspend and expel students. The paper examines how the process of suspending and expelling should be carried out in order to affirm the right to education to the greatest extent possible. It argues that suspensions and expulsions should be the option of last resort and that the result of them should not be to end a student's education. In order for the students' right to education to be truly acknowledged, legislative changes are required as are considerable attitudinal changes. This paper therefore assesses the changes which need to be made.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16,500 words.

## I. INTRODUCTION

Until recently the issue of school suspensions and expulsions has received very little media attention. Nor has it been the subject of much academic interest. However, school suspensions and expulsions raise many issues about the intersection of law and social policy in the education arena. The process of suspending or expelling is the only way in which a student can be legally removed from a school on the basis of their behaviour. It is the ultimate sanction which can be applied for bad behaviour and its use is, in theory, strictly limited. The use of suspensions and expulsions also raise questions about whether schools are adequately equipped and funded to deal with problem children.

In 1995 there were 8850 students suspended from New Zealand schools and 112 students were expelled.<sup>1</sup> This amounted to an increase of 18% in suspensions since 1994 and 129% in expulsions in the same period.<sup>2</sup> Of those suspended in 1995, nine were seven year old children.<sup>3</sup> These figures indicate that school suspensions are being used relatively frequently as a disciplinary tool for children of various ages.

School suspensions and expulsions from state schools are dealt with under the Education Act 1989. Sections 13 to 18 deal with the sorts of behaviour that students can be suspended for and the process which must be gone through before a student can be suspended or expelled. There are two types of suspensions; specified period suspensions and unspecified period suspensions. A specified period suspension can be no longer than three school days and no student can be dealt with in such a way more than once in a school year.<sup>4</sup> If a

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<sup>1</sup> Approximately 2/3 of all of the suspensions were specified period suspensions. See text below n 4. Question for written answer, Hon David Caygill, MP to the then Minister of Education, Hon Lockwood Smith, MP. Reply dated 17 January 1996.

<sup>2</sup> There were 7491 suspensions and 49 expulsions in 1994. Above n 1.

<sup>3</sup> "Creech targets suspensions" *Evening Post*, Wellington, New Zealand, 12 April 1996.

<sup>4</sup> Section 13(1) and (3).

student is suspended for a specified period, the Board of Trustees must be informed but they do not have to make any further decisions and can not extend the period of the suspension. Instead, the parent(s) of the suspended student may meet with the principal to discuss the suspension and the principal may lift the suspension immediately as a result of this.<sup>5</sup>

In order to be suspended for a specified period, the student's behaviour must meet the same criteria as that of a student suspended for an unspecified period.<sup>6</sup> However, a specified period suspension is often given as a final warning that if there is any further trouble they are likely to be removed from the school.<sup>7</sup> Once the specified period has ended, the student is allowed to go back to school.<sup>8</sup>

When a student has been suspended for an unspecified period by the principal, and the student is under the age of 16, the Board of Trustees must hold a meeting within seven days. At that meeting the Board:

- (a) May lift the suspension at any time before it expires (unconditionally, or subject to any conditions it wants to make); and
- (b) May 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.<sup>9</sup>

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<sup>5</sup> Section 15(8).

<sup>6</sup> The criteria are set out in Part IV, below n 44.

<sup>7</sup> Youth Law Project *Kicked out of School- a young person's guide to school expulsions* (Youth Law Project (Inc.), Auckland, August 1994) 1. This can not be the guaranteed outcome of any further trouble. See below Part IV A2.

<sup>8</sup> Section 15(1).

<sup>9</sup> Section 16(1). The meeting is subject to procedural requirements which will be dealt with in Part V.

If the student is aged 16 or over, then the Board must also hold a meeting (although not necessarily within seven days) at which the student can have the suspension lifted, either unconditionally or subject to any conditions, or the student must be expelled.<sup>10</sup>

This paper takes an in depth look at suspensions and expulsions. It looks at the criteria for suspending and expelling and at how these are applied. It also looks at the procedure set out in the legislation for suspensions and expulsions and at how this has been, and should be, interpreted. Problems with the legislation are also dealt with as is the effect of a suspension or expulsion on a student's right to education.

## II. A RIGHT TO EDUCATION

Both the Education Act 1989 and the United Nations Convention on the Rights of the Child (UNCORC) state that children have a right to education. Section 3 of the Education Act describes this as an entitlement:

to free enrolment and free education at any state school during the period beginning on the person's 5th birthday and ending on the 1st day of January after the person's 19th birthday.

The meaning of s3 is clear. In addition, it is supported by s20 of the Education Act which states that enrolment at a registered school is compulsory for New Zealand citizens and residents between the ages of six and 16. This is subject to two exceptions; s21 which deals with home schooling, and s22 which allows the Secretary of Education to give an exemption certificate on the application of the parents if the student is aged at least 15 and if the Secretary is satisfied that on

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<sup>10</sup> Section 17(1).

the basis of that student's educational problems, their conduct and the benefit (if any) that they are likely to get from available schools, it is sensible to do so. The student must have at least completed Form Two and been enrolled for a class above that.<sup>11</sup>

On some occasions, students who are suspended will have considerable problems which may amount to special needs.<sup>12</sup> Section 8 of the Education Act provides that:

(1) Except as provided in this Part of this Act, people who have special educational needs (whether because of 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).

Special education is defined in the Act as "education or help from a special school, special class, special clinic, or special service."<sup>13</sup>

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<sup>11</sup> This second proviso could be used as an alternative to suspension for students over the age of 15 provided that there is true consultation and that the section is applied correctly. Otherwise it could amount to a "Kiwi suspension". See below Part V C.

<sup>12</sup> In its submission to the Education and Science Select Committee Inquiry into Children at Risk through Truancy and Behavioural Problems, which was carried out in 1994 and reported to the House of Representatives on 14 March 1995, Henderson High School described the seven students that they had suspended in the first term of 1994. All seven were male and they were aged between 14 and 18. They were suspended for various reasons including violence and drug dealing. Truancy was a problem in nearly all of the cases and low self esteem was a major factor. At least two of the students were suicidal and two were victims of child abuse. Nearly all of them were known to Police Youth Aid and some were known to the Department of Social Welfare. See the appendix for a summary of the purpose, objectives and recommendations of this committee relating to suspensions and expulsions.

<sup>13</sup> Section 2 of the Education Act 1989. Section 9 of the Education Act deals with special education.



Therefore, all students, no matter what behavioural or other difficulties they have, are entitled to an education. Once a student has been suspended or expelled, s8(2) indicates that this right is, to some extent, altered as ss16 to 18A will apply.<sup>14</sup> However, this does not mean that the general right to education provided by s3 is lost.

Therefore, the Education Act not only gives students the right to an education until the age of 19, it also requires students to be educated until they are 16 years old. This must inform any discussion about school suspensions and expulsions.

UNCORC sets out various rights relating to children.<sup>15</sup> Article 28 of UNCORC states that:

1. States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

...

(e) Take measures to encourage regular attendance at schools and the reduction of drop out rates.

Although UNCORC is not part of New Zealand's domestic legislation, it was ratified in 1993 and has an increasingly significant role to play in dealing with the domestic situation in New Zealand. In the case of *Tavita v Minister of Immigration*,<sup>16</sup> Cooke P discussed the case of *Ashby v Minister of Immigration* in which the Court of Appeal had recognised that some international obligations

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<sup>14</sup> See below Part VI for a discussion regarding the application of these sections.

<sup>15</sup> Children is defined under Article 1 as meaning people below the age of 18 unless, under the law applicable to the child, majority is reached earlier.

<sup>16</sup> [1994] 2 NZLR 257.

are so manifestly important that no reasonable Minister could fail to take them into account.<sup>17</sup> He went on to say that:<sup>18</sup>

A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.

Therefore international conventions can not be ignored when dealing with New Zealand legislation. It has also been suggested that international conventions can be used as an aid to the interpretation of ambiguous statutes.<sup>19</sup> Therefore, if there was any confusion as to whether a student retains the right to education after having been suspended or expelled, the application of Article 28 of UNCORC would indicate that this was the case.

Despite this, it is clear that suspensions and expulsions do legally limit the right under s3. Section 3 provides for a right to education at *any state school* whereas s18 of the Education Act states that:

(1) Subject to section 16(7)(b) of this Act, the Board of a state school from which a student has ever been suspended or expelled may refuse to enrol the student at the school.

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<sup>17</sup> [1981] 1 NZLR 222 in above n 16, 266.

<sup>18</sup> Above n 16, 266.

<sup>19</sup> J Burrows *Statute Law in New Zealand* (Butterworths, Wellington, 1992) 238 in G W Austin "Children's rights in New Zealand law and society" (1995) 25 VUWLR 249, 253.

(2) Except as provided in subsection (3) of this section, the Board of a state school may refuse to enrol a student who has been suspended or expelled from another state school.

Therefore the right to an education *at any state school* is expressly removed by s18. However, this does not legally remove the right to an education itself although this is often the practical effect of a suspension or expulsion.<sup>20</sup>

Due to the considerable impact on a student's right to education of suspension or expulsion, such action should only be a last resort. The Commissioner for Children states that: "That is when a student's behaviour is affecting the rights of others in the school to such an extent that it warrants interfering with his or her right to education."<sup>21</sup> However, the Commissioner goes on to remind schools that they retain a discretion not to suspend or expel even if the statutory grounds are made out.<sup>22</sup>

Sometimes that discretion can be used to ensure that a student's behaviour is dealt with in a way that does not harm his or her right to education but at the same time respects the rights of others in the school. It does not necessarily follow that if the grounds for suspension are met the rights of other students and staff can only be protected by suspending the student.

The Guidelines put out by the Ministry of Education for Boards of Trustees and principals of state schools also recognise that.<sup>23</sup>

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<sup>20</sup> This is discussed in Part VI. Section 3 is also limited by s11 which deals with enrolment schemes.

<sup>21</sup> Statement of the Commissioner for Children regarding suspensions, 1.

<sup>22</sup> Above n 21, 2.

<sup>23</sup> *Guidelines for Principals and Boards of Trustees of State Schools on the Statutory and Procedural Requirements for the Suspension and Expulsion of Students* (Issued by the Ministry of Education, Wellington, July 1996) 1.

Sections 13 to 18 of the Education Act 1989 need to be considered in the context of the broader philosophy of education as it is expressed in education legislation. The main features are:

(a) Right to education.

The Guidelines go on to say that.<sup>24</sup>

The suspension, particularly for an unspecified period, and the expulsion of a student are not steps to be taken lightly or without first considering all the circumstances surrounding the particular incident at issue and all the options for addressing the matter effectively from both the individual student's perspective as well as the overall good of the school.

This statement recognises that one person's rights can not always override those of others.

Paul Rishworth in an article regarding search and seizure in schools states that the rights of the majority to a first rate and drug free education are sometimes more important than the right of some students to be free of searches.<sup>25</sup> This statement can be applied to the issue of suspensions and expulsions. It is important to recognise however, that what should be denied is the right, for example, of a student to possess and use illegal drugs at school<sup>26</sup> or to beat up other students; not the right to education itself. In fact, the student never had such rights in the first place; assault and drug taking are certainly not sanctioned by law. Nor is there any right for students to do such things as drinking alcohol

<sup>24</sup> Above n 23, 23.

<sup>25</sup> Paul Rishworth "Search and Seizure in Public Schools" in *School Discipline and Students' Rights* (Legal Research Foundation, Auckland, March 1996) 1,7.

<sup>26</sup> This is currently illegal under s7 of the Misuse of Drugs Act 1975.

at school or using verbal abuse. Therefore, although other students do have a right to education without the threat of assault or the existence of drugs, under current law, the student concerned does not forfeit their right to an education. However, on some occasions the interference with the rights of others does justify that student's rights being interfered with and suspension or expulsion may be the only realistic course of action given issues such as resourcing and the ability of schools to deal with certain kinds of behaviour. Sometimes "schools are caught between their responsibilities to the majority and spending limited funds on buying programmes like anger management for the misbehaving element."<sup>27</sup>

This raises issues about government resourcing and funding for such needs.<sup>28</sup> It also raises issues about cost effectiveness and the general purpose of education as: "Being denied education is a long term prescription for becoming a beneficiary."<sup>29</sup> From a wider perspective, these problems are seen as being, to some extent, the result of the considerable reforms in education in recent years. An issues paper prepared for the Education and Science Select Committee Inquiry into Children at Risk through Truancy and Behavioural Problems deals with the conflict faced within the education world. It states that:<sup>30</sup>

[Some] submissioners considered that the primary role of the school was educative, that teachers were trained to be educators, and that associated

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<sup>27</sup> Diana Dekker "On yer bike kid" *The Evening Post*, Wellington, New Zealand, 28 February 1996, 21.

<sup>28</sup> One example of this is a case of an intermediate aged student who had serious anger management problems. The school had asked for extra resources to deal with him but this request had been refused. He was suspended from the school but no suitable alternative school was found (especially as the parents had no transport). Therefore the Ministry reinstated him at the original school and provided more resources to deal with him. Conversation with Nicky Darlow, Wellington Community Law Centre, 10 April 1996.

<sup>29</sup> Shenagh Gleeson "Talks on school suspensions: Police support call for an inquiry" *New Zealand Herald*, Auckland, New Zealand, 2 July 1996 citing Inspector Chris Graveson, National Co-ordinator of Police Youth Aid.

<sup>30</sup> Issues Paper. Education and Science Select Committee Inquiry. Above n 12.

roles including those with a welfare focus, ought to be the province of other agencies. Others took a broader view of the school as an agency of state which had a responsibility to play various roles on behalf of society, including that of welfare and pastoral care, in serving the best interests of pupils.

This former view is supported by the observation in a further issues paper that.<sup>31</sup>

It would appear that school principals and Boards of Trustees are showing less tolerance for unruly students as a result of the education reforms that began with Tomorrow's Schools.

The effect of this attitude may be to deny some students the right to education; a right which is preserved by statute and should not be taken lightly.

Despite these reforms and costing issues, the Education Act clearly states that young people in New Zealand have a right to education. The fact that schools often feel unable to exercise this right or wish to limit it does not remove the right.

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<sup>31</sup> Issues Paper - Access to Education. Select Committee Inquiry. The submission summary of the NZPPTA (New Zealand Post Primary Teachers' Association) stated that: "The increase in suspensions and expulsions is indicative of schools assuming too great a welfare role and of the few options available to schools to deal with at risk students." NZPPTA submission no 105, submission summary, 11 October 1994. Select committee Inquiry. The effect of the reforms was also referred to in more "technical" language:

The state sector reforms with their underpinning of principles of clear single focus outputs, of the compartmentalisation of outputs into uni-dimensional segments of government, and of direct and stringent accountability for the effective and efficient delivery of those outputs, has caused schools to question the continued expectation that they should remain multi-purpose in output delivery and in the services they provide to their clients. There has been a call for welfare functions to be shed to enable a concentration on the primary educative function with its associated outputs. Issues Paper, Select Committee Inquiry. Above n 12.

### III. ROLE OF BOARDS OF TRUSTEES

From 1 October 1989 Boards of Trustees gained statutory powers under the Education Act 1989. Under s75 of the Act, Boards of Trustees are given complete discretion to control the management of the school as they see fit subject to any enactment or the general law of New Zealand that provides otherwise. The role of the principal is set out in s76 of the Education Act. This states that:

(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

(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.

Although ss75 and 76 set out clear and separate roles for the Board and the principal, it has been noted that.<sup>32</sup>

Simplistic statements about the Board making policy and the principal executing it are of no help, particularly when one is familiar with the realities of policy making in schools. The principal is part of the Board.

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<sup>32</sup> Rodney Harrison "The Powers, Duties and Accountability of School Boards of Trustees" *Education and the Law in New Zealand* (Legal Research Foundation, Auckland, April 1993) 62, 75 citing Linda Braun, the then Vice President of the Secondary Principals Association of New Zealand (SPANZ).

Parent trustees, the staff trustee and the principal control the management of [a] school, in a collaborative partnership. Boards [do] not just make policy, they implement it, by virtue of the principal being a board member. Once the decisions are made then the principal controls the day to day management of implementing the full board's management direction.

Under s72, the Board is entitled:

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.

The Guidelines put out by the Ministry of Education state that:<sup>33</sup>

It is recommended that school Boards should have written policies or make bylaws under section 72 of the Act which incorporate policies and procedures for the control and management of the school including matters of student discipline. Any such policies should take into account the provisions of the Education Act, the Human Rights Act, the New Zealand Bill of Rights Act and other relevant statutes and regulations.

In making decisions regarding the management of the school, the Board must also have a written Charter of aims, purposes and objectives which must have been written after wide consultation within the school community.<sup>34</sup> The Charter is deemed to contain the aim of achieving, meeting and following the

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<sup>33</sup> Above n 23, 3.

<sup>34</sup> Section 61 of the Education Act 1989.



national education guidelines which are set out by the Minister.<sup>35</sup> Therefore the Board does not have an entirely unfettered discretion in deciding how to manage the school.

Part of the responsibility of the Board is to deal with situations where students have been suspended by the principal for an unspecified period.<sup>36</sup> The Board of Trustees has to decide whether to lift or extend the suspension in the case of under 16 year olds<sup>37</sup> and whether to reinstate or expel students over the age of 16.<sup>38</sup> This is an extremely important role as no student can be removed from a school as a result of an extended unspecified suspension or an expulsion without the Board making the final decision. In the case of a specified period suspension, the principal must also inform the Board and provide them with a full written report on the circumstances of the suspension.<sup>39</sup>

Therefore, although the principal makes the initial decision as to whether a student should be suspended, it is the Board which is the final arbiter. The fact that the Board of Trustees carries out this role raises various concerns.<sup>40</sup> In the leading case in this area of *McManus & Rowe v Syms and the Board of Trustees of Palmerston North Boys High School*<sup>41</sup> the respondent stated that the Court should be particularly cautious when asked to review school discipline; "an area traditionally left to schools which have the expertise."<sup>42</sup> However, under the

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<sup>35</sup> Section 61(2) of the Education Act 1989. See appendix for the National Education Guidelines.

<sup>36</sup> The Board can, however, delegate this power to a committee under s66. As Greig J said in *C v H & Anor* (Unreported, High Court, Masterton Registry, CP3/93, 23 April 1993) this can be particularly beneficial in a small or rural area where members of the Board may be widespread and unavailable at short notice. In the case of a student who is under the age of 16, the Board meeting must be held within seven days (s16(3)).

<sup>37</sup> Section 16 of the Education Act 1989.

<sup>38</sup> Section 17 of the Education Act 1989.

<sup>39</sup> Section 14(2) of the Education Act 1989.

<sup>40</sup> Procedural issues arising out of this are dealt with in Part V D3.

<sup>41</sup> Unreported, High Court, Palmerston North Registry, CP302 and CP303, 5 December 1990, McGechan J.

<sup>42</sup> Above n 41, 16.

current regime such decisions are left to Boards of Trustees which do not have expertise. Unlike school principals, Board members have not generally made a career of education and are not required to have children of their own.<sup>43</sup>

Although the principal can make a recommendation to the Board, it is important that the Board comes to an independent decision. Therefore, the Board is asked to carry out a very difficult task for which they have no training. They must also deal with a very complex piece of legislation. This is a matter of some concern.

#### **IV. GROUNDS FOR SUSPENSION**

Section 13(1) sets out the grounds on which a student can be suspended being:

- (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 legislation itself provides very little guidance as to what sort of behaviour is sufficient to meet the grounds required for suspension. However, it is crucial that the grounds for suspension are adequately met otherwise the decision of the

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<sup>43</sup> Section 94 deals with the constitution of Boards of Trustees. It could be argued that people with no children of their own are unlikely to stand for, or be elected on to, a Board but this will not necessarily be the case.

Board can be overturned.<sup>44</sup> Boards and principals must therefore look to other things for guidance in this area.

#### A. *Guidance*

Given that the details of specific suspensions remain confidential there is very little detail about the sorts of behaviour which should be sufficient to trigger suspensions or what sorts of behaviour do in fact result in suspensions.<sup>45</sup> Until July 1996 schools only had to inform the Ministry of Education whether they had suspended under section 13(1)(a) or (b). Therefore, the Ministry had no information on the grounds on which students were suspended. New forms introduced in July 1996, however, require more detailed information to be given.

The Ministry of Education does, however, publish guidelines for principals and Boards of Trustees<sup>46</sup> and the Youth Law Project in Auckland also publishes an

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<sup>44</sup> An example of this is a case which went to the Ombudsman from an Upper Hutt College decision. In this case a student admitted that he had used datura at school on one occasion. (The Ombudsman found that this in itself was not sufficient proof that the student had, as the Board contended "regularly used a highly dangerous and toxic hallucinogenic".) However, the initial notice of suspension and the Acting Principal's statement to the Disciplinary Committee did not refer to a finding of "gross misconduct that is a harmful or dangerous example". Therefore there was nothing to show that the requirements of the Education Act had been addressed. This, combined with other procedural problems resulted in a recommendation from the Ombudsman that the student be reinstated. The Board refused to implement this recommendation. *Annual Report of the Office of the Ombudsman*, Wellington, 30 June 1993, 26 - 28. However, the Ombudsman now has more power in such situations. See below Part VII C.

<sup>45</sup> In her study of school suspensions and expulsions in Christchurch secondary schools in the first term of 1994, Anne Overton found that of the 213 students suspended:

- 38% of the suspensions were for violence
- 22% were for verbal abuse
- 16% were for drugs at school (including cigarettes)
- 14% were for defiance or disruption
- 9% were for property offences
- 1% were for other reasons.

Anne Overton *Circumstances Leading to the Suspension of Students from Christchurch Secondary Schools* (Education Department, University of Canterbury, Research Report 95-2, July 1995) 17. The Correspondence School claims that a growing number of suspensions are for disruption in class. Submission no 118, Submission of the Correspondence School to the Select Committee Inquiry. Above n 12.

<sup>46</sup> Above n 23.

Adviser's Guide on School Suspensions.<sup>47</sup> Neither of these publications contain a lot of detail on the sorts of behaviour that are relevant, their focus being on procedural fairness. Decisions of Boards of Trustees are, however, subject to judicial review in the High Court of New Zealand, a process which resulted in the case of *McManus & Rowe*.<sup>48</sup> This provides considerable judicial guidance and remains the leading case in the area.

*McManus & Rowe* dealt with two students who consumed small amounts of alcohol while on a school trip as members of the school skiing team. McManus, a fifth former, consumed approximately half a can of beer and Rowe, who was in the third form, consumed a lesser amount. McManus was expelled by the Board and Rowe had his indefinite suspension extended on the basis that they had broken the school rules regarding alcohol. In this case, a circular had been sent to the parents of all third formers which highlighted the school rules regarding alcohol. This said that:<sup>49</sup>

Offences against school rules relating to alcohol will also result in immediate suspension and a recommendation to the Board of Trustees for the removal of offenders from the school.

McGechan J ruled that the suspension and expulsion were invalid as neither the principal nor the Board had addressed their statutory discretions under the Education Act in accordance with the law.

### **1. Meaning of "gross misconduct"**

In his decision, McGechan J stated that:<sup>50</sup>

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<sup>47</sup> Youth Law Project *School Expulsions: An Adviser's Guide* (Youth Law Project (Inc.), Auckland, revised and updated to May 1992).

<sup>48</sup> See below Part VII A for a discussion regarding judicial review.

<sup>49</sup> Above n 41, 3.

<sup>50</sup> Above n 41, 19.

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.

"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.

McGechan J went on to describe "serious extreme" actions such as stabbing or other injurious assault on a teacher as clearly qualifying.<sup>51</sup>

However, he stated that:<sup>52</sup>

Such small matters as uniform irregularities, whistling in corridors, lateness and the like, however infuriating to teachers, hardly could [so] qualify (although the possibility of repetition amounting to calculated defiance of authority and creating a more serious situation is not excluded).

He went on to say that it was not possible to have preordained absolutes and that for intermediate situations: "Whether or not a particular act amounts to "gross misconduct" will always depend upon all the circumstances prevailing at the time."<sup>53</sup> In order to demonstrate this, McGechan J discussed the example of a theft and said that amongst the questions which would need to be asked in order to establish whether it amounted to "gross misconduct" would be whether theft was an occasional problem or endemic and serious, whether it was an

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<sup>51</sup> Above n 41, 26.

<sup>52</sup> Above n 41, 27.

<sup>53</sup> Above n 41, 27.

isolated incident and whether it disrupted the efficient functioning of the school. "Thefts from one school, or at one particular time, may amount to "gross misconduct", and from another school or at a different time may not."<sup>54</sup>

While this reasoning may appear to be sound, this may result in students from schools in lower socio-economic areas where there are large problems with theft being suspended more easily.<sup>55</sup> The fact that there have been other thefts in a school should not necessarily elevate one incident by a particular student into one of sufficient seriousness to warrant suspension. Similarly, students from schools with "good reputations" could also be more easily suspended under this reasoning in order to reinforce the school's strict "no nonsense" attitude.<sup>56</sup> Scapegoating must be avoided given the seriousness of the consequences.

## 2. Effect of school rules

A Board of Trustees is entitled to make school rules under Part IV of the Education Act which deals with "control and management" of the school. The school Charter sets out the aims, purposes and objectives of the school and s72 allows for the making of bylaws which the Board thinks necessary for the control and management of the school. Under s76(2)(b), the principal also has the power to manage the school's day to day administration. Rishworth writes that this:<sup>57</sup>

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<sup>54</sup> Above n 41, 27.

<sup>55</sup> This is of course a generalisation. However, there is considerable concern about the level of Maori students being suspended. The figures for the first half of 1995 show that Maori students made up 38% of all specified period suspensions (1,163 of a total of 3,074) and 46% of all unspecified period suspensions (631 of 1,378). *School Students Suspension Statistics: January to 30 June 1995* Ministry of Education, 7 August 1995.

<sup>56</sup> The case of *McManus & Rowe* is perhaps an example of this. The judgment states that the student from Feilding Agricultural High School who was responsible for supplying the beer was sent home as an individual but that no team action was taken despite the fact that approximately seven students from that school were involved. Above n 41, 7.

<sup>57</sup> Above n 25, 15.

implies the power to maintain and enforce rules directed toward the maintenance of a proper educational environment within which teachers may fulfil their educational duties. Some of the necessary rules will relate to discipline in the school.

It is important that there are some school rules so that students know what sort of behaviour is acceptable in the school environment. However, it is clear from the decision of *McManus & Rowe* that "gross misconduct" cannot be predetermined by school rules.<sup>58</sup>

In the case of *McManus & Rowe*, the Rector argued that the:<sup>59</sup>

penalty for breach of standard rules should be standardised so that [the rules] are applied with uniformity and certainty so that students are aware that certain penalties result from breach of these rules.

McGechan J refused to agree with this statement because "The legislation does not permit arbitrary predeterminations."<sup>60</sup> However, he stated that rules were relevant as they demonstrated the importance of the matter involved to the school. Knowing breaches of school rules could also have "overtones of challenges to authority". Therefore: "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."<sup>61</sup>

In order to assist those using the decision as a frame of reference, McGechan J added a postscript stating:<sup>62</sup>

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<sup>58</sup> Above n 41, 32.

<sup>59</sup> Above n 41, 29.

<sup>60</sup> Above n 41, 29.

<sup>61</sup> Above n 41, 29.

<sup>62</sup> Above n 41, 57 - 59.

It is important [that] there be no misunderstandings 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.... Rather it holds:

....  
(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.  
....

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

Given the weight placed on school rules, such rules must also be fair and in accordance with student's rights; a rule that is based on discrimination may not be upheld by the Court. It is possible that the case of *Edwards v Onehunga High School Board*<sup>63</sup> which involved a male third former who refused to cut his hair in accordance with a rule about boy's hair length, may be decided differently given that s21 of the Human Rights Act provides that sex is a prohibited ground of discrimination. This would also be a breach of s19 of the Bill of Rights Act which prohibits discrimination.<sup>64</sup>

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<sup>63</sup> (1974) 2 NZLR 238.

<sup>64</sup> See below Part VII B for a discussion on the remedies for such a breach.



Section 57 of the Human Rights Act provides that it shall be unlawful for an educational establishment to exclude a person as a student by reason of any of the prohibited grounds of discrimination. Therefore, to suspend a student because he failed to cut his hair in accordance with a school rule which was discriminatory would be a breach of s57 of the Act.

A similar situation was dealt with in Australia in the case of *Cope v Girton Grammar School Limited*<sup>65</sup> where a male student was issued with a "uniform defect notice" which prevented him from attending classes because he refused to cut his hair in accordance with a school rule that.<sup>66</sup>

Hair must be well brushed in a neat, appropriate and conventional style. It must be tied back if worn in a longer style. Boys shall have hair to collar length at a maximum.

It was found that this did amount to discrimination and the student was allowed to return to school. This decision was upheld by the Supreme Court of Victoria.<sup>67</sup>

There have not been any New Zealand cases in this area, but it is submitted that the same approach should be followed. Therefore, a school should not have school rules which are discriminatory.

The decision of McGechan J does not mean that schools can not have school rules; the legislation clearly allows for them and they are important in setting boundaries for students. However, such rules can not state that they carry an automatic penalty.

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<sup>65</sup> (1995) EOC, 92- 680, 78, 150.

<sup>66</sup> Above n 65, 78, 152.

<sup>67</sup> *Girton Grammar School v Cope* (1995) EOC 92- 713, 78, 354.

McGechan J stated in *McManus & Rowe* that one of the factors to consider was whether the rule was an important one to the school. Therefore it is suggested that rules regarding such matters as drug taking and assault, or any other matters which the Board considers very serious should state that: "Any breach of this rule will be treated very seriously and may result in suspension as such behaviour is not acceptable at X school." In order for such statements to be effective, it would be advisable for Boards to include this statement only for rules which are viewed by them as being very important and of the type which could conceivably lead to suspension. Such a statement is preferable to a rule which states:<sup>68</sup>

drugs - any student found carrying, buying, selling or under the influence of drugs or involved in substance abuse will be suspended immediately pending hearing of the Board, after which (providing guilt has been established to the satisfaction of the Board) the offending student will almost certainly be expelled from the college.

The latter example is likely to be seen by the Court as fettering the discretion of the principal and the Board as it does not require them to determine, as McGechan J said, "whether or not individual ...conduct amounts to gross misconduct."<sup>69</sup> Nor does it take into account the fact that even when behaviour is found to amount to gross misconduct, both the principal and the Board still retain a discretion and must look at other factors such as the quantity consumed, whether this student has previously caused trouble, or any mitigating circumstances such as problems at home.<sup>70</sup>

Despite the fact that *McManus & Rowe* is a leading High Court decision in this area and should be followed carefully, the suspension of 14 Cambridge High School students for drug use in June 1996 demonstrated that there is much

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<sup>68</sup> The Upper Hutt College case referred to at above n 44 had this rule.

<sup>69</sup> Above n 41, 58.

<sup>70</sup> See text at n 92.

confusion and misunderstanding about the place of school rules in the suspension process. The Minister of Education, Hon. Wyatt Creech MP, said on National Radio that he would only be concerned about the high number of suspensions from Cambridge High School "...in the narrow sense, if it's not abiding by the law" and then went on to say: "If that is what the school policy is and the students are all told, it's hard to criticise the school for enforcing the rules that they have put in front of their people."<sup>71</sup>

The principal of nearby Ngaruawahia High School was also quoted as saying that: "Any students at Ngaruawahia High School who are caught using drugs or alcohol are immediately suspended..."<sup>72</sup> which clearly amounts to a breach of the law as set down by McGechan J in this area. In addition, the school allows some students to be readmitted on a contract basis which requires them to undergo counselling but "If they break their contract that's their last chance."<sup>73</sup> This is also a breach of the law as it provides for a fixed result and does not allow for the exercise of any discretion. This does not mean that a student who was readmitted on this basis could not be suspended if they again used drugs; however, in such a case the procedure for suspensions and expulsions would have to again be followed. Previous behaviour can not be used in order to fast track a student through the process.

The Editor of the *Ashburton Guardian* also wrote at length on the issue saying that.<sup>74</sup>

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<sup>71</sup> "Morning Report", *National Radio*, 27 June 1996.

<sup>72</sup> Emma Hopkins "Support, not Suspension, says Ngaruawahia Principal" *This Week*, Ngaruawahia, New Zealand, 4 July 1996.

<sup>73</sup> Above n 72.

<sup>74</sup> Sue Newman "It's time someone took a stand and Cambridge has" *Ashburton Guardian*, Ashburton, New Zealand, 28 June 1996.

[P]eople are so accustomed to rules being bent to suit their purposes that they find it intolerable when someone has the courage to set rules and stand by them....

The rules are very clear and punishment for their breach is equally clear. There are no options and no shades of grey. Students know exactly where they stand - commit crime A and punishment B will follow.

This statement clearly goes against the law set down by McGechan J in *McMamus & Rowe* and in some ways it clouds the issues. McGechan J himself said that there is nothing to stop schools having rules prohibiting certain substances at school. Nobody is denying the right of the school to make rules and to stick by them. What is not allowed, however, is a statement in a rule that a breach will automatically result in suspension. This does not mean that the breaking of a rule must go unpunished, or even that it cannot result in suspension. It does, however, mean that the principal and the Board must consider all of the circumstances before deciding on an appropriate punishment.

### 3. Meaning of "continual disobedience"

The Youth Law Project's student guide to school expulsions describes continual disobedience as "where a student deliberately or regularly fails to do what he or she is told."<sup>75</sup> The Ministry of Education guidelines state that:<sup>76</sup>

"Continual disobedience" is more than not doing what [one] is told or responding slowly. There must be an element of deliberate non-cooperation or defiance which happens more than once. Frequent or repeated breaking of school rules may be continual disobedience.

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<sup>75</sup> Youth Law Project *Kicked out of school- A young person's guide to school expulsions* (Youth Law Project Inc., Auckland, August 1994) 2.

<sup>76</sup> Above n 23, 8.

Therefore, no specific behaviour will come into this category. The behaviour must, however, be continual. Therefore an isolated act of disobedience would not come under this category although it might amount to gross misconduct.<sup>77</sup> If suspending on this basis the school should have clearly documented evidence of continual disobedience and this should have been drawn to the student's attention and to the attention of the student's parents in the past.<sup>78</sup> Failure to comply with this may result in the decision being overturned.

#### 4. Harmful or dangerous example

In order to be suspended for gross misconduct or continual disobedience, this behaviour must be a harmful or dangerous example to other students. Therefore, the process must be undertaken in two stages. It has been suggested that the question to be asked is "Will this behaviour lead to the imitation of anti-social or rebellious behaviour?"<sup>79</sup> This will be particularly relevant where it is a case of continual disobedience. Dr Rodney Harrison QC states that schools must be careful not to assume that just because the behaviour amounts to gross misconduct, that it is an example to the other students, or even if it is an example, that it is a harmful or dangerous one. He suggests that the student's mental state at the time of the misconduct may mean that "no properly informed person could view it as an example to others."<sup>80</sup> This is a difficult test to apply. However, s13 states that the principal may suspend *if, in the principal's opinion* the student's behaviour fits the criteria. Therefore, the principal is entitled to come to a decision on the basis of her or his opinion.

McGechan J also stated that:<sup>81</sup>

<sup>77</sup> Dr Rodney Harrison QC "Student Discipline by School Principals and Board of Trustees: Powers, Procedures and Remedies" in *School Discipline and Students' Rights* (Legal Research Foundation, Auckland, March 1996) 56, 62.

<sup>78</sup> This is required under section 77 Education Act 1989. See below Part V A.

<sup>79</sup> Patrick J Walsh *School Discipline and the Law: A Practical Guide for Administrators, Boards of Trustees, Teachers and Parents* (Longman Paul, Auckland, 1993) 15.

<sup>80</sup> Above n 77, 61.

<sup>81</sup> Above n 41, 29-30.

If driven to it, I prefer the latter and subjective approach. 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 properly intended to allow the principal the expedient of reliance upon his own opinion, subject only to administrative law controls.

Therefore, the decision must be made as the result of a subjective assessment by the principal on the basis of her or his experience as an educationalist.

#### **5. Serious harm**

Section 13(b) sets out the second ground for suspension. Under this subsection, a student may be suspended if, in the principal's opinion,-

(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.

This is a difficult category to deal with. Given the significance of the consequences, the harm must be sufficiently serious to warrant such action. This aspect of s13 was enlarged upon by Greig J in *C v H & Anor* where he said:<sup>82</sup>

The words used in the statute are words of ordinary import which do not, I think, require any analysis to extract their meaning. It is to be remembered that they are to be applied by lay people, not lawyers, who have the control and management of the school and the pupils all together. The principal and the Board are to be the judges of the

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<sup>82</sup> Above n 36, 7.

behaviour in question and the result of that, whether it is likely or not to cause serious harm.

Greig J went on to say that the decision could not be based purely on past behaviour as the section was intended to prevent serious harm in the future.<sup>83</sup> In that case, Greig J was dealing with a student who had been involved in the consumption and trading of drugs. He had also drunk some alcohol and allowed other students to drink. The principal found that there was likely to be harm to students as a result of exposing them to drugs and alcohol. The principal also felt that the student was unaware of the implications of his behaviour and was likely to repeat it.<sup>84</sup>

In extending the unspecified period suspension, the Disciplinary Subcommittee of the Board was concerned about the involvement of other students and the fact that the student admitted to behaving in this manner on previous occasions. They were also concerned about the student's ability to resist further temptation and not trade again.<sup>85</sup> Greig J upheld their decision.

On the basis of the facts of *C v H*, the case could, however, have been dealt with under s13(1)(a) as gross misconduct. The judgment therefore does not help to establish why s13(1)(b) exists. Walsh cites examples of things which would fit this second category as being alcohol, drugs, weapons and pornographic material.<sup>86</sup> However, these things could also fit within the gross misconduct category.

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<sup>83</sup> Above n 36, 7.

<sup>84</sup> Above n 36, 5.

<sup>85</sup> Above n 36, 6.

<sup>86</sup> Above n 79, 15.

The rationale for the inclusion of this section is therefore difficult to establish.<sup>87</sup> Harm to learning is not likely to be sufficient to come within it and the harm must be serious. Harrison states that the behaviour does not have to amount to gross misconduct or continual disobedience and suggests that a student who is showing behavioural symptoms of serious mental disturbance could fit into this category.<sup>88</sup> However, while this may be the case, the appropriateness of including this sort of thing in a section which is dealing with disciplinary action is questionable. It would be preferable to deal with such a situation in a different manner with the involvement of the parents. If a student under the age of 16 is suspended the legislation requires the principal to try to find another state school for them. However, it is submitted that this would not be an appropriate way of dealing with a student who suffered from serious mental disturbance.<sup>89</sup> Therefore, it must be assumed that the legislature was not intending to use s13(1)(b) to deal with such situations as this does not fit within the scheme of the legislation.

Harrison also suggests that a student who is a repeat sexual offender out of school hours could be dealt with under this category.<sup>90</sup> However, the Ministry Guidelines point out that:<sup>91</sup>

[S]chools should not confuse youth justice procedures with suspension procedures. Although the behaviour that results in youth justice action being taken may satisfy the grounds for suspension, the fact that youth justice action has been taken is not in itself reason for suspension.

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<sup>87</sup> The wording is very similar to that of the equivalent section of the former Act, s130 of the Education Act 1964, which allowed for a student to be suspended "... whose attendance at school is likely for any serious cause to have a detrimental effect upon himself or upon the other pupils."

<sup>88</sup> Above n 77, 63.

<sup>89</sup> It is possible that s18A could be invoked. This is discussed in Part VI C.

<sup>90</sup> Above n 77, 67.

<sup>91</sup> Above n 23, 4.



Therefore schools need to be very careful about suspending students for this sort of thing. In addition, there is no judicial or legislative guidance in this area and therefore the issue of whether s13(1)(b) was intended to deal with such behaviour is open to debate.

#### 6. Other circumstances

Once the grounds for suspension are made out, the principal initially, and then the Board, must exercise their discretion as to whether the particular student should be suspended. This involves a consideration of all the circumstances surrounding the case. In his judgment in *McMamus & Rowe*, McGechan J stated his view that in some cases suspension may be a disproportionate punishment. He suggested that a student who had not previously offended and who was at a vital stage in schooling (about to sit major exams, for example) could be shown some leniency. He also felt that flexibility was required in dealing with students with special problems, either psychological or material.<sup>92</sup>

A child suddenly violent at school towards a teacher might simply be repeating violence at home, not his fault, and be capable of control. A child who behaves destructively or irrationally might be calling for help, and deserve help rather than punishment. A child who steals might be from a disadvantaged background and be hungry or lack essential clothing items.

This indicates that such decisions can not be made in a vacuum. Once again McGechan J clearly spelt out what this aspect of his decision meant in the postscript.<sup>93</sup>

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<sup>92</sup> Above n 41, 40.

<sup>93</sup> Above n 41, 58.

(iii) ...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 [the] suspension (conditionally or otherwise) or extended suspension or expulsion is warranted as a matter of discretion. At each of the latter discretionary stages, special circumstances and considerations of mercy may be brought into account.

Such matters can not be ignored by either the principal or the board when suspending.

#### 7. The board's decision

In the case of an unspecified period suspension, the Board must decide whether to lift the suspension or extend it for a student who is under the age of 16 or to lift it or expel a student aged 16 or over. There is nothing in the legislation which states what criteria the Board should use when making these decisions. However, McGechan J held in *McManus & Rowe* that:<sup>94</sup>

It is clear that the powers of Boards are not untrammelled.... The "gross misconduct" and "harmful or dangerous example" prerequisites which empower and restrict a principal, apply likewise to powers and consideration at Board level.

In addition to omitting the grounds on which the Board should make its decision, the legislation is also ambiguous. Section 16(1)(a) refers to the power of the Board to lift the suspension before it *expires* although when it expires is

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<sup>94</sup> Above n 41, 45.

not clear from the legislation. It must be assumed that this is a reference to a situation where the meeting of the Board is not held within seven days in which case the suspension is deemed to be lifted.<sup>95</sup> This should be clarified in the legislation. Section 16(1)(b) speaks of the Board's power to "extend" the suspension which implies that the suspension is of some pre-set length. However, the basis of an unspecified suspension is that it is not for any pre-determined time and that it is for the Board to set its length. In addition, the Board is given no guidance as to the appropriate length of time for the suspension to continue and often a suspension will be extended until the student's 16th birthday.<sup>96</sup> It is important that the Board does make a decision as to the length of the suspension because otherwise the decision can be declared invalid because it is procedurally wrong.<sup>97</sup> These things should also be clarified in the legislation.

McGechan J also looked at whether the Board of Trustee's decision should be made on a subjective or an objective basis. He held that: "At this final determination stage with no appeal open, the legislative expectation could be that [the] decision would be on the relatively more demanding and standardised 'objective basis'."<sup>98</sup>

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<sup>95</sup> Section 16(3) of the Education Act 1989. Decision of the Ombudsmen, case no A2097, dealt with this and held that the student could not then be re-suspended for the earlier behaviour, Above n 47, 3.

<sup>96</sup> The Select Committee recommended that the Education Act should be amended to incorporate a statutory limit on the length of the suspension. Above n 12.

<sup>97</sup> In one case decided upon by the Ombudsmen, a 14 year old was suspended for an unspecified period and the Board decided to extend it until it had received a written report from a counsellor that the student was not likely to repeat the type of behaviour which had resulted in the suspension. The Ombudsmen found that this decision did not meet s16(1)(b) requirements that it be extended for a "specified period". (In this case there was no recommendation for reinstatement because of other aspects of the case) *Te Arotake: Ombudsmen Quarterly Review* Vol 1, Issue 1, March 1995.

<sup>98</sup> Above n 41, 45.

Therefore, the Board must carefully decide whether the behaviour in question meets the criteria set down by the legislation. It must then exercise its discretion in deciding whether to actually lift or extend the suspension.

## V. PROCEDURE

In addition to meeting the criteria for suspensions and expulsions as set down in the legislation, principals and Boards must also comply with the required procedure. This is set out in the legislation and is also helpfully described in flow charts in the Ministry of Education guidelines. This part of the paper deals with several aspects of the procedure for suspending and expelling students.

### A. *Guidance and Counselling*

In order for the process to operate in accordance with the legislation, there are requirements regarding guidance and counselling for the student and information for the parent. Section 77 provides that:

77 Guidance and counselling - 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.<sup>99</sup>

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<sup>99</sup> Discussions regarding the student's relationships with teachers or other students may give rise to some privacy issues as personal information may be disclosed about the student and other people. It is beyond the scope of this paper to deal with the complex topic of privacy issues in schools.

In addition to this, under s13(4):

The principal of a state school shall take all reasonable steps to ensure that a student suspended from the school has the guidance and counselling that are reasonable and practicable in all the circumstances of the suspension.

This section could be used to provide alcohol and drug counselling or anger management courses for students who have been suspended for behaviour of this type. It could also be used to provide extra tuition for those with learning difficulties.

Harrison argues that the extent to which there has been compliance with s77 will be a relevant consideration when deciding whether to suspend. He suggests that if s77 has not been complied with it may be best to postpone or not take disciplinary action.<sup>100</sup> The Guidelines do, however, point out that there may be occasions when a previously trouble free student commits an action "which is so serious as to warrant suspension" leaving the principal with no opportunity to have given guidance and counselling.<sup>101</sup> The fact that s77 refers to the principal's duty to take all *reasonable* steps allows for this sort of situation. However, this should not be used as an excuse for not providing guidance and counselling and the fact that the student has never caused any trouble before should impact on whether suspension or expulsion is the best option to take in dealing with the problem. If suspension is decided upon, the guidance and counselling required by s13(4) will play an even more important role.

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<sup>100</sup> Above n 77, 58.

<sup>101</sup> Above n 23, 2. These flowcharts are set out in an appendix.

### *B. Procedural Difficulties*

Some parts of the legislation are not particularly clear. One example of this is the nature of the principal's dealings with the students when the problem is drawn to their attention and they decide whether or not they have to suspend. Section 13 does not require the principal to hold a "hearing" with the student in order to establish whether a suspension is appropriate. Nor do the flow charts set out in the guidelines require this. In the case of the Board, the decision can not be made to lift or extend a suspension or to expel, without considering:<sup>102</sup>

(i) The principal's written report on the circumstances of the suspension;  
and

(ii) Everything said by any parent or parent's representative at the meeting before the Board decides.

However, the principal is entitled to make their decision on the basis of their opinion and is entitled to come to this assessment of the facts on the basis of their "assumed expertise in such matters."<sup>103</sup> The principal should, however, see the student in order to hear the student's side of the story. This is required as part of natural justice.<sup>104</sup> In addition, in order to truly exercise their discretion, the principal needs to assess other circumstances such as whether the student is having problems at school or at home and any other relevant matters.

The Act is also vague about the timing of the Board meeting for a student who has turned 16 and has been suspended for an unspecified period. Although a meeting regarding a student under the age of 16 must be held within seven days, there is no such requirement for students aged 16 or over. The Guidelines say

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<sup>102</sup> Section 16(2)(b) and s17(2)(b) of the Education Act 1989.

<sup>103</sup> Above n 41, 30.

<sup>104</sup> See text at below n 115.

that: "It is recommended that the Board meeting is held on a day that is reasonably close to the date of the suspension, for example within seven days of the suspension."<sup>105</sup> There does not seem to be any reason for this inconsistency in the legislation. A student aged 16 or over may be preparing for external examinations in which case it will be imperative that a decision is made quickly in order to minimise the disruption to the student's schooling. Therefore, the legislation should be amended so that the meeting must also be held within seven days under s17.

This has highlighted just two of the aspects of ss13-18 which make this legislation so difficult to apply. It is important that these areas are clarified so that what is a complex task for principals and Boards of Trustees can be made simpler.

### C. *Kiwi Suspensions*

In order to be suspended or expelled from school, the procedure set down in ss13-18 must be followed, otherwise the suspension will be illegal. Such illegal exclusions from school are referred to as "Kiwi suspensions". Examples of Kiwi suspensions include students being told to go home and not come back until, for example, "You've cut your hair" and pressure being put on the parents by the school to withdraw their child because "If you don't, I will suspend her and that will be on her record forever."<sup>106</sup> Expelling a student from a school hostel can also be a Kiwi suspension as "this almost automatically means they are unable to attend that school until suitable alternative boarding arrangements are made which may take some time and be beyond the parent's ability to pay."<sup>107</sup>

<sup>105</sup> Above n 23, 20.

<sup>106</sup> Jan Breakwell "Control and Management of Schools - Disciplinary Powers of Boards of Trustees" *Education and the Law in New Zealand* (Legal Research Foundation, Auckland, April 1993) 99, 107.

<sup>107</sup> *Annual Report of the Office of the Ombudsman*, 30 June 1993, 25.

Kiwi suspensions are not uncommon; the Wellington Community Law Centre dealt with seven Kiwi suspensions in a five day period in November 1995. Kiwi suspensions are often more common towards the end of the year as some principals attempt to stop students from returning to school in the next academic year.<sup>108</sup> In 1994, 81 of the students enrolled in the Correspondence School were identified as being the subject of a Kiwi suspension.<sup>109</sup> Such suspensions can have an even more drastic effect on a student's education than legitimate suspensions and expulsions as the principal is not required to find another school for the student.

It is important that parents are informed that any attempt to remove their son or daughter from school in this way is illegal and should not be accepted.

#### *D. Natural Justice*

It is not sufficient for the principal and the Board of Trustees to simply ensure that the behaviour for which they are suspending does meet the criteria; they must also ensure that they deal with the suspension or expulsion in a procedurally correct manner. This does not just mean following the letter of the legislation; it is important that the procedure is fair at each stage and that they behave in accordance with natural justice.

Natural justice was defined in the case of *Board of Education v Rice* as "a duty lying on everyone who decides anything" to "act in good faith and fairly listen to both sides."<sup>110</sup> In New Zealand the principles of natural justice must be taken

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<sup>108</sup> Conversation with Nicky Darlow, Wellington Community Law Centre, 10 April 1996.

<sup>109</sup> The Correspondence School Submission to the Select Committee Inquiry. Submission no 118. The Education Review Office (ERO) also reported to the Committee that they had found 20 cases of "Kiwi suspensions" during their investigations in 1994 and that 10 of these were primary school aged children. *Schools' Charter Requirements for Children with Learning and Behavioural Difficulties* Education Review Office, 29 November 1994. Above n 12.

<sup>110</sup> [1911] AC 179, 182. House of Lords, per Lord Loreburn.



into account by virtue of the New Zealand Bill of Rights Act 1990. Section 27 states:

27 Right to Justice - (1) Every person has the right to the observance of the principles of natural justice by any tribunal or 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.

The New Zealand Bill of Rights Act provides:

3. Application - This Bill of Rights applies only to acts done:

(a) By the legislative, executive or judicial branches of the Government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The Board of Trustees and the principal are likely to come under s3(b) because they are carrying out a public function.<sup>111</sup> Therefore the principles of natural justice must be applied when a student is suspended or expelled.

Harrison says that there are three key principles of natural justice which are relevant to schools; a right to adequate notice of hearing, a right to a procedurally fair hearing and a right to a hearing and decision free of bias and

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<sup>111</sup> Dr Rodney Harrison QC acknowledges that this point is not yet settled, but says that there is a strong argument that the Bill of Rights Act applies to school Boards as a result of s3(b). Above n 77, 58.

prejudgment.<sup>112</sup> Each of these three rights will be dealt with separately as will student's rights and natural justice.

### 1. A right to adequate notice of hearing

The legislation itself says in s16:<sup>113</sup>

(2) A school's Board shall not lift or extend the suspension for an unspecified period from the school of a student under 16 without -

(a) Taking all reasonable steps to give the student's parents reasonable notice of -

(i) The time and place of the meeting where the Board will decide whether to lift or extend the suspension;...

While this ensures that the parents are informed of the meeting, it does not fully comply with this aspect of natural justice. The right to adequate notice of the hearing also includes the right to be given adequate detail of the "charges" faced and the issues to be discussed and this is not dealt with by this section. In addition, the legislation is not very specific in that it uses the term "reasonable" to describe the sort of behaviour expected of the Board. Section 14 does require the principal to give notice of a suspension to a parent of the student (if the student is under the age of 20) and this involves telling them:

(a) That the student has been suspended, and why; and

(b) Whether the suspension is for a specified or unspecified period; and

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<sup>112</sup> Above n 77, 72.

<sup>113</sup> Similar wording is found in s17(2) which deals with students over the age of 16.

(c) If it is for a specified period, the period.<sup>114</sup>

However, under s14(2) the principal only has to give the Board a full written report on the circumstances of the suspension, there is no requirement to give the parents, let alone the student, a copy of this.

The Guidelines are, however, more specific in this area saying that:<sup>115</sup>

In order to comply with the principles of natural justice, the board **must** ensure that any reports prepared by the principal or other staff at the school which the board is to consider at the meeting are made available to the parents. It is suggested that these reports are made available at least 24 hours before the board meeting so that parents can be fully informed of the issues and properly prepared to contribute meaningfully to the discussions at the meeting. The board may not introduce new material at the meeting.

In order to comply with this, the hearing must be based on the original charge; it is not permissible for the hearing to be ostensibly for gross misconduct due to marijuana smoking but to have information introduced at the meeting about the student swearing at a teacher three years ago which would be continual disobedience.<sup>116</sup>

This aspect of natural justice must be met in order to ensure that the hearing is, as far as possible, a level playing field. Board of Trustee meetings to determine a student's educational future will often be intimidating for a parent who may not

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<sup>114</sup> Section 14(1) of the Education Act 1989.

<sup>115</sup> Above n 23, 17.

<sup>116</sup> There is anecdotal evidence of this occurring. Conversation with Nicky Darlow, Wellington Community Law Centre, 10 April 1996.

know what to expect and may be quite nervous. Therefore, it is important to make the situation as equitable as possible.

## **2. Right to a procedurally fair hearing**

This involves the right of the "accused" party to state their case. Section 16(2)(b) requires the Board to consider: "Everything said by any parent or parent's representative at the meeting before the Board decides." It is not clear whether this means that both a parent *and* a parent's representative may speak or whether the right is limited to only one of them. In the interests of fairness, and given that there are several members of a Board, it would seem best if this right extended to both, within reason. The Specimen Letters prepared by the Ministry of Education say that the parent has "the right to bring [a support person/representative/members of your aiga/whanau] with you. You and your [support person/representative/group] have the right to speak to the Board."<sup>117</sup> The meeting may become particularly lengthy if all of the support people have an unlimited right to speak. However, an important decision is being made and therefore the meeting must be sensitive to the needs and wishes of the family.<sup>118</sup> Clearly a balance must be struck.

## **3. Right to a hearing free of bias and prejudice**

This is an aspect of natural justice which is not dealt with at all by the legislation. It is, however, discussed in the Guidelines which state that:<sup>119</sup>

Although the principal is not prohibited from remaining with the other board members when reaching their decision, it is unwise for the principal to do so as there could be allegations of bias in reaching the decision.

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<sup>117</sup> Specimen Letter, above n 23.

<sup>118</sup> This includes the need for the process to be as culturally sensitive as possible.

<sup>119</sup> Above n 23, 17.

This warning seems to operate on the basis that a principal may be able to get away with being present but someone may allege bias. It would be better, however, to not allow any bias in the first place. Therefore, it would be best to prohibit the principal from remaining so that there could be no question of unfairness. This would mean that all students, not just those who have sufficient parental awareness or interest to challenge the decision via the Ombudsman or the High Court, would get a fair decision.<sup>120</sup> It is to be hoped that this will be one of the changes made to the legislation as a result of the proposed amendments to the suspension provisions in the Education Act 1989.<sup>121</sup>

However, the principal is not the only problem in this area. Nicky Darlow says that while principals do usually leave while the decision is made, sometimes the teacher representative on the Board is still there and they can be the teacher who made the complaint.<sup>122</sup> Even if the teacher's representative is not the one who made the complaint, they may have considerable influence on the decision by saying things like "You have no idea how annoying this kid is and all of the other kids suffer as a result."<sup>123</sup> This can also result in bias and prejudgment.

The charts put out by the Ministry of Education are not particularly clear in this area. The chart which deals with under 16 year olds who are suspended for an

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<sup>120</sup> See below n for ways in which the decision of a Board of Trustees can be challenged.

<sup>121</sup> The press release which went with the release of the Guidelines said that:

The Guidelines are one of a number of the Government's responses to the Parliamentary Select Committee's report on Children at Risk. A further response, already announced by the Minister, is likely to be a bill amending the suspension provisions in the Education Act.

Press Release, 12 July 1996.

The Guidelines themselves say that:

The availability of the remedy of damages for breaches of the Bill of Rights Act gives weight to the view that the Education Act should be amended to lessen the likelihood of boards of trustees finding themselves in breach of the Bill of Rights Act.

Above n 23, 6.

<sup>122</sup> Conversation with Nicky Darlow, Wellington Community Law Centre, 10 April 1996.

<sup>123</sup> Conversation with Nicky Darlow, Wellington Community Law Centre, 10 April 1996.

unspecified period says that when it is time for the decision to be made "Principal and parents leave meeting" whereas the chart for students aged 16 or over says "Principal, parents and other interested parties leave meeting."<sup>124</sup> Clearly the latter is preferable. It should, however, be made clear in both charts that this is the case, otherwise the omission in one chart could be seen to be deliberate. It is also important that the charts are very clear as schools are likely to rely on them more than the guidelines themselves.

In the case of *C v H & Anor* the Board had passed a resolution regarding the Discipline Subcommittee which stated that:<sup>125</sup>

Board members must declare a conflict of interest if the student under consideration has close personal or family connections with the trustee or if the principal teacher who made the complaint is a close teaching colleague of the trustee or staff representative.

This is an excellent step towards ensuring a hearing free of bias.

The fact that the Board of Trustees has this role to play gives rise to other concerns about bias and prejudgment. Boards may feel a loyalty to the principal and the school and find it difficult to go against a principal's desire for a student to be removed.<sup>126</sup> Board members may also be strongly influenced by their own children who are students at the school and may have told them "horror stories" about the students whose educational futures they are called upon to decide.<sup>127</sup> Schools are also concerned with having a good community image in what has become a very competitive environment and therefore Boards are sometimes

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<sup>124</sup> Chart four and chart six, above n 23.

<sup>125</sup> Above n 36, 4.

<sup>126</sup> Above n 47, 12.

<sup>127</sup> Conversation with Nicky Darlow, Wellington Community Law Centre, 10 April 1996.

keen to get rid of "undesirable influences".<sup>128</sup> In addition, any determination to stick by school rules religiously may also amount to prejudgment by the Board.<sup>129</sup>

It will be very difficult to prove bias or prejudgment in the nature of these latter examples. However, Boards and principals must take considerable care not to come to a decision which is procedurally unfair on the basis of bias or predetermination.

### *E. Student's Rights and Natural Justice*

The above discussion has focused on natural justice in terms of the parent's rights. However, the principle of natural justice also applies to students. In addition UNCORC gives students rights in the process.<sup>130</sup> The Guidelines acknowledge this and say that:<sup>131</sup>

Accordingly the student should have a right to receive information and to be heard in board of trustee hearings. The Education and Science Select Committee Report on Children at Risk Through Truancy and Behavioural Problems recommended that "the Education Act 1989 should be amended to give students as well as parents a right to be present at Board of Trustee meetings dealing with the suspension and

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<sup>128</sup> Martin Cooney, President of the Post Primary Teacher's Association (PPTA) says:  
Before... local schools were responsible for ensuring all children in their area received an education.... Now the education of some young people [is] being jeopardised at best and destroyed at worst because of the environment of "so-called choice" in which schools operate.... What are our schools for? Are they providers of the education that every young New Zealander is entitled to and legally obliged to receive or are they small business units set up to attract the right customers?

"Union urges schools review" *Dominion*, Wellington, New Zealand, 3 July 1996. See also the text at above n 30.

<sup>129</sup> This is discussed in greater detail at above Part IV A2.

<sup>130</sup> See text at above n 15 for a discussion regarding UNCORC.

<sup>131</sup> Above n 23, 2.

expulsion of students". Government supported this recommendation, and it is likely to be included in future amendments to the legislation.

However, as will be discussed later, the extent to which this has been put into practice is limited.

### **1. UNCORC and process rights**

Various Articles of UNCORC are relevant to the issue of students' rights in the suspension process. While Article 28 which has already been discussed,<sup>132</sup> deals with a student's right to education; Article 12 looks at a student's process rights.

Article 12 states that:

1. States Parties shall assure to a 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 of the child being given due 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 or an appropriate body, in a manner consistent with the procedural rules of national law.

As was acknowledged by the Ministry of Education, this should be taken into account and applied in the suspension process.

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<sup>132</sup> See text at above n 15.



## 2. **Gillick v West Norfolk and Wisbech Area Health Authority**

*Gillick v West Norfolk and Wisbech Area Health Authority*<sup>133</sup> is an English House of Lords case. Therefore it is not binding authority in New Zealand although its influence is persuasive. This case dealt with the rights of young people to make decisions for themselves regarding the use of contraception. However, in deciding the case, their Lordships took a more in-depth look at the issue of childrens' rights from first principles. Lord Scarman said that whilst parental rights clearly did exist, they were "derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child."<sup>134</sup> Therefore, "parental right yields to the child's right to make decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."<sup>135</sup> This could not be tied to any specific fixed age, but was instead a question of fact.<sup>136</sup>

This case is therefore important in that it gives young people the right to make decisions about themselves. In the case of school suspensions and expulsions, under the existing legislation, the student, and indeed, his or her parents, have no role to play in deciding the final outcome. However, the decision can be extended in order to say that students have a right to be involved in decisions which are made about them. This is consistent with Article 12 of UNCORC and the New Zealand Bill of Rights Act.

## 3. **Student rights in the legislation and guidelines**

The legislation itself does not even mention the rights of students in the suspensions and expulsions process. This is not because the Act is completely oblivious to students' rights. Section 25A deals with release from tuition on religious or cultural grounds and allows a parent of a student under the age of

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<sup>133</sup> [1986] 1 AC 112.

<sup>134</sup> Above n 133, 184.

<sup>135</sup> Above n 133, 186.

<sup>136</sup> Above n 133, 189.

18 to request that the student be released from tuition in any class or subject on the basis of "sincerely held religious or cultural views."<sup>137</sup> The section goes on in s25A(3) to say:

Before releasing the student, the principal shall take all reasonable steps to ascertain the student's views on being released from tuition.

Then, provided that the principal is satisfied that the situation meets the criteria set out in s25A(2);<sup>138</sup>

the principal shall release the student...unless satisfied, in the light of -

(a) The student's age, maturity and ability to formulate and express views; and

(b) Any views the student has expressed,-  
that it is inappropriate to do so.

This section is consistent with the decision of *Gillick* in that it gives students the right to be involved in decisions made about them. This may be because of the subject matter of the section. It may be widely perceived to be in a student's best interests to attend, for example, sex education lessons despite a parent's disapproval. In this sort of a case, society as a whole is likely to be more willing to step in and ask "What does this child really want?" Despite this, the inclusion of s25A(2) does demonstrate that the legislative drafters have turned their minds

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<sup>137</sup> Section 25A(2). Section 25A was inserted into the Education Act by s6(1) of the Education Amendment Act (no 4) 1991.

<sup>138</sup> These being that:

- (a) The parent has asked because of sincerely held religious or cultural views; and
- (b) The student will be adequately supervised (whether within or outside the school) during the tuition.

to the issue of student rights. Therefore, the fact that students' rights are ignored in ss13 to 18 is less excusable. Their exclusion may also be seen as a deliberate omission. It is therefore important to amend the suspensions provisions to create consistency in the Act and to set out the obligations of schools very clearly.

The Guidelines state that the Government is likely to amend the legislation to give the student the right to attend the meeting in order to be consistent with the student's rights under natural justice principles.<sup>139</sup> However, this is not carried through into the charts prepared by the Ministry of Education in order to show schools the process which must be gone through. The Guidelines do carry a disclaimer that:<sup>140</sup>

Recourse must be to the Act itself if details are required. These guidelines are not intended to give legal advice and should not be relied on for that purpose.

However, it is highly likely that schools will rely on these, especially as Boards and principals will not necessarily have any legal training and are likely to find the Act itself rather complex. In addition, schools are likely to be particularly reliant on the charts as they set out the procedure in clear flow charts which are easy to follow. In its circular to principals and Boards of Trustees, the Ministry encourages this reliance by advising schools that "If you are undertaking your first suspension you might like to turn first to the flow charts."<sup>141</sup> Therefore, the flow charts should make it clear that the student has a right to attend the meeting of the Board of Trustees at which a decision is made. This is not the

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<sup>139</sup> See above n 131.

<sup>140</sup> Above n 23, 4.

<sup>141</sup> Kathy Phillips, Senior Manager, National Operations, Ministry of Education. Circular to Principals of Schools and Chairpersons of Boards of Trustees re Guidelines for Principals and Boards of Trustees on the Statutory and Procedural Requirements for the Suspension and Expulsion of Students. 15 July 1996.

case. The only reference to the student's attendance at the meeting is an excerpt from Specimen Letters 3 and 5, dealing with students under 16 and 16 or over respectively, which are addressed to the custodial parent/primary caregiver. These state that:<sup>142</sup>

... it is your right to attend the meeting... You may also wish to bring [first name of student] with you as the meeting is very important for [her/his] future. You and your [support person/representative/group] have the right to speak to the Board about the suspension and whether it should be lifted or extended. If [first name of student] comes to the meeting, the Board will also offer [him/her] the opportunity to speak.

However, if the student has "sufficient understanding and competence" in the words of *Gillick* or is "capable of forming his or her own views" in the words of Article 12 of UNCORC, the student has a *right* to attend the meeting. The approach taken by the Ministry of Education gives the impression that the parent has a right to decide whether or not the student should attend. It also infers that while the parent has a right to speak, the Board is merely being charitable in allowing the student to speak. This is contrary to the decision in *Gillick* and is a breach of the student's right to natural justice. A decision reached on this basis could be found to breach the Bill of Rights Act.

In addition to this, the only mention of the student's rights in the flow charts comes in chart six which deals with unspecified period suspensions for students aged 16 or over. According to the chart, once the student is expelled, the next stage is that the "Student is reminded of rights and assistance available. - Free education until end of year in which she/he turns 19 years and Ministry

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<sup>142</sup> Specimen Letters 3 and 5. Above n 23. These letters should also be given to the student in accordance with natural justice.

Information Pamphlet.”<sup>143</sup> This seems to be a rather token gesture to the rights of students. Its inclusion, given that there is no other mention of students’ rights in the process seems to indicate that while the Ministry is keen to mention rights, the policy itself is not really informed by a rights oriented attitude.

This impression is reinforced by the pamphlet put out by the Ministry entitled “Suspension and Expulsion: The rights of parents and students.”<sup>144</sup> The pamphlet refers to parents as “you” throughout and is focused on the parents’ rights. It states, for example:

It is your right to be told:

...

as soon as your child is suspended.

...

It is the student’s right to have:

...

supervision by the school on the day of the suspension until you are able to make other arrangements; or the end of the school day.

You have a right:

...

for your child who has been suspended to be heard.

It is clear that this pamphlet is not focused on the rights of students as it claims.

While some very young students are suspended<sup>145</sup> in which case this pamphlet would not be so inappropriate, many of the students suspended will be quite

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<sup>143</sup> Chart Six Suspension for an unspecified period - student over 16 years of age - action by board” Above n 23.

<sup>144</sup> Ministry of Education, Wellington, July 1996.

<sup>145</sup> See above n 3.

capable of exercising their own rights and in these cases the pamphlet will be considerably less than appropriate. This could be remedied by having two separate pamphlets; however, it must be remembered that young children have rights too and that this should be acknowledged.

Therefore, despite some improvements, student's rights are not adequately acknowledged in the process. This may be a reflection of society's attitudes to the rights of young people generally and it may only change when society as a whole changes. As Graeme Austin says:<sup>146</sup>

For a real difference to be made to children's lives, ... more is needed than assumptions or even august legal documents articulating the international community's commitment to the issue. Children's rights need to become part of the moral and ideological frameworks which define the humanity of the human condition.

Society has some way to go before the rights of students are truly recognised.

## **VI. THE EFFECT OF SUSPENSION OR EXPULSION**

Sections 16, 18 and 18A deal what happens to a student when they have been suspended. Section 16 which applies to students under the age of 16 says:

(5) If the Board of a state school from which a person under 16 has been suspended for an unspecified period extends the suspension, the principal shall try to arrange for the student to attend another school (being a suitable school that the student can conveniently attend).

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<sup>146</sup> Austin. Above n 19, 281.

(6) If unable to arrange for a student under 16 suspended from a state school for an unspecified period to attend another school, the principal shall tell the Secretary what steps the principal took in trying to do so.

(7) Where the Secretary is satisfied that a student under 16 has been suspended for an unspecified period from a state school that is not an integrated school, and that the Board has extended the suspension, and that the principal has not arranged for the student to attend another school, the Secretary shall-

(a) Direct the Board of another state school that is not an integrated school (which may be the Board of the school from which the student has been suspended) to enrol the student at the other school; and in that case, the Board shall do so; or

(b) If satisfied that it is not inappropriate for the student to return to the school from which the student has been suspended, lift the suspension; or

(c) Direct a parent of the student to enrol the student at a correspondence school.

Section 18 also deals with this area and states:

(1) Subject to section 16(7)(b) of this Act, the Board of a state school from which a student has ever been suspended or expelled may refuse to enrol the student at the school.

(2) Except as provided in subsection (3) of this section, the Board of a state school may refuse to enrol a student who has been suspended or expelled from another state school.

(3) At any time before the 1st day of January after the 19th birthday of a student who has been suspended for an unspecified period or expelled from a state school, the Secretary may (in the case of a student who has at any time held a certificate of exemption under section 21 of this Act, or has turned 16) and shall (in every other case) after first making all reasonable steps to consult -

(a) The student's parents; and

(b) The Board; and

(c) Any other person or organisation that, in the opinion of the Secretary, may be interested in, or able to advise on or help with, the student's education or welfare;

-  
direct the Board of another state school to enrol the student at the school; and in that case the Board shall do so.

#### *A. Students Under the Age of Sixteen*

The relationship between these two sections is complex. In the case of a student who is under the age of 16 and is suspended for an unspecified period, the principal must try to arrange another school for the student to attend. There is no set time period within which this must be done; however, the Guidelines state that:<sup>147</sup>

Principals and Boards must keep in mind that the right to a free education at any state school extends until the 1st day of January after a person's 19th birthday. Therefore, the shorter the time between the

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<sup>147</sup> Above n 23, 21.



suspension/expulsion at one school and enrolment at another school, the better for the student's educational opportunities.

The lengths to which the principal must go in attempting to find another school are not clear although the new RS80 form "Suspension of student - Outcome of Board Meeting" which is sent to the Ministry of Education requires information about the placement outcome and asks principals to list up to five schools in the "Schools approached but refused" category.

The task of a principal in finding another school will be a difficult one as s18(2) allows schools to refuse to enrol any student who has been suspended or expelled from another state school unless s18(3) applies and the Secretary has directed the Board to enrol the student.<sup>148</sup> While some schools take the approach that: "We do take them because we're asking other schools to take our students and every child should have a second chance",<sup>149</sup> other schools are less supportive. In the Cambridge High School case, the principal of Cambridge High School, Alison Annan, referred to another school in the Waikato area where the principal:<sup>150</sup>

had a policy of [not] taking pupils for anything to do with drugs. He would take them if they were indefinitely suspended for other reasons but anybody associating with drugs or using drugs he would not take at his school.

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<sup>148</sup> The Guidelines say that if the Secretary directs the Board of another school to take the student and the Board refuses:

1. The Ministry may review the process by which the decision was reached.
2. There could be further negotiation.
3. The Ministry could take legal action to enforce the decision.
4. The parents could take the matter to the Ombudsman, Commissioner for Children or Human Rights Commissioner.

Chart Eight, above n 23.

<sup>149</sup> Peter Lee, Upper Hutt College principal, above n 27, 22.

<sup>150</sup> "Kim Hill" *National Radio*, 27 June 1996.

A further example of this is a draft drug accord developed by Eastern Bay of Plenty schools which removes the guarantee of entry to another state school in the area for under 16 year olds who are suspended for an unspecified period for drug offences. Whakatane High School principal Martin Elliott describes the part of the Education Act requiring principals to find new schools as “‘a stupid piece of legislation’, comparing it with ‘expecting a business person to try to find another job for an employee who has been caught stealing’”.<sup>151</sup> It is submitted, however, that schools should not view themselves in the same way as companies. There is no statutory right to employment, but there is a statutory right to education and, while it may be difficult, the education sector should not be so easily able to give up on its students.

If a principal is unable to find another school for the student, it becomes the task of the Secretary of Education to find another school. This is governed by ss 16 and 18. While s18(1) is subject to s16(7)(b), it is not subject to s16(7)(a). Therefore, although the Secretary has the power under s16(7)(a) to direct the Board of the school from which the student has been suspended to take the student back “and in that case, the Board shall do so,” under s18(1) the Board can, in fact, refuse to do so. Under the current statutory scheme, the only occasion on which a school will have to take back a student who has been suspended will be if the student is under the age of 16 and has been suspended for an unspecified period and the Secretary is satisfied that it is not inappropriate to lift the suspension. There is no guidance as to when it would be considered to be “not inappropriate” for the suspension to be lifted. It is therefore difficult to

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<sup>151</sup> Neryda McNabb “Drugs: No schools for cult heroes” *Bay of Plenty Times*, Bay of Plenty, New Zealand, 4 July 1996. In addition, of the 14 students suspended from Cambridge High School only one was offered a position at another school (another failed to turn up for his interview) and the Minister of Education, Hon. Wyatt Creech MP, stated that he would seek advice from the Ministry as to why this was the case. Shenagh Gleeson “Creech inquires into row: students shunned by other schools” *New Zealand Herald*, Auckland, New Zealand, 2 July 1996.

determine the rationale for referring to the original school in s16(7)(a) and it is also difficult to assess how s16(7)(b) will apply. The Secretary may also direct a parent of the student to enrol the student at a correspondence school.<sup>152</sup>

In directing the Board of another school, or a correspondence school, to enrol the student, the Secretary must, under s18(3), consult various parties. The legislation does not make it clear in what order this process should be carried out. The chart in the Guidelines dealing with this area says that once the principal has informed the Secretary that further schooling can not be arranged, the consultation under s18, and if relevant s18A, is carried out from which a decision is made as to whether a new school is the most suitable placement. If the response to this question is yes, then the student is enrolled at another school. If, however, the answer is no then the Secretary must decide whether it is inappropriate for the student to return to the original school. If it is not inappropriate then the suspension is lifted and the student returns to school. Alternatively, if it is inappropriate then the student is enrolled at a correspondence school.<sup>153</sup> While the Ministry may have chosen to take this approach, it is not clear that this is what was envisaged by the legislature. Nor does the legislation clearly set out the nature of the consultation to be carried out. Once again, it would be helpful if the legislation was amended in order to deal with this more clearly.

A student who has been suspended for a specified period (three school days or less) is entitled to go back to her or his original school when the period is over.<sup>154</sup> However, the student's enrolment at any other school after this time is governed by s18(2) and (3). Section 16 does not apply and therefore no other school has to take the student unless directed to do so by the Secretary.<sup>155</sup>

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<sup>152</sup> Section 16(7)(c) of the Education Act 1989.

<sup>153</sup> Chart seven, above n 23.

<sup>154</sup> Section 15(1) of the Education Act 1989.

<sup>155</sup> See above n 148 for what can happen if such a school refuses to take that student.

*B. Students Aged Sixteen or Over*

While it is mandatory for the Secretary to find another school for a student under the age of 16 who has been suspended for an unspecified period, under s18(3) the Secretary *may* do so for students who have been expelled. The Guidelines put out by the Ministry state that:<sup>156</sup>

The principal does not have to find another school for someone who is 16 or over, but the student has a legal right to free education until 19. The Ministry of Education will help the parents and student find another school. The Ministry may direct the board of any school other than that which the student has expelled a student 16 or over, to enrol that student.

This does not, however, seem to be very effective. If the Ministry does not have to direct another school to take the student, then the student is not guaranteed a place at another school and their legal right to education until the age of 19 is limited. In addition, although the age of 16 is significant in that students must legally remain at school until the age of 16,<sup>157</sup> there is no reason why students over that age who do wish to continue their education should be prevented from doing so even if they have been expelled as they have a right to education until the age of 19. There is therefore no reason for this anomaly in the legislation.

*C. Section 18A*

Section 18A was inserted by s9 of the Education Amendment Act 1990. This section complements s18 and states:

18A Director-General of Social Welfare may recommend that student should attend particular school.

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<sup>156</sup> Above n 23, 20.

<sup>157</sup> Section 20 of the Education Act 1989.

(1) The Secretary may, on the recommendation of the Director-General of Social Welfare, and after taking all reasonable steps to consult,-

(a) The person's parents; and

(b) The Board of the school concerned; and

(c) The Director-General, and any other person or organisation that, in the Secretary's opinion, may be interested in, or able to advise on or help with, the person's education or welfare, -

direct the Board of a state school to enrol at the school any person under 18; and in that case the Board shall do so.<sup>158</sup>

In response to a question in Parliament, the Minister of Education, Hon. Wyatt Creech MP, stated that.<sup>159</sup>

The Ministry of Education has no written record of instances when schools have been directed under s18A of the Education Act 1989 to enrol students who have been suspended on the recommendation of the Director-General of Social Welfare.

The Ministry has confirmed its findings with the Children, Young Persons and their Families Service (CYPFS).

On several occasions there has been a belief that s18A is being used; however, these cases have in fact been dealt with under the consultation requirements of s18. Despite this obvious confusion, the Ministry is keen to retain the section in

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<sup>158</sup> This section deals with students under the age of 18 unlike the other sections. There is no indication of the reason for this.

<sup>159</sup> Reply to question from Trevor Mallard MP, Question for written answer, reply dated 24 July 1996.

the belief that it is useful for dealing with students with extreme behavioural difficulties.<sup>160</sup> However, it is submitted that if it is so difficult to establish whether or not the section has been invoked, the purpose of the section and its intended usage must be set out more clearly. Otherwise what may indeed be a useful section will continue to be underutilised.

*D. General Effect of the Legislation*

The purpose of the legislation is not to end the education of a person when they are suspended or expelled. The right to education as set out in s3 is not, in theory, removed. However, the practical effect of the legislation is to often end schooling. This is the result of several factors. In part it is the fault of the legislation itself. Students aged 16 or over are not guaranteed a right to education at another school as no school has to take such a student unless directed to do so by the Secretary and there is no requirement on the Secretary to make any directions for students aged 16 or over. Such students can still attend correspondence school;<sup>161</sup> however, the legislation's intent is not to limit the educational opportunities of suspended students to this. This is intended to be the option of last resort. In addition, participation in correspondence school courses requires considerable motivation and support from both the student and their parents. This may be lacking in some cases. It may also be difficult for families where the custodial parent or parents are involved in full time employment.

It is also a result of the attitude of some schools and the lack of resources as typified by the statement that: "By their irresponsible actions they have lost the right to continued formal schooling until such time as the Government provides

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<sup>160</sup> Conversation with Elspeth Preddy, National Operations, Ministry of Education, 5 September 1996.

<sup>161</sup> In July 1996 the Correspondence School had 258 suspended and expelled students enrolled in its secondary division. Shenagh Gleeson, above n 151.

alternative schools in all regions."<sup>162</sup> However, this raises the issue of whether it would be appropriate for all suspended or expelled students to go to a school especially for that purpose. The problem with this is that there are a mixture of reasons for suspending students and no two cases will be exactly the same. A student who has been suspended for continual disobedience may have no interest in learning and may be quite different to a student who is caught with drugs once. In addition this could result in the alienation from society of all suspended or expelled students. Article 40 of UNCORC which deals with children who are accused of, or recognised as, having infringed the penal law recognises the right of such students to:

be treated in a manner... which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

By putting all suspended students together, they would not be reintegrated into society. In addition s9 of the Bill of Rights Act says that:

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* (emphasis added)

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<sup>162</sup> Ian Simpson, Rector of Kings High School and Past President of the Secondary Principals Association of New Zealand in an open letter to the Commissioner for Children. "Schools not the villains" *Otago Daily Times*, Dunedin, New Zealand, 6 July 1996. Richard Prebble (leader of the political party ACT) believes that direct resourcing of schools with funding following the student would mean that where several students are suspended, a retired teacher, for whom it would be financially worthwhile, could come and teach the group. *Meet the Press*, TVNZ, 8 September 1996. This raises questions about the quality of that education given that a retired teacher may well be out of touch with curriculum changes and other such matters.

It has been noted that:<sup>163</sup>

Suspending until age 16 when dealing with a third or fourth former who actually *wants* to be at school is imposing a sentence of exile which is probably way greater than the community service or periodic detention the court system would impose.

To then require such a student to attend an "alternative" school for the rest of their education may also be a disproportionate and unjustified response to their behaviour.

There also seems to be a lack of follow-up and support in many cases of suspension and expulsion. The Principal Youth Court Judge, Judge Carruthers, claims that approximately 80% of young offenders seen by him under the age of 16 are not attending school.<sup>164</sup> While not all of these students will have been suspended, it is likely that a large proportion of them will have been. This lack of attendance is of considerable concern given that all students under the age of 16 are required to attend school and that the Secretary of Education has a legal requirement to find schools for them when they are suspended.

Therefore, in order for students to truly be able to retain their right to education after being suspended or expelled, changes in the legislation, in the level of follow-up and in attitudes themselves are necessary.

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<sup>163</sup> Hertha James "In search of a punishment to fit the crime" *Evening Post*, Wellington, New Zealand, 6 July 1996.

<sup>164</sup> Andrew Laxon "Judges deplore education ills: Alternative chances call for 'lost tribe'" *New Zealand Herald*, Auckland, New Zealand, 5 July 1996.



## VII. PROCESS OF REVIEW

### A. *Judicial Review*

Under s27(2) of the Bill of Rights Act:

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.

Therefore, the student is entitled to a review in some form of the decision of the principal and the Board.

The most common form of judicial review is brought pursuant to the Judicature Amendment Act 1972. In order to come under this Act a "statutory power" or a statutory power of decision which comes under the Act's definition must have been exercised.<sup>165</sup> Therefore, on the basis that principals and Boards are carrying out a statutory function, both will be subject to judicial review.

Judicial review is, however, carried out on a very narrow basis. It is not an appeal. As Greig J said in *C v H & anor*:<sup>166</sup>

The merits of the decision made in any given case are not in issue or subject to reconsideration by the Court unless there is no ground for the decision on the facts or the decision is such as can be described as

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<sup>165</sup> Above n 77, 77. A statutory power of decision is defined as: "a power or right conferred by or under any Act... to make a decision deciding or prescribing or affecting -

(a) The rights, powers, privileges, immunities, duties, or liabilities of any person..."

Section 2 of the Judicature Amendment Act 1972.

<sup>166</sup> Above n 36, 2.

irrational.... The decision of the Court does not depend upon whether the Judge considers that the decision is the correct one or one that he would not have come to on the facts, but whether in the conduct of the decision-maker there is some mistake in law or in principle such that the decision should be set aside.

Therefore, the focus is a fairly narrow one. This is particularly significant given that the principal makes the decision whether or not to suspend in the first place on a subjective basis. Even though the Board's final decision is intended to be made on a more objective basis, there is a strong possibility that they will follow the principal's recommendation.

In addition, the courts are wary about using the remedy of judicial review in the education arena. In the case of *Maddever v Umawera School Board of Trustees*, Williams J said that:<sup>167</sup>

[E]ven in case 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 education guidelines.

McGechan J was also cautious about reviewing the school's decision in *McManus & Rowe*. He pointed out that relief is discretionary although

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<sup>167</sup> [1993] 2 NZLR 478, 509.

“applicants who have made out a case should have appropriate relief.”<sup>168</sup> He felt that the result of invalidating a disciplinary decision of the school could be detrimental to authority and order within the school and he was also concerned that it may give rise to the belief that the Court is “some final educational disciplinary authority. Nothing, of course, is further from the truth...”<sup>169</sup> Despite this, he decided to grant the relief as sought as “Quite simply, justice and fairness demand it. No one should underrate a school child’s capacity to perceive and feel personal injustice.”<sup>170</sup> He therefore made declarations that the suspensions by the Rector and the decisions by the Board to extend and expel were invalid and he also made orders quashing the decisions.

Therefore, despite the apparent judicial distaste for allowing judicial review proceedings in suspension and expulsion cases, the courts have shown themselves to be willing, in appropriate cases, to invalidate such decisions. Judicial review may, therefore, be an effective way of getting a decision overturned. However, it is a costly process, both for the student and their family, and the school<sup>171</sup> and it has a very narrow focus. It is therefore not the ideal way to give effect to s27 of the Bill of Rights Act.

### ***B. Breach of the Bill of Rights Act 1990***

In a case where natural justice rights are denied or there is some form of discrimination which is covered by s19 of the Bill of Rights Act,<sup>172</sup> the student

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<sup>168</sup> Above n 41, 54.

<sup>169</sup> Above n 41, 55.

<sup>170</sup> Above n 41, 55.

<sup>171</sup> The student may be entitled to civil legal aid under the Legal Services Act 1991. However, the school is not entitled to receive civil legal aid, s27 Legal Services Act. See *Maddever v Umawera School Board of Trustees* for a discussion about the costs of legal advice for schools. Above n 167, 509-510.

<sup>172</sup> Section 19 of the Bill of Rights Act 1990 states that:

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

Under s21 of the Human Rights Act, the prohibited grounds of discrimination are: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, and disability.

and their family can go to court on the basis of a breach of the Bill of Rights Act.

The issue of remedies for a breach of the Bill of Rights Act was discussed in *Simpson v Attorney General (Baigent's Case)*.<sup>173</sup> In that case it was found that the only effective remedy was compensation, although in other cases remedies such as injunctions or an order for the return of property might be appropriate.<sup>174</sup> In a case of a suspension or an expulsion where a breach of the Bill of Rights Act is made out, the Courts may, therefore, prefer to make an order for the return of the student to the school. However, this will not always be appropriate, especially when the relationship between the two parties has become particularly acrimonious. In such cases damages may be awarded.

The factors to be assessed when determining the level of an award of damages for a breach of the Bill of Rights Act 1990 were discussed by Cooke P (as he then was) in *Baigent's Case*. He said that:<sup>175</sup>

In addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided.

A situation in which a student has been suspended or expelled on the basis of a discriminatory rule or where there has been a clear breach of natural justice could therefore be covered. However, as with judicial review, this will be an

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<sup>173</sup> [1994] 3 NZLR 667. This was a case which dealt with a breach of s21 of the Bill of Rights Act which deals with unreasonable search and seizure.

<sup>174</sup> Above n 173 676 per Cooke P.

<sup>175</sup> Above n 173, 678.

expensive process. In addition the outcome of such a case could not be guaranteed as this is an untested area in the education arena.

### *C. Review by the Ombudsmen*

The Ombudsmen have considerable powers of review when dealing with school suspensions and expulsions. These powers enable the Ombudsmen to review whether a decision:<sup>176</sup>

- (a) appears to have been contrary to law;
- (b) is unreasonable, unjust, oppressive, or improperly discriminatory;
- (c) is based on mistake of fact or law; or
- (d) is wrong.

Therefore, a review carried out by the Ombudsmen can cover a much wider area than a review carried out by the High Court. In enforcing such a decision, the Ombudsmen only have recommendatory powers.<sup>177</sup> However, these powers differ depending on the nature of the organisation with which they are dealing. Section 22(3)(g) of the Ombudsmen Act 1975 states that:

The Ombudsman shall also, in the case of an investigation relating to a Department or organisation named or specified in Parts I and II of the First Schedule to this Act, send a copy of his report or recommendations to the Minister concerned...

and s22(4) goes on to say that:

If within a reasonable time after the report is made no action is taken which seems to the Ombudsman to be adequate and appropriate, the

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<sup>176</sup> Section 22(1) of the Ombudsmen Act 1975.

<sup>177</sup> See above n 44.

Ombudsman, in his discretion, after considering the comments (if any) made by or on behalf of any Department or organisation affected, may send a copy of the report and recommendations to the Prime Minister, and may thereafter make such report to the House of Representatives on the matter as he thinks fit.

From 19 January 1994, Boards of Trustees were included under Part II of the First Schedule to the Ombudsmen Act 1975. Therefore, if a case such as the Upper Hutt College case where the school refused to implement the recommendations, arose now, the Ombudsmen would have considerably more persuasive powers. It is likely that schools would, therefore, be more wary about ignoring such recommendations.<sup>178</sup>

Review by the Ombudsmen is therefore a relatively accessible way to have the decision of the Board or the principal reviewed. However, while their powers have been widened in this area, it is still possible for a school to choose to ignore their advice. It is to be hoped that this would not occur.

#### *D. Education Law Tribunal*

Given that none of the above options are ideal, it has been suggested by the Youth Law Project that an independent Education Law Tribunal be set up to provide "an accessible, relatively quick and inexpensive means of reviewing Board of Trustees' decisions." This would therefore provide an accessible means of review and would encourage consistency between schools as a body of precedent cases would be developed. It would also provide for a neutral

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<sup>178</sup> There have not yet been any suspension or expulsion cases where the power to go to the Prime Minister and the House of Representatives has been exercised. Conversation with Eoin Cameron, Investigating Officer, Office of the Ombudsmen, 6 September 1996.

mediator in cases where the school community was divided on an issue.<sup>179</sup>

While this would be of great benefit, especially to Boards of Trustees who are required to make their decisions in isolation; caution would need to be exercised to ensure that decisions were still made on the basis of the particular facts and by looking at all of the circumstances of the case as required by McGechan J.<sup>180</sup> However, provided that this caution is taken into account, this would, it is submitted, be an improvement on the current situation.

### VIII. CONCLUSION

It is crucial that young people have access to education so that they can go on to participate fully in society. However, the effect of suspensions and expulsions can often be to restrict access to education thereby preventing students from completing courses and acquiring qualifications. While this is a tragedy for the young people concerned; it is also a tragedy for society. As the Secondary Principal's Association of New Zealand says:<sup>181</sup>

The trauma experienced by a suspended student is undeniable. One can only hope that a lesson is learnt from the experience and every effort made to make a fresh start in a new school. If that is not the case then the community will indeed suffer both in the short term and the long.

However, as this paper has shown, under the current system students are often not given the opportunity to make a fresh start in a new school.

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<sup>179</sup> Andrea Jamison "An education law tribunal" *Children* no 15, December 1994. This was also recommended in the submission from the Taskforce on Truancy, Suspensions and Expulsions to the Select Committee Inquiry. The recommendation was not taken up by the Committee in their report. Above n 29.

<sup>180</sup> See text at above n 92.

<sup>181</sup> Secondary Principal's Association of New Zealand (SPANZ) Submission to the Select Committee Inquiry. 30 May 1994. Above n 12.

The purpose of this paper is not to proclaim that suspensions and expulsions are inherently bad. On some occasions they will be the only appropriate way to deal with what amounts to highly inappropriate and unacceptable behaviour.

However, suspensions and expulsions should be the option of last resort; they should not be used as an easy way to get rid of "difficult" students and the statutory right to education should always be borne in mind when deciding whether to take this option.

In addition, because of their extremely significant impact, they should be carried out with care, complying with both the legislation and with the guidance from the courts. They should also ensure that they comply with the principles of natural justice and are carried out in a manner which affirms the rights of all involved.

It is to be hoped that the considerable discussion regarding this topic in 1996 and the Minister of Education's promise to review the legislation will result in the issue being looked at in depth rather than in a piecemeal fashion. As has been discussed, considerable reform of the legislation is needed in order to both make the legislation clearer and to ensure that the right to education is preserved. Questions such as "What do we hope to achieve by suspending and expelling students?" must be discussed and assessed and new ways of dealing with the growing numbers of students who seem to be unable or unwilling to meet the traditional expectations of New Zealand schools need to be found. Schools should not be left to deal with such problems alone; the whole of society needs to become involved. As Judge McElrea says:<sup>182</sup>

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<sup>182</sup> Judge F W M McElrea, District Court Judge and Youth Court Judge, Auckland District Court. "Student Discipline and Restorative Justice" in *School Discipline and Students' Rights* (Legal Research Foundation, Auckland, March 1996) 87.



If we are not prepared to act inclusively, to accentuate the positive, to build on the resources of the community in order to support embattled schools and families, to devise remedial plans and give them a chance to work, then either the problem is going to be passed on to the next school, or there is no next school. Then what has been the schools' problem becomes the business of the courts, and the police, and the prisons, and the next generation of victims.

One can only hope that this is not the final result of school suspensions and expulsions.

<sup>17</sup> Andrew Jackson "An education law tribunal" *Children at Risk*, December 1994. This was also recommended in the submission from the Teachers' Union, "Suspensions and Expulsions to the Select Committee Inquiry." The recommendations are set out in the Committee's final report, *Above & Beyond*.

<sup>18</sup> See note at above p. 52.

<sup>19</sup> Secretary Education's Committee of New Zealand District School Boards to the Select Committee Inquiry, 27 May 1994, *Above & Beyond*.

## APPENDIX 1

### **The National Education Guidelines**

Pursuant to sections 60A and 61 of the Education Act 1989, the Minister of Education hereby specifies the following National Education Goals and National Administration Guidelines which form the National Education Guidelines for the time being in force. In terms of section 61 these guidelines are deemed to be part of the charter of every state and integrated school in New Zealand and apply to the Board of Trustees and Principal of every state and integrated school.

#### *National Education Goals*

Education is at the core of our nation's effort to achieve economic and social progress. In recognition of the fundamental importance of education, the Government sets out the following goals for the education system of New Zealand.

1. The highest standards of achievement, through programmes which enable all students to realise their full potential as individuals, and to develop the values needed to become full members of New Zealand's society.
2. Equality of educational opportunity for all New Zealanders, by identifying and removing barriers to achievement.
3. Development of the knowledge, understanding and skills needed by New Zealanders to compete successfully in the modern, ever-changing world.
4. A sound foundation in the early years for future learning and achievement through programmes which include support for parents in their vital role as their children's first teachers.
5. A broad education through a balanced curriculum covering essential learning areas with high levels of competence in basic literacy and numeracy, science and technology.
6. Excellence achieved through the establishment of clear learning objectives, monitoring student performance against those objectives, and programmes to meet individual need.
7. Success in their learning for those with special needs by ensuring that they are identified and receive appropriate support.

8. Access for students to a nationally and internationally recognised qualifications system to encourage a high level of participation in post-school education in New Zealand.
9. Increased participation and success by Maori through the advancement of Maori education initiatives, including education in Te Reo Maori, consistent with the principles of the Treaty of Waitangi.
10. Respect for the diverse ethnic and cultural heritage of New Zealand people, with acknowledgement of the unique place of Maori, and New Zealand's role in the Pacific and as a member of the international community of nations.

### *National Administration Guidelines*

In order to ensure that the National Education Guidelines are met, Boards of Trustees and Principals respectively, are also required to follow sound governance and management practices involving curriculum, employment, financial and property matters applying to schools. Further details of these requirements are found in the relevant legislation, appropriate contracts of employment and, from time to time, guidelines promulgated by the Secretary for Education.

1 Boards of Trustees must foster student achievement by providing a balanced curriculum in accordance with the national curriculum statements (i.e., the New Zealand Curriculum Framework and other documents based upon it).

In order to provide a balanced programme, each Board, through the Principal and staff, will be required to:

- i implement learning programmes based upon the underlying principles, stated essential learning areas and skills, and the national achievement objectives; and
- ii monitor student progress against the national achievement objectives; and
- iii analyse barriers to learning and achievement; and
- iv develop and implement strategies which address identified learning needs in order to overcome barriers to students' learning; and
- v assess student achievement, maintain individual records and report on student progress.

2. According to the legislation on employment and personnel matters, each Board of Trustees is required in particular to:

i develop and implement personnel and industrial policies, within policy and procedural frameworks set by the Government from time to time, which promote high levels of staff performance, use educational resources effectively and recognise the needs of students;

ii be a good employer as defined in the State Sector Act 1988 and comply with the conditions contained in employment contracts applying to teaching and non-teaching staff.

3. According to legislation on financial and property matters, each Board of Trustees is also required in particular to:

i allocate funds to reflect the school's priorities as stated in the charter;

ii monitor and control school expenditure, and ensure that annual accounts are prepared and audited as required by the Public Finance Act 1989 and the Education Act 1989;

iii comply with the negotiated conditions of any current asset management agreement, and implement a maintenance programme to ensure that the school's buildings and facilities provide a safe, healthy learning environment for students.

4. Each Board of Trustees is also required to:

i document how the national education guidelines are being implemented;

ii maintain an ongoing programme of self-review.

5. Each Board of Trustees is also required to:

i provide a safe physical and emotional environment for students;

ii comply in full with any legislation currently in force or that may be developed to ensure the safety of students and employees.

6. Each Board of Trustees is also expected to comply with all general legislation concerning requirements such as attendance, the length of the school day, and the length of the school year.

The National Education Guidelines specified in notices published in the *New Zealand Gazette* on 9 November 1989, No. 198, page 5669 and 11 January 1990, No. 1, page 6 are hereby revoked.

This notice comes into force the day after the date of this publication.

Dated at Wellington this 26th day of March 1993.

LOCKWOOD SMITH, PH. D., Minister of Education.

*New Zealand Gazette* 29 April 1993, No. 58, page 1086.

## APPENDIX 2

### **Report of Education and Science Select Committee Inquiry into Children at Risk Through Truancy and Behavioural Problems**

Reported to the House of Representatives on 14 March 1995

#### Purpose

To gather evidence, identify and assess successful educational strategies that may assist children at risk through truancy and behavioural problems.

#### Objectives (relating to suspensions and expulsions)

...

4. To review available suspension and expulsion data.

...

9. To make general recommendations to the Government on action schools could take to assist children at risk.

#### Summary of Recommendations (relating to suspensions and expulsions)

##### Section 7.7 Consumer Input

The committee recommends to the Government that:

the Ministry of Education conduct research into schools that promote a student centred culture of consultation and participation;

...

##### Section 7.9 Access to Education

The committee recommends to the Government that:

the Education Act 1989 be amended to incorporate a statutory limit on the length of suspensions for students;

the Education Act 1989 be amended to allow more than the current one short-term (3 days) suspension per child, per year, before the expulsion procedure is used;

the Education Act 1989 be amended to give students, as well as parents, a right to be present at Board of Trustee meetings dealing with the suspension or expulsion of students;

Boards of Trustees be required to inform parents/caregivers, of their right to be present at any meeting of a Board of Trustees convened to deal with the suspension or expulsion of a student;

the Education Review Office, or another suitable agency, be contracted to monitor and assess the levels of "Kiwi suspensions";

legislative and practical steps be taken to prevent the use of "Kiwi suspensions";

more funding and resources be given to the Ministry of Education to follow up children out of the education system and for monitoring suspensions and expulsions.

APPENDIX 3

SUSPENSION CHARTS FOR USE IN SCHOOLS 1

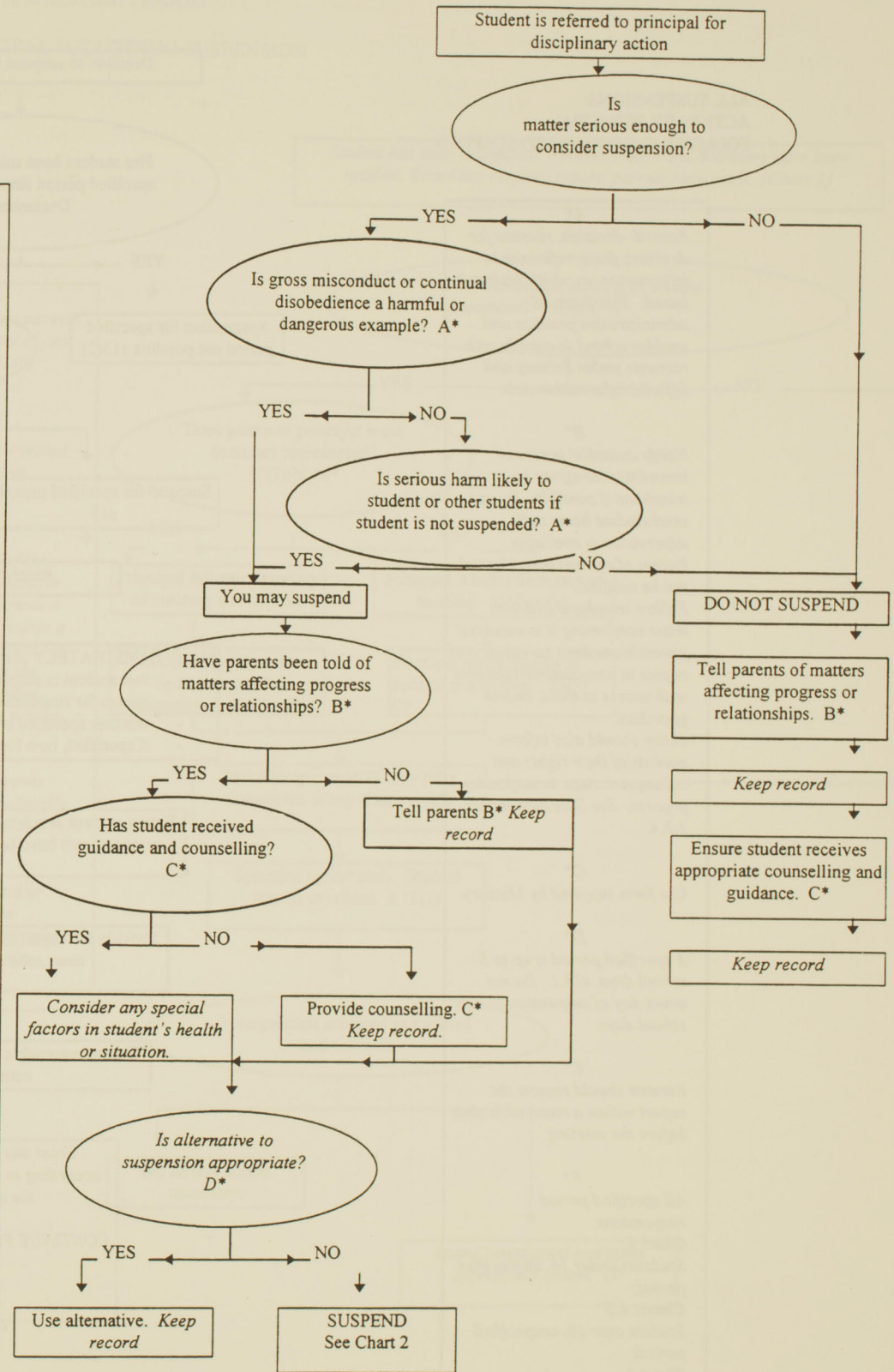
ALL SUSPENSIONS  
IS SUSPENSION APPROPRIATE?

**A\***  
Section 13(1)(a) of the Education Act 1989: Refer to Ministry Guidelines Circular 1996/xx, paragraph 3, page Y.

**B\***  
S.77(b) of the Act requires principals to tell parents of matters affecting progress or relationships. Failure to have done so may lead to successful challenge of suspension.

**C\***  
S.77(a) of the Act requires principals to take all reasonable steps to ensure students get good guidance and counselling. Failure to have done so may lead to successful challenge of suspension.

**D\***  
Possible alternatives are a. cooling off period in a different environment within the school for a few hours, b. behaviour contracts between student, parents, school, extended family.





# SUSPENSION CHARTS FOR USE IN SCHOOLS 2

ALL SUSPENSIONS:  
ACTION BY PRINCIPAL  
FOLLOWING DECISION TO SUSPEND

**A\***  
*Record: decision, reasons for decision, facts, reference to information on which finding is based. This is sound administrative practice and enables school to comply with requests under Privacy and Official Information Acts.*

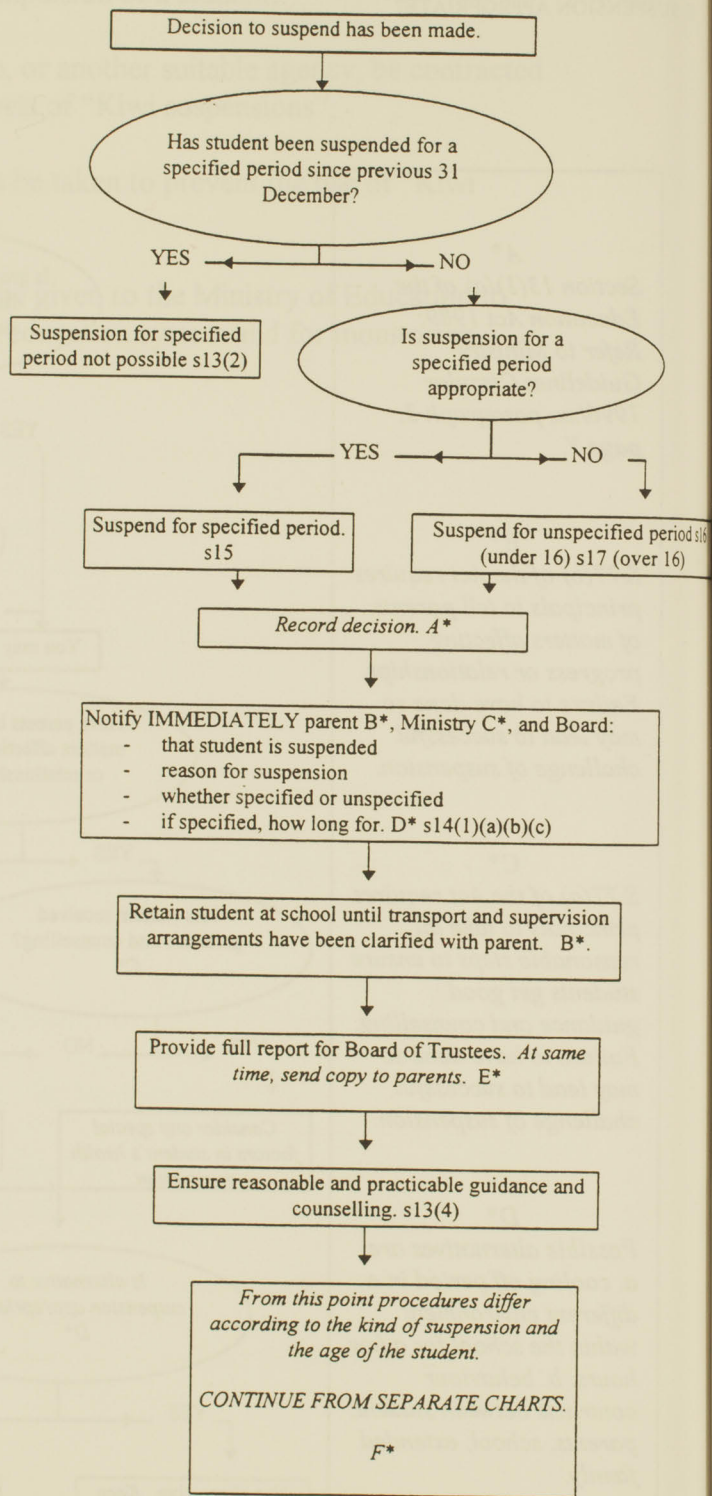
**B\***  
*Notify custodial parent or immediate caregiver by telephone if possible. Do not send student home until supervision is available. Parent of student over 20 need not be notified. Follow telephone call with letter confirming it to custodial parent/immediate caregiver and copies to non-custodial parents with access to child, and/or guardian. Letter should also inform parents of their rights and subsequent steps in suspension process. See Specimen letters 1,2,4.*

**C\***  
*Use form supplied by Ministry.*

**D\***  
*A specified period is up to 3 school days. s13.1. Do not count day of suspension or non school days.*

**E\***  
*Parents should receive the report within a reasonable time before the meeting.*

**F\***  
*All specified period suspensions:  
Chart 3  
Students under 16, unspecified period:  
Charts 4,5  
Student over 16, unspecified period:  
Chart 6*



# SUSPENSION CHARTS FOR USE IN SCHOOLS 3

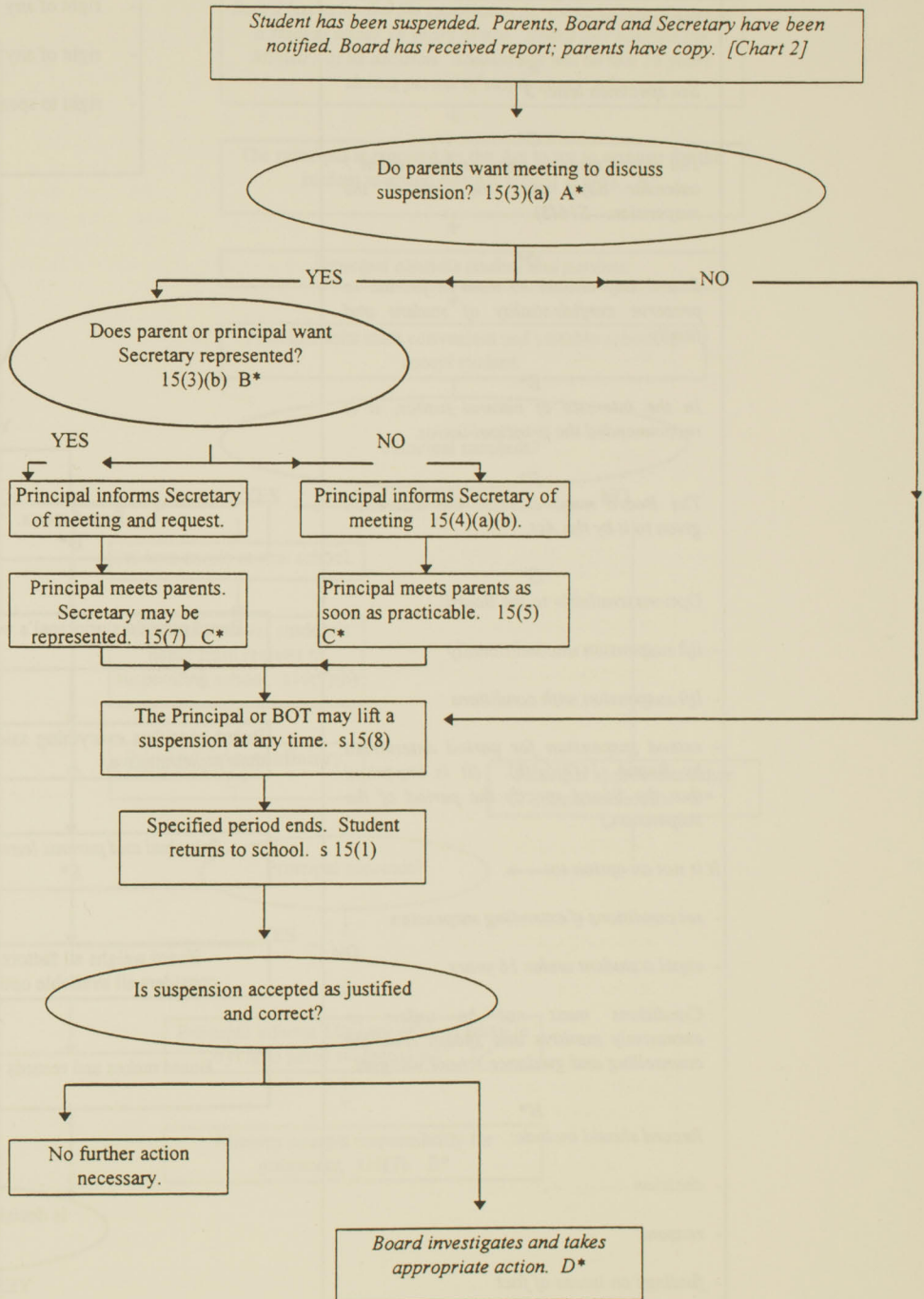
SUSPENSION FOR A SPECIFIED PERIOD  
 ALL STUDENTS  
 ACTION BY PRINCIPAL FOLLOWING SUSPENSION

**A\***  
 Principal need meet parents only once in respect of any one suspension s15(6)

**B\***  
 The Secretary's representative is permitted to attend the meeting. s15(7)

**C\***  
 Either attendance of the Ministry representative or the need to give parents a copy of the report within a reasonable time before the meeting, may mean the suspension has expired before the meeting is held.

**D\***  
 If the suspension proves unjustified or procedurally incorrect the Board's options are:  
 i to apologise and/or  
 ii to clear the student's record and inform Ministry of Education.



# SUSPENSION CHARTS FOR USE IN SCHOOL 4

SUSPENSION FOR AN UNSPECIFIED PERIOD  
STUDENT UNDER 16 YEARS OF AGE  
ACTION BY BOARD

**A\***  
In order to comply with the principles of natural justice, the board must ensure that any reports prepared by the principal or other staff, which the board is to consider at the meeting are made available to the parents within a reasonable time before the meeting.

**B\***  
See specimen letter 3

**C\***  
The Board meeting must be held within 7 calendar days after the day of the suspension. S16(3)

**D\***  
Board may choose to meet in private to preserve confidentiality of student and family.

**E\***  
In the interests of natural justice, it is recommended the principal leaves.

**F\***  
The Board must exercise the discretion given to it by the Act.

**G\***  
Options available to the Board:

- lift suspension unconditionally
- lift suspension with conditions
- extend suspension for period determined by Board s16(1)(a)(b). (It is important that the Board specify the period of the suspension.)

It is not an option to:

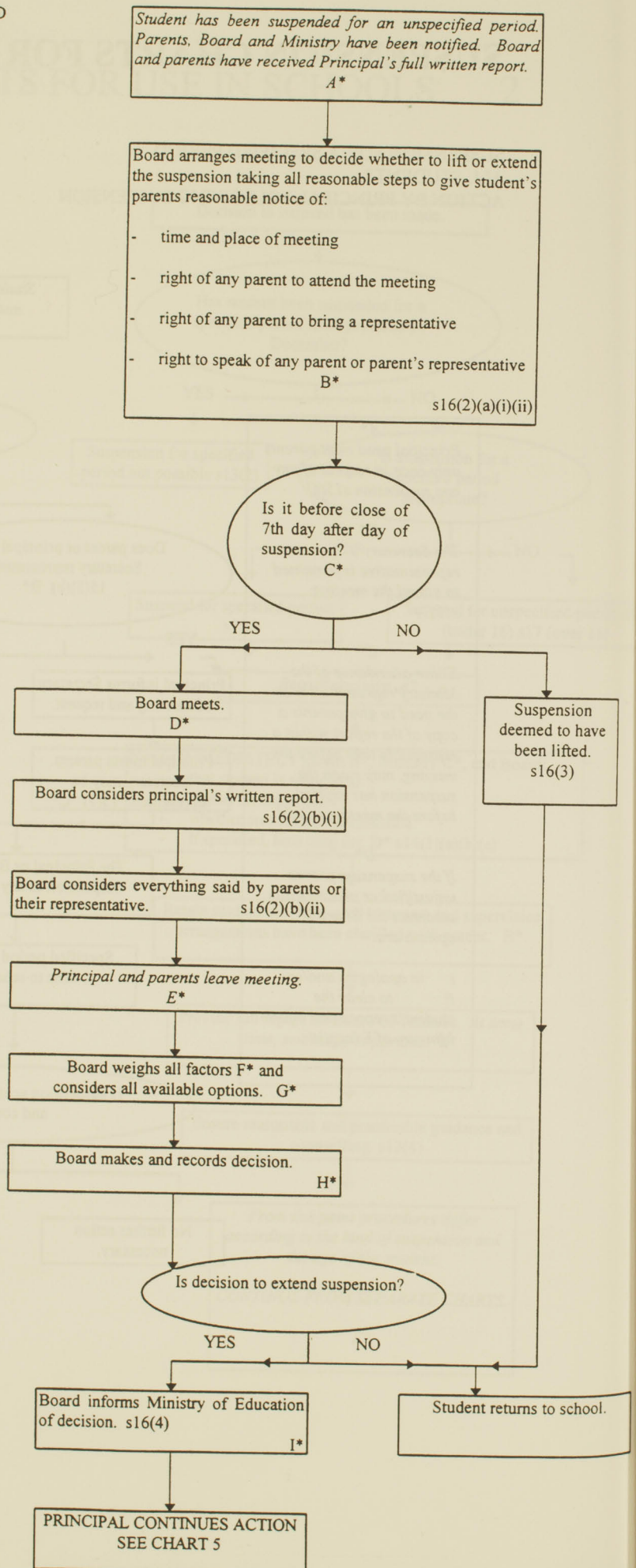
- set conditions if extending suspension
- expel a student under 16 years

Conditions must not be unfair or excessively punitive and should state the counselling and guidance school will give.

**H\***  
Record should include:

- decision
- reasons
- findings on issues of fact
- reference to information on which findings are based

**I\***  
Use Ministry Advice form RS80



# SUSPENSION CHARTS FOR USE IN SCHOOLS 5

SUSPENSION FOR AN UNSPECIFIED PERIOD  
STUDENT UNDER 16 YEARS OF AGE  
SUSPENSION EXTENDED  
ACTION BY PRINCIPAL

**A\***  
A student who turns 16 while suspended is treated as though 16 when suspended. s16(10) - see chart 6

**B\***  
The school must be suitable and convenient to attend. s16(5)

It is suggested the principal try to arrange a suitable school within a reasonable time.

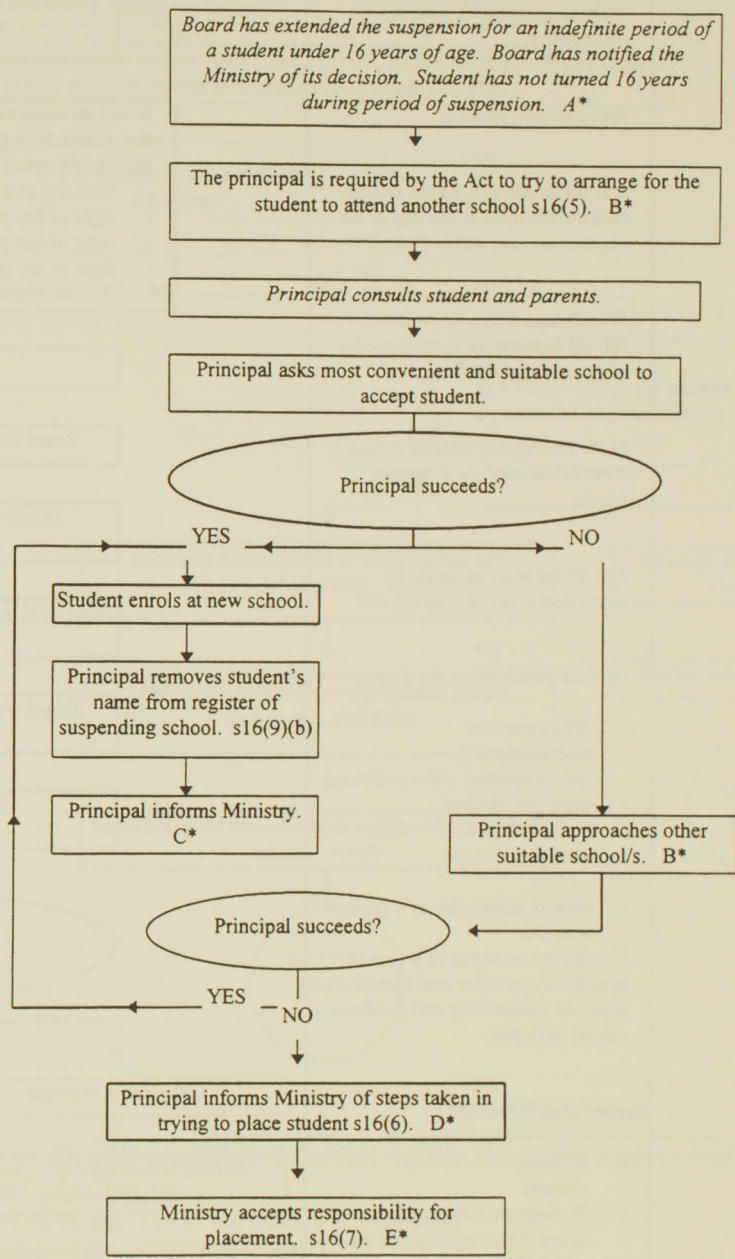
**C\***  
Use Ministry form. RS80

**D\***  
It is important that interruption to the student's schooling is as brief as possible.

**E\***  
The Ministry's responsibility is to: consult student's parents, school boards, any other person or organisation interested in or able to help with student's education or welfare and decide on one of the options below:

- direct the board of another school to enrol the student
- lift the suspension so that student can return to the school which suspended the student
- direct parents to enrol student at a correspondence school. s 16(7)

Directions under these sections override section 11(J) of the Education Act 1989 and section 5 of the Education Amendment Act 1991.



# SUSPENSION CHARTS FOR USE IN SCHOOLS 6

SUSPENSION FOR AN UNSPECIFIED PERIOD  
STUDENT OVER 16 YEARS OF AGE  
ACTION BY BOARD

**A\***  
*In order to comply with the principles of natural justice, the board must ensure that any reports prepared by the Principal or other staff, which the Board is to consider at the meeting are made available to the parents within a reasonable time before the meeting.*

**B\***  
*See specimen letter 5.*

**C\***  
*It is advisable to hold the meeting reasonably close to the day of the suspension, say within 7 days.*

**D\***  
*Board may choose to meet in private to preserve confidentiality of student and family.*

**E\***  
*In the interests of natural justice it is recommended the Principal leaves.*

**F\***  
*The Board must exercise the discretion given to it by the Act.*

**G\***  
*Options available to the Board:*

- lift suspension unconditionally
- lift suspension with conditions
- expel the student

*It is not an option to:*

- extend suspension of a student over 16.

*Conditions must not be unfair or excessively punitive and should state the counselling and guidance school with give.*

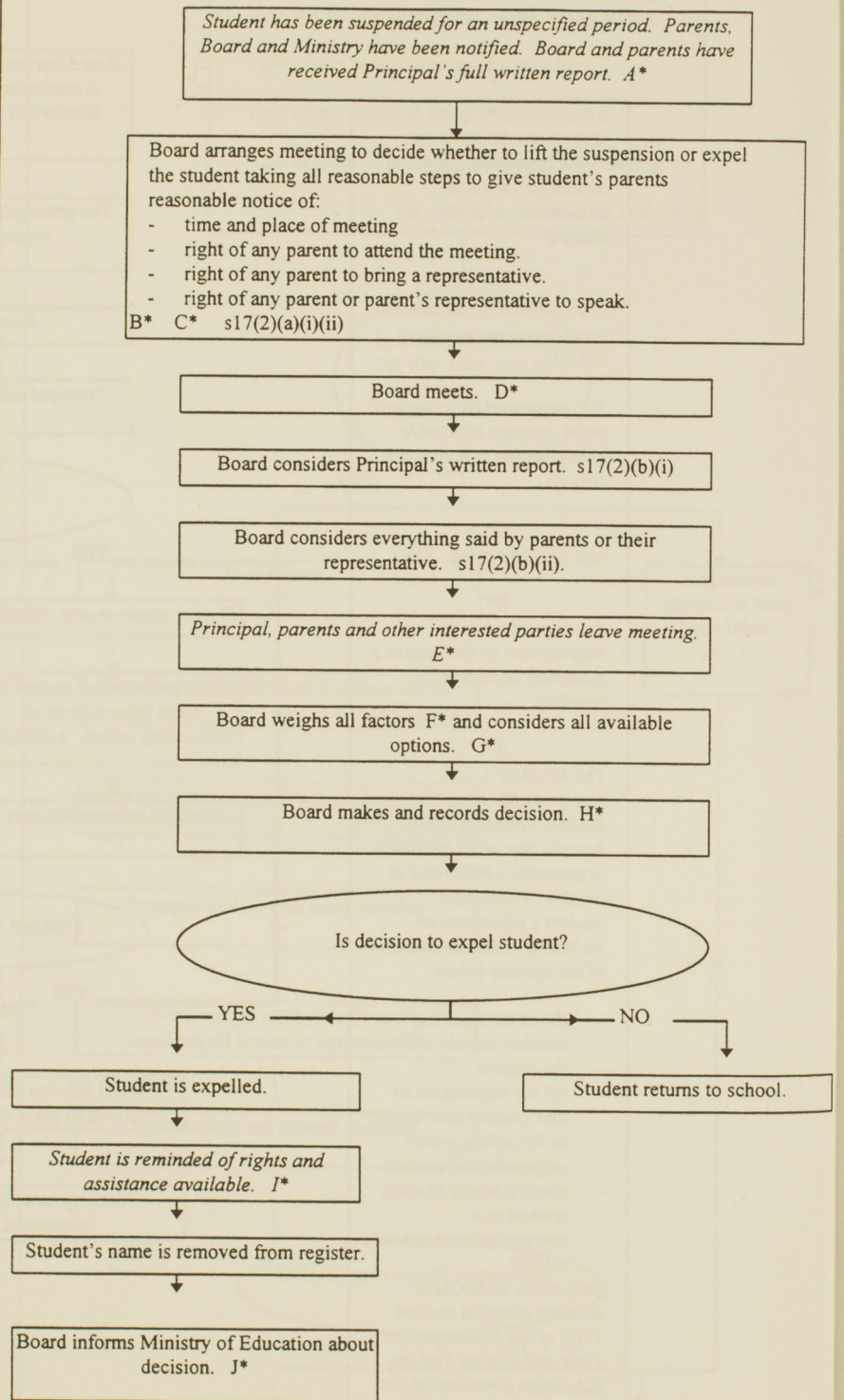
**H\***  
*Record should include:*

- decision
- reasons
- findings on issues of fact
- reference to information on which findings are based.

**I\***

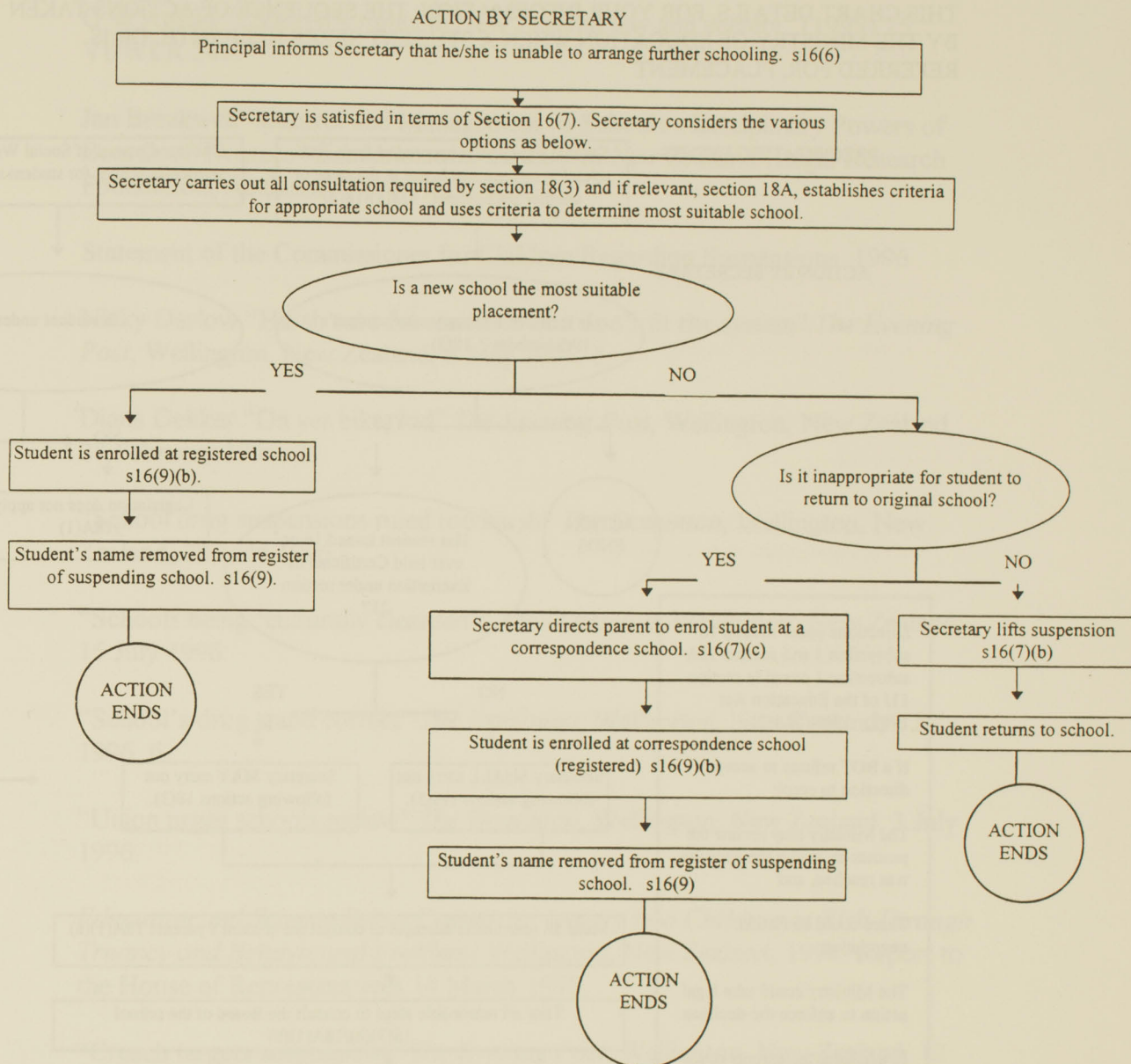
- free education until end of year in which she/he turns 19 years
- Ministry information pamphlet.

**J\***  
*Use Ministry advice form - RS80A.*



## SUSPENSION CHARTS FOR INFORMATION OF SCHOOLS 7

THIS CHART DETAILS, FOR YOUR INFORMATION, THE SEQUENCE OF ACTIONS TAKEN BY THE MINISTRY OF EDUCATION WHEN A STUDENT UNDER 16 IS REFERRED FOR PLACEMENT.



IF A STUDENT TURNS 16 YEARS WHILE SUSPENDED and still on the school register, the student shall be dealt with as though the student has already turned 16 years (refer Chart 6).

DIRECTION UNDER SECTION 16(7)(a) overrides section 11J of the Education Act 1989.

UNDER SECTION 16(7) THE SECRETARY MUST BE SATISFIED THAT:

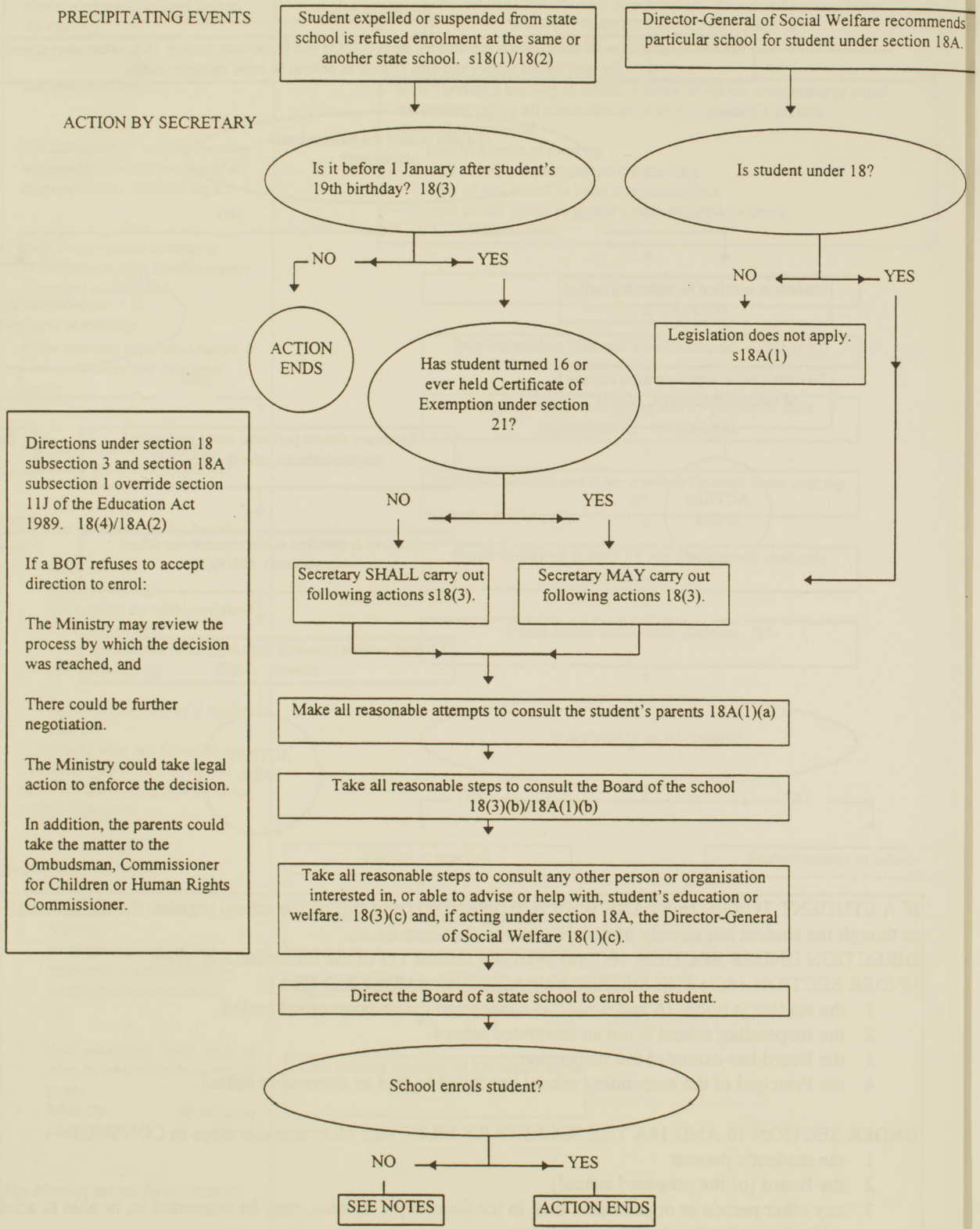
- 1 the student is under 16 and subject to suspension for an unspecified period
- 2 the suspending school is not an integrated school
- 3 the Board has extended the suspension
- 4 the Principal of the suspending school has failed to find an alternative school.

UNDER SECTION 18 AND 18A THE SECRETARY MUST take all reasonable steps to CONSULT:

- 1 the student's parents
- 2 the Board [of the proposed school]
- 3 any other person or organisation that, in the Secretary's opinion, may be interested in, or able to advise on or help with, the student's education or welfare.

# SUSPENSION CHARTS FOR USE IN MoE ONLY 8

THIS CHART DETAILS, FOR YOUR INFORMATION, THE SEQUENCE OF ACTIONS TAKEN BY THE MINISTRY OF EDUCATION WHEN A STUDENT SEEKS HELP WITH, OR IS REFERRED FOR, PLACEMENT



Directions under section 18 subsection 3 and section 18A subsection 1 override section 11J of the Education Act 1989. 18(4)/18A(2)

If a BOT refuses to accept direction to enrol:  
The Ministry may review the process by which the decision was reached, and  
There could be further negotiation.  
The Ministry could take legal action to enforce the decision.

In addition, the parents could take the matter to the Ombudsman, Commissioner for Children or Human Rights Commissioner.

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