

Discipline and Procedural Fairness

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Discipline and Procedural Fairness

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What is this paper about?

This paper is about school discipline and the need to afford students procedural fairness when administering discipline.

School discipline, or student management as some schools refer to it, generally is aimed at providing a safe, caring and happy school environment in which students can learn and grow. Schools use discipline not only to demonstrate that there are consequences for unacceptable behaviour but also to help their students to become self-disciplined. The consequences of breaking the rules can range from minor punishments through to suspension and expulsion. My focus in this paper will be the need for procedural fairness when considering suspension or expulsion.

What is procedural fairness?

Procedural fairness (or natural justice, as many lawyers prefer to call it) refers to a body of principles that have evolved to provide fairness to people who are being investigated or charged or who are the subject of administrative action which may adversely affect them. While these principles are generally becoming better known, it seems that, almost as a result of this familiarity, people are losing sight of the fact that procedural fairness usually means simply observing practical fairness. In other words, as Young CJ in Eq said in *Hedges v Australasian Conference Association Limited*:

*Different situations will give rise to requirements of satisfying the general principle of natural justice in different ways.*¹

Gleeson CJ of the High Court of Australia put it this way:

¹ [2003] NSWSC 1107 at [121]

Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.²

Mason J, in the High Court's decision in *Kioa v West*, said:

The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.³

He also said:

The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?⁴

In *R v Governors of Dunraven School, ex p B*, Sedley LJ of the English Court of Appeal said:

It is a proposition too obvious to require authority that what fairness demands in a particular situation will depend on the circumstances.⁵

All these Judges are underlining the importance of the particular situation when determining the content of procedural fairness. This is especially important in schools where the circumstances may relate to very trivial allegations or to very serious ones.

What do the courts say?

Australia

There is no doubt that there is an obligation to afford procedural fairness to students in government schools when disciplining them.⁶ The Department of Education and Training's documents often state:

Procedural fairness is a basic right of all individuals dealing with authorities. All individuals have a legitimate expectation that Department of Education and Training officers will follow these

² *In re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502 at 511

³ (1985) 159 CLR 550 at 585

⁴ (1985) 159 CLR 550 at 585

⁵ English Court of Appeal, Civil Division, 21 December 1999, at [18]

⁶ *CF (by her Tutor JF) v State of New South Wales (Department of Education)* (2003) 58 NSWLR 135; see also *McMahon v Buggy* (NSWSC unreported, December 1972).

principles in all circumstances, including when dealing with suspensions and expulsions.

The position is not as clear in non-government schools. In the recent New South Wales case of *Bird v Campbelltown Anglican Schools Council*, the Court said that there was no principle of law to the effect that a principal of a non-government school acts in a judicial or quasi-judicial capacity or has an obligation to apply the principles of procedural fairness in making disciplinary decisions concerning students at the school.⁷ The Court relied on *Seymour and Anor v Swift and Ors*⁸ and *Ge v Taylors Institute of Advanced Studies Ltd.*⁹ However, both these cases were only applications for interlocutory judgment. In the *Ge Case*, Kellam J actually said:

*I accept that the question of whether a student is entitled to rely on the principles of natural justice or procedural fairness, to challenge a decision to suspend him or her from a school, is not the subject of clear and consistent authority in Australia.*¹⁰

Kellam J also noted that Starke J in *Dage v Baptist Union* was of the opinion that the issue was far from free of doubt.¹¹

On the other hand, there have been a number of recent Australian cases where it has been said that private organisations ought to afford procedural fairness when considering the expulsion of persons from those organisations: *Hedges v Australasian Conference Assn Ltd*¹², *Carter v NSW Netball Association*¹³, and *Plenty v Seventh-Day Adventist Church of Port Pirie*.¹⁴

England

As early as the mid-nineteenth century in England, it was clear that the school principal did not have an unfettered right to expel students. *Fitzgerald v Northcote*¹⁵ established that the master of a private school did not have a discretionary power of expulsion but could only expel for reasonable cause.

⁷ [2007] NSWSC 1419 at [11 ii.]

⁸ (1976) 10 ACTR 1 at 3

⁹ [2003] VSC 354 at [40]

¹⁰ [2003] VSC 354 at [41]

¹¹ [1985] VR 270

¹² [2003] NSWSC 1107

¹³ [2004] NSWSC 737

¹⁴ [2003] SASC 68

¹⁵ (1865) F & F 656; (1865) 176 ER 734

In *R v Governors of Dunraven School, ex p B*¹⁶, even though there was a statutory provision requiring the Discipline Committee of the governing body to give parents an opportunity of appearing and making oral representations, Sedley LJ said that the common law would have required the same. This was particularly because, although a decision to expel a student is not a criminal proceeding, “its consequences can be at least as severe as those of a criminal proceeding”.¹⁷ The Court of Appeal then proceeded to deal with the case by asking whether the student had received a fair hearing. For reasons I will mention later, the Court decided the student had not been treated fairly and so the decision to expel was set aside.

*Gray v Marlborough College*¹⁸ is a more recent decision of the English Court of Appeal in which a student challenged his expulsion, essentially on the basis that it was in breach of the contractual arrangements in place between the school and his parents. Although not necessary for the decision, Auld LJ was of the view that the principal of an independent school in England was not subject to public law remedies, thereby putting himself at odds with Sedley LJ in *R v Governors of Dunraven School, ex p B*.

Northern Ireland

In Northern Ireland, Coghlin J in *Re Kean*¹⁹ accepted that an application for judicial review could be made to challenge a school decision to suspend a pupil on the grounds of procedural irregularity. While he was sceptical of any suggestion that the day to day exercise of disciplinary powers by a teacher should be subject to unwieldy and time consuming supervision by the law, he concluded in that case, which involved a suspension of a student, there was a breach of basic fairness and that relief should be granted. He said that basic fairness would have required that the student should have been given an opportunity to consider the case being made against her by other parties and the headmaster.

Ireland

In Ireland, the High Court in *Student A v Dublin Secondary School*²⁰ was dealing with a challenge to a decision to expel a student from a private school. The Court said quite specifically that, because “expulsion is the

¹⁶ English Court of Appeal, Civil Division, 21 December 1999, especially at [18]

¹⁷ English Court of Appeal, Civil Division, 21 December 1999, at [9]

¹⁸ [2006] All ER (D) 145 (Sep); [2006] EWCA Civ 1262 at [54]-[57]

¹⁹ [1997] NITB 109

²⁰ [1999] IEHC 47

most draconian punishment a school can impose, the decision to expel can be properly regarded as quasi-judicial in nature²¹. The Court cited with approval the following statement from *Education and the Law* by Glendenning:

Other school decisions have a greater impact on the lives of students, for instance, when a school permanently excludes a student, or suspends a student for a long period or refuses to enrol a student. In such circumstances, a school may be perceived by a Court to be acting in a quasi-judicial capacity because it is making decisions of a serious nature which influence the rights and liabilities of students. In these instances, there is a legal obligation to act fairly and to implement fair procedures. Accordingly, parents, or the student who has reached his or her eighteenth birthday, may seek the leave of the High Court to have school decisions of a quasi-judicial nature reviewed by the High Court on procedural grounds only i.e. on the grounds of fairness.²²

It concluded that the school must act fairly and so examined whether fair procedures had been adopted and the requirements of natural justice observed.

New Zealand

In the New Zealand case of *J suing by his Litigation Guardian v Bovaird*²³, a 16 year old boy was suspended and then expelled for drug related offences. Although a major part of the boy's argument to have the suspension and expulsion decisions declared invalid and set aside was based on a failure to comply with statutory requirements, he also argued that there had been a failure to follow procedural fairness. The High Court agreed, saying:

The need for the process to be fair, however, is basic. It applies most acutely where a principal, or his or her delegate, [is] faced with an issue of serious behaviour that could result in a child being stood down or suspended.²⁴

²¹ [1999] IEHC 47 at [35]-[36]

²² Dr Dympna Glendenning, Butterworths Tolley, Dublin, 1999 at p 328

²³ [2007] NZHC 560 (7 June 2007)

²⁴ [2007] NZHC 560 (7 June 2007) at [67]

Hong Kong

In Hong Kong, the High Court there in *R v English Schools Foundation*²⁵ found that it had jurisdiction to review a decision to expel a student from a school run by the Foundation. This was because the Foundation and its schools were public bodies exercising public functions. The Foundation was created by statute which empowered it to operate schools in Hong Kong teaching boys and girls using the English language. Those powers in turn were subject to the provisions of the Hong Kong *Education Ordinance*, which consolidated the law relating to the supervision and control of all schools in Hong Kong. The schools received public funding. The school's discipline rules had the force of subordinate legislation – a situation peculiar to Hong Kong. Accordingly, the school's decision-makers were obliged to act in good faith and fairly listen to both sides.

Canada

In *C.D. v. Ridley College*²⁶, the Court found that a decision to expel a student by the College, a private school in Canada receiving no public funds, was subject to judicial review. Accordingly, the process leading to the expulsion was governed by the principles of natural justice. The Court noted that the College had been incorporated by statute which gave the principal power to make rules for the discipline of students. The Court said that the College, notwithstanding its private funding, was providing a public service (and a critically important public service), namely, the education of children, and, as a result, it must be subjected to some degree of public accountability. Further, the Court said that it was in the public interest that private schools (although they may be permitted latitude, in certain areas, not available to public or government-funded schools) operate within the principles of natural justice when it comes to the expulsion of students.

United States of America

In the United States, the Supreme Court has held that if students are to be suspended even for a short period of time then, unless they are actually disrupting the school's work or are acting or threatening to act dangerously or destructively, they must be notified that suspension action is about to be taken. The students must also be given the reason for the intended suspension and the opportunity to explain. Students are protected by the due

²⁵ [2004] HCFI 651

²⁶ 1996 CanLII 8128 (ON S.C.); (1996) 140 D.L.R. (4th) 697

process clause of the Fourteenth Amendment of the United States Constitution. Litigation involving student rights has changed disciplinary policy in US schools. Students must be made aware of school rules. Those whose conduct is to be sanctioned by some disciplinary action must be advised in writing of the grounds and the evidence on which action is being taken. Students must be given adequate time to explain their actions. Their accusers must attend the disciplinary hearing.

In one American case,²⁷ the court held that a junior high school student facing suspension and indefinite expulsion for possession of marijuana was entitled to “procedural due process”. The boy and his parents were advised of the accusations against him prior to the hearing. The boy’s father, who also served as the boy’s lawyer, was present during all suspension and expulsion proceedings. At the hearing, a female student testified that the boy showed her a bag of a leafy substance identified by the boy as “weed” and “dope”. The boy’s teacher testified that a bag of a green, leafy substance, a rolled cigarette, and additional rolling papers were found near the boy’s seat in class. Several other students gave written statements which were introduced at the hearing stating that the boy had shown them marijuana. The boy was given the names of the students and the substance of their testimony, but was not able to cross-examine the students because their parents would not allow them to testify in person at the hearing. The court held that the admission of statements of students who were not present at the hearing did not violate due process because there was no constitutional right to cross-examine witnesses at an expulsion hearing.

What does the *Education Act 1990* require?

As can be seen, there are many views around the world about whether schools must afford students procedural fairness when meting out discipline. To a large extent, this is now academic for New South Wales schools as the State Government has decided that schools should do so.

The New South Wales Government is responsible for school education in this state. School education is provided by government schools run by the Department of Education and Training and non-government schools run by a range of organisations.

²⁷ *Arrington ex rel. L.Q.A. v Eberhart*, 920 F. Supp. 1208 (M.D. Ala. 1996)

The Minister has a direct say in school discipline in government schools. Section 35 of the *Education Act* deals with discipline in government schools. It reads:

(1) *The Minister may control and regulate student discipline in government schools.*

(2) *The Minister may prepare guidelines for the adoption by government schools of fair discipline codes that provide for the control and regulation of student discipline in those schools (except for the suspension or expulsion of students).*

(2A) *The guidelines and codes must not permit corporal punishment of students attending government schools.*

(2B) *The guidelines and codes may permit other reasonable forms of punishment or correction of those students, including requiring students to perform any reasonable work or service for the school.*

(3) *The Minister may, on the recommendation of the Director-General, expel a child of any age from a government school. The Director-General may suspend any child from a government school.*

(4) *The Minister may establish programs to assist any child who has a history of non-attendance at a government school or who has been expelled from a government school to adjust more successfully to school life or to improve his or her behaviour so as to be able to return to school.*

(5) *The Director-General may, with the consent of the child's parent, arrange for a child who has been expelled from a government school to be admitted to and attend another government school (unless the child is refused admission under section 34 (4)) or to participate in a program referred to in subsection (4).*

Consistent with this, the department has a policy called *Student Discipline in Government Schools* which states that schools must have a School Discipline Policy which, among other things, must incorporate the principles of procedural fairness.

The Government has chosen to control discipline in non-government schools indirectly through the registration process administered for the Government by the Board of Studies. Section 47 of the *Education Act* sets

out the requirements for registration of a non-government school. The first example of using the registration requirements in relation to discipline came in 1995 when the *Education Reform Amendment (School Discipline) Act 1995* added section 47(f) which read:

For the purposes of this Act, the requirements for the registration of a school are as follows:

...

(f) official school policies relating to student discipline that do not permit corporal punishment of students attending the school.

The amendment Act commenced on 21 December 1996, a year after it was passed by the Parliament. The new section 47(f) was stated specifically to extend to any school registered before the commencement date.²⁸

The *Education Act* was again amended in relation to discipline by the *Education Amendment (Non-Government Schools Registration) Act 2004* which commenced on 1 May 2004. This followed recommendations by the Grimshaw Report 2002. Warren Grimshaw proposed that:

*schools should demonstrate that they have in place policies and procedures that provide for student welfare in all its aspects, including child protection. These policies should be readily available to parents and students and those that relate to student discipline should be based on the principles of procedural fairness. The ban on corporal punishment introduced in 1995 should be preserved as a requirement in its own right.*²⁹

The *Education Amendment (Non-Government Schools Registration) Act* replaced former section 47 with new sections 47 and 47A. The former section 47 continued to apply to and in respect of any non-government school that was a registered non-government school at 1 May 2004 for a period of one year (that is, until 1 May 2005) or for the balance of its current registration (whichever was the shorter).³⁰ This paper is chiefly concerned with section 47(h) which deals with discipline policies and corporal punishment. Its forerunner was section 47(f) set out above. Section 47(h) now reads:

²⁸ *Education Reform Amendment (School Discipline) Act 1995* Schedule 1 [6]

²⁹ Review of Non-Government Schools in NSW: Report 1 page 11

³⁰ *Education Amendment (Non-Government Schools Registration) Act 2004* Schedule 1 [30]

For the purposes of this Act, the requirements for the registration of a non-government school are as follows:

...

(h) school policies relating to discipline of students attending the school are based on principles of procedural fairness, and do not permit corporal punishment of students,

I note that the parliament effectively allowed schools one year to prepare for the changes to school discipline introduced in 1995 and 2004. This lead in period was achieved in different ways. When corporal punishment was banned, the change applied from commencement but commencement was deferred for 12 months from when the Act was passed. When procedural fairness was brought in, the change applied 12 months after commencement and the amending Act commenced as soon as it was passed.

In *Bird's Case*, Einstein J said:

*Section 47(h) ... does not provide a statutory source for any obligation on the [College] to comply with the principles of natural justice...*³¹

With respect, this cannot be correct as the provision effectively requires non-government schools to have school discipline policies based on principles of procedural fairness if they wish to be registered. The judge presumably meant that the College did not have an obligation to its students or their parents to afford procedural fairness. He was influenced in this view by section 47A which reads:

The operation of section 47 is not to be regarded as giving rise to any implication that it is a term of any contract (whether or not written) between the proprietor of a registered non-government school and a parent of any child enrolled at the school that the school comply with the requirements imposed by or under this Act for registration of non-government schools or that failure to comply with any such requirement in itself gives rise to any civil cause of action.

Einstein J noted that the College was last registered before section 47(h) took effect. He seemed to imply that the College therefore did

³¹ [2007] NSWSC 1419 at [12]

not need to have a discipline policy based on principles of procedural fairness until it was next due for re-registration. This is not a view shared by the Board of Studies.

What does the Board of Studies require?

Section 131 of the *Education Act* allows the Board to make rules:

(1) The Board may make rules, not inconsistent with this Act or the regulations, for or with respect to the exercise of any of its functions.

(1A) Without limiting subsection (1), the rules may set out guidelines with respect to the requirements for registration and accreditation set out in Parts 7 and 8.

(2) A rule does not take effect unless approved by the Minister.

(3) A rule is to be published as prescribed by the regulations and takes effect on the date of publication or a later date specified in the rule.

Under Section 131, the *Registered and Accredited Individual Non-government Schools (NSW) Manual* and the *Registration Systems and Member Non-government Schools (NSW) Manual* (the manuals) constitute the rules set out by the Board in relation to the requirements for registration and accreditation. The following appears in both Manuals but is extracted from the former:

3.7 Discipline

3.7.1 A registered non-government school must have policies relating to discipline of students attending the school that are based on principles of procedural fairness.

The Act requires that policies related to the discipline of students be based on procedural fairness. It is the responsibility of the school to determine incidents that may require disciplinary action and the nature of any penalties that may apply. The process that leads to the imposition of such penalties, particularly but not exclusively in relation to suspension, expulsion and exclusion, must be procedurally fair.

Suspension is a temporary removal of a student from all of the classes that a student would normally attend at a school for a set period of time.

Expulsion is the permanent removal of a student from one particular school.

Exclusion is the act of preventing a student's admission to a number of schools. In extreme circumstances, the principal of a school may make a submission to an appropriate authority, or to other schools, recommending the permanent exclusion of a student from the registration system of which the school is a member, or from other schools.

Procedural fairness is a basic right of all when dealing with authorities. Procedural fairness refers to what are sometimes described as the 'hearing rule' and the 'right to an unbiased decision'.

The 'hearing rule' includes the right of the person against whom an allegation has been made to:

- know the allegations related to a specific matter and any other information which will be taken into account in considering the matter
- know the process by which the matter will be considered
- respond to the allegations
- know how to seek a review of the decision made in response to the allegations.

The 'right to an unbiased decision' includes the right to:

- impartiality in an investigation and decision-making
- an absence of bias by a decision-maker.

Procedural fairness includes making available to students and parents or caregivers the policies and procedures under which disciplinary action is taken. It also includes providing details of an allegation relating to a specific matter or incident. This will usually involve providing an outline of the allegations made in witness statements and consideration of witness protection. As part of ensuring the right to be heard, schools could establish any need for parents/caregivers to be provided with interpreter services and, if required, make arrangements for such services to be available.

While it is generally preferable that different people carry out the investigation and decision-making, in the school setting this may not always be possible. If the principal is conducting both the investigative and decision-making stages, he or she must be reasonable and objective. To be procedurally fair, the principal must act justly and be seen to act justly. While it is difficult to combine the roles of investigator and adjudicator, it is acceptable to do so given the nature of the principal's responsibilities. Nevertheless, it may be preferable to have another appropriate officer, such as an assistant principal or independent person, carry out the investigation where possible. The review mechanism adds to the fairness of the process.

In matters where a long suspension, expulsion or exclusion is contemplated, the gravity of the circumstances requires particular emphasis to be given to procedural fairness. This includes the offer of having a support person/observer attend formal interviews. The key points of the interview/discussion should be recorded in writing.

Evidence of compliance

A registered non-government school will have in place policies related to the discipline of students, including but not limited to the suspension, expulsion and exclusion of students, that are based on procedural fairness.

3.7.2 A registered non-government school must have policies related to discipline of students attending the school that do not permit corporal punishment of students.

Evidence of compliance

A registered non-government school will have in place and implement policies related to the discipline of students that:

- either expressly prohibit corporal punishment or clearly and exhaustively list the school's discipline methods so as to plainly exclude corporal punishment
- do not explicitly or implicitly sanction the administering of corporal punishment by non-school persons, including parents, to enforce discipline at the school.

Discipline Policies

What does a policy relating to discipline of students based on principles of procedural fairness look like? The Board of Studies says in its Manuals: *Procedural fairness refers to what are sometimes described as the 'hearing rule' and the 'right to an unbiased decision'*. However, there is potentially much more to procedural fairness than these two things. The principles of procedural fairness which schools must take into account in their discipline policies are:

Fully informing students of the allegations against them

Students and their parents must be told why the student is in trouble. The High Court of Australia's decision in *Kioa v West* is very important in this regard:

... recent decisions illustrate the importance which the law attaches to the need to bring to a person's attention the critical issue or

*factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it*³²

In *D v Independent Appeal Panel of Bromley London Borough & Another*, Longmore LJ said:

*It is of the essence of natural justice that a party to proceedings does know what case he has to meet.*³³

In *R v Governors of Dunraven School, ex p B*, Sedley LJ noted that, when expulsion was under contemplation, a student, through his or her parents, had a right to be heard. He then said:

*Such a right is worthless unless the parent knows in some adequate form what is being said against the child.*³⁴

A little later, he added:

*It was right that a boy facing possible expulsion should know the nature of the accusation against him.*³⁵

In *Bird's Case*, the Court found that the school complied with the requirements of procedural fairness in part because the student and his mother were informed of the nature of the allegation of misconduct.³⁶

In *R v Cobham Hall School Ex parte 'GS'*, Dyson J said that procedural fairness required that, other than in exceptional circumstances,

*if the school is contemplating requiring the removal of a particular pupil for unsatisfactory work or behaviour, the pupil should be given a warning and an opportunity to make representations and improve before action is taken. There will be exceptional cases where a warning is not necessary, but these will be rare.*³⁷

Fully informing students of the likely consequences

Just as students and their parents must be told why the student is in trouble, so too must they be told what may flow from adverse findings.

In the *Cobham Hall Case*, the school had made known to the student and her parents its concerns about the girl's academic performance and

³² (1985) 159 CLR 550 at 587 per Mason J

³³ [2007] EWCA Civ 1010 at [4]

³⁴ English Court of Appeal, Civil Division, 21 December 1999, at [18]

³⁵ English Court of Appeal, Civil Division, 21 December 1999, at [20]

³⁶ [2007] NSWSC 1419 at [50]

³⁷ [1997] EWHC Admin 1051 at [44]

behaviour. She had been placed on detention several times and had been “on report”. However, the girl had at no time been warned that, if she did not improve, her place at the school would be withdrawn. Dyson J said that the decision that she would have to leave the school came like a “bolt out of the blue”. There had been no warning whatsoever. In the judge’s view, this meant that the school was in breach of the rules of procedural fairness.

It is therefore important that schools inform students and parents when the student’s misconduct is so serious that it may well merit suspension or expulsion. Otherwise, they may not appreciate the gravity of the matter or what procedural rights there are available to them. In *Carter’s Case*,³⁸ not only did Ms Carter not know the nature of the proceedings against her, it seems that the Netball Association also failed to correctly identify the nature of the proceedings.³⁹ According to Palmer J, that compounded the injustice of the proceedings.⁴⁰

Giving students and their parents the opportunity to provide an explanation or make representations

Once the student and his or her parents know why the student is in trouble, they must be given ample opportunity to respond.⁴¹ While this will normally mean giving them time to consider the allegations and an opportunity to respond in person at a meeting, it may be appropriate to allow a written response.

In *Student A v Dublin Secondary School*, the Irish High Court was concerned that

*expulsions were put in place before either the students or their parents had an opportunity of making representations prior to the imposition of the most severe penalty to be imposed by a school. This is an essential aspect of fair procedures. It ... is also, it seems to me, an essential requirement of natural justice.*⁴²

In *Bird’s Case*, the Court found that the school complied with the hearing rule when the Deputy heard the student and his mother give their version of events.⁴³

³⁸ [2004] NSWSC 737

³⁹ A similar situation arose in *Forbes v Boston* [1999] NSWSC 1217 (14 December 1999)

⁴⁰ [2004] NSWSC 737 at [120]

⁴¹ *Carter*, [2004] NSWSC 737 at [122]

⁴² [1999] IEHC 47 at [33]

⁴³ [2007] NSWSC 1419 at [50]

In *M (a minor), Re Application for Judicial Review*⁴⁴, the headmaster's decision was procedurally flawed as his investigation carried out to establish the facts was unfair. He failed to take reasonable steps to involve the student's parents before purporting to come to the serious conclusion that she was "knowingly involved in the handling and promotion" of a banned drug.

In *R v English Schools Foundation*, the Court found that the school and the Foundation, in what was apparently its anxiety to deal rapidly with the problem, failed to listen to what either the student had to say in his defence or in mitigation or what his parents had to say on his behalf. In the circumstances, "that was plainly a breach of natural justice; to put it another way, it was a failure to act fairly."⁴⁵

Ensuring that proper investigation of the allegations occurs, that all parties are heard and relevant submissions considered

It is often correctly said that investigations within schools are not bound by the rules of evidence. Nevertheless, it must be remembered that these rules are a useful guide to any investigator. They should only be departed from "where consideration of equity, good conscience and substantial merit so justify."⁴⁶ Evatt J made the same point in *R v War Pensions Entitlement Appeal Tribunal; exp Bott*:

*After all, [the rules of evidence] represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and solicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer "substantial justice".*⁴⁷

The relevant standard of proof for investigations by schools is "on the balance of probabilities". Such investigations do not amount to criminal proceedings, no matter how serious the allegation. Accordingly, to find that an allegation is sustained requires proof on the balance of probabilities - the

⁴⁴ [2004] NIQB 6 (04 February 2004) at [17]

⁴⁵ [2004] HCFI 651 at [39]

⁴⁶ *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2004] NSWIRComm 65 at [322]

⁴⁷ (1933) 50 CLR 228 at 256

ordinary standard of proof required of a party who bears the onus in civil litigation in Australia. It is often suggested that this civil standard is given an extra dimension where the issue under consideration is more serious. The basis for this suggestion is found in the judgment of Dixon J in *Briginshaw v Briginshaw*:

*The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, an inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect references.*⁴⁸

It is not uncommon for schools to be required to investigate alleged behaviour which could constitute criminal activity in situations where the Police have already investigated but decided against bringing charges. The school finds itself in the invidious position of having to investigate the alleged criminal activity when the Police have decided that there is not enough evidence to prove what is alleged beyond reasonable doubt - the appropriate burden of proof in criminal matters. The decision by the Police not to charge a student cannot be relied upon by the school as being determinative of the issues which are the subject of the investigation. As the

⁴⁸ (1938) 60 CLR 336 at 361-362

Full Bench of the Industrial Commission said in *Wang v Crestell Industries Pty Ltd* (an employment case):

*The onus of proof in such a case is on the employer and the standard of proof must be such as to enable a positive finding that the misconduct occurred. The standard is, of course, the civil and not the criminal one, but the requisite degree of satisfaction must have regard to the seriousness of the alleged conduct and gravity of the consequences of the finding.*⁴⁹

It is also important to consider all relevant evidence. This especially includes evidence that the accused student puts forward. The teacher investigating must speak to all the people involved, look at any relevant documents and make other relevant enquiries - all with a view to making a finding or findings on the balance of probabilities, as to what happened. While this may appear obvious, sadly, it is clearly not always obvious to experienced investigators, let alone teachers. For example, the investigator in *Carter's Case*, a former police officer, was criticised because she failed to interview any of the witnesses who could have given a contrary view of events to that put forward by those making the allegations.⁵⁰

Ensuring that the decision-maker acts fairly and without bias

There should be a neutral investigator⁵¹ and decision-maker. Obviously, this means that they have to be, and have to be seen to be, objective and impartial. It is not always appreciated that neutrality can be affected by a conflict of interest. For example, principals who know that they should be impartial and yet have some personal relationship with either those making the allegation or the student against whom the allegation is made necessarily have a conflict of interest. However, the circumstances of the case will determine whether a particular relationship between various parties will be important enough to amount to a denial of natural justice.

In *C.D. v. Ridley College*, the student sought to have a decision of a Discipline Committee set aside because of an apprehension of bias. The student argued that the fact that the Committee was comprised largely of other school principals who all knew the College principal professionally and personally gave an impression of unfairness. The Court said:

⁴⁹ (1997) 73 IR 454 at 463-464

⁵⁰ [2004] NSWSC 737 at [26], [28], [33], [34] and [45]

⁵¹ *Hedges*, [2003] NSWSC 1107 at [18]

*If such a committee did create an apprehension of bias it would only be in the eyes of the applicants and the apprehension would be unreasonable. As well, it must be remembered that the test is not whether there might be an apprehension of bias but, instead, it is whether there will be, in the mind of a reasonable person, a reasonable apprehension of bias.*⁵²

In an English case,⁵³ it was contended that a decision to expel a student was made by a biased decision-maker. Stoke Newington School had an Exclusion Panel to make expulsion decisions. A student was expelled by an Exclusion Panel which included a teacher who had been involved with the student and who was the student's Head of Year. The court said that the rules of natural justice had been breached because, while there was no actual bias, there was from the perspective of the reasonable person a real suspicion of bias as the teacher was both Head of Year and a member of the Exclusion Panel. Accordingly, the decision to expel was set aside.

Allowing a student to have an advocate

In government schools, the right to have a support person is enshrined in Departmental procedures. The main problem in *CF (by her Tutor JF) v State of New South Wales (Department of Education)* was that, before the students were interviewed, they were not informed of their right to have an independent person of their choosing present. O'Keefe J said:

The right of students who may be subject to the penalty of Long Suspension to have an independent person of choice present at interview is clearly intended as a safeguard for the student. By having an independent person present the students may be able to obtain advice that would prevent them from making admissions that may be detrimental to their interests. Furthermore, the presence of such a person would be an aid to ensuring that the will of the students was not overborne by aggressive or other inappropriate forms of interviewing. It could also operate to give a sense of comfort to them so that they would not feel overawed by the circumstances and perhaps, as a consequence, make admissions or statements that may be detrimental to them. It is thus a valuable

⁵² 1996 CanLII 8121 (ON S.C.) at [35]

⁵³ *R v Board of Governors of Stoke Newington School; Ex parte M* (unreported, 21 January 1992)

*right. However, unless the students are aware of the right they will not be able to exercise it. The existence and nature of the right in my opinion bespeaks an obligation on the part of the relevant school authority to inform a student who is to be interviewed in connection with his or her involvement in a matter that may sound in Long Suspension of the existence of this right.*⁵⁴

The obvious force of what O’Keefe J said suggests that non-government schools would be prudent to ensure students can have a support person present when being interviewed about serious matters or when suspension or expulsion is being contemplated.

Apart from the obvious protection for the student, having a support person present will assist schools to show that any admissions made by a student were not obtained improperly. In *Bovaird’s Case*, Keane J noted that:

*If the child does not admit the misbehaviour freely, or positively denies it, and there is no compelling eye witness, the principal should not then seek an admission. The parents should be consulted. Any admission should be sought in their presence or that of a nominee.... An admission in the absence of an adult can be a breach of natural justice.*⁵⁵

A little later in his judgement, Keane J said that there had been a breach of fair process when two executive teachers, acting on the report of the teachers supervising a camp and the complaints of four fellow students, invited those accused to make immediate admissions. The judge said that the executive teachers should instead have notified the parents affected and interviewed the students in their parents’ presence.⁵⁶

In *R v Governors of Dunraven School, ex p B*, the student B was interviewed by the head teacher without an adult present. Sedley LJ said:

*Without doubt an admission made to a head teacher who has told a child that he will be kept in until he confesses, or who has untruthfully told a child that he has been seen committing the offence, would be worthless.*⁵⁷

⁵⁴ *CF (by her Tutor JF) v State of New South Wales (Department of Education)* (2003) 58 NSWLR 135 at [31]

⁵⁵ [2007] NZHC 560 (7 June 2007) at [67] and [68]

⁵⁶ [2007] NZHC 560 (7 June 2007) at [77]

⁵⁷ English Court of Appeal, Civil Division, 21 December 1999, at [31]

Brooke LJ also said that if the head teacher has secured an admission through conduct tantamount to oppression it would be unfair to rely upon it. However, both judges found that the head teacher had not behaved in an improper way.

In some cases, procedural fairness will dictate that people under investigation be allowed legal representation. In *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs*, Drummond J referred to various cases on the circumstances in which a right to legal representation is an element of natural justice and said:

*The effect of the cases is that in the absence of statutory indication to the contrary, administrative bodies and lay tribunals are in general free to exclude lawyers; but the circumstances of the particular case may be such that a refusal to allow legal representation may constitute a denial of natural justice. This is likely to be so where complex issues are involved or where the person affected by the decision is not capable of presenting his or her own case. In this sense, it may be said that in certain circumstances the 'right to legal representation' is an element of natural justice.*⁵⁸

In *C.D. v. Ridley College*, the Court said:

The common law principles of natural justice essentially all flow from the concept of procedural fairness. That fairness is absent here and is characterized primarily by the following:

(a) C.D. is a minor. An expulsion hearing should never have been convened without notice to one of his parents. Had such notice been given, I regard it as highly probable that either or both of the parents would have been on the next plane from the Cayman Islands to Ontario and, failing that, I regard it as a virtual certainty that they would have arranged for C.D. to be represented at the hearing.

(b) The entire case against C.D. rested on the evidence or word of other students. He, his parents or his legal or other representative should have been permitted the opportunity to

⁵⁸ *Li Shi Ping v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 35 ALD 557 per Drummond J at 570

*test the evidence or word of his accusers by means of cross-examination.*⁵⁹

Nevertheless, legal representation is unlikely to become common in the school situation. Even in the United States, only last year, a court in Illinois said that “due process” did not mean that a boy’s lawyer had the right to cross-examine other student witnesses.⁶⁰

If parents do ask that their lawyer attend a meeting where suspension or expulsion is to be discussed, a school should listen to the reasons advanced by the parents in support of their request before making a decision to agree or not. If the school agrees, it should consider whether its own lawyer should also be present.

Ensuring that the student is given a chance to deal with matters adverse to his or her interests

Brennan J pointed out in *Kioa v West* that:

A person whose interests are likely to be affected by the exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise. The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance...

*Nevertheless, in the ordinary case where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it.*⁶¹

In *R v Governors of Dunraven School, ex p B*, Sedley LJ made the same point saying:

*... it is unfair for the decision-maker to have access to damaging material to which the person at risk here the pupil through his parent has no access.*⁶²

⁵⁹ 1996 CanLII 8128 (ON S.C.) at [32]

⁶⁰ *Brown v Plainfield Cmty. Consol. Dist.* 202 2007 WL 4180358 (N.D. Ill. Nov 2007)

⁶¹ (1985) 159 CLR 550 at 629

⁶² English Court of Appeal, Civil Division, 21 December 1999, at [19]

This case involved an allegation against three boys, D, M and B (the applicant in the case), that they had stolen a teacher's handbag from the staff room. A committee of the school's governing body had to consider the case for expulsion in each case. The committee heard from D first. They then heard B's case but without telling B or his parents what D had said about B's involvement. Sedley LJ said that it was unfair for the committee to take into account D's written statement which B had not seen and D's oral evidence which B had not heard.⁶³ Brooke LJ concluded that what the committee did in this regard changed a fair procedure into an unfair procedure which could not stand.⁶⁴

This raises the difficult issue often faced by schools of how to protect the identity of other children who have made statements about an incident. Normally, copies of relevant statements should be provided to the student whose misconduct is being examined and to his or her parents. However, this is not mandatory as there may be issues of fear of intimidation, peer pressure or other negative factors that may make the giving of statements and the revealing of the names of witnesses inappropriate.⁶⁵ The English Court of Appeal wrestled with this in *R v Governors of Dunraven School, ex p B*. There was a legitimate need to protect D from exposure as the informant and from consequent reprisal. Drawing analogies from criminal and employment matters, the Court recognised that a careful balance had to be maintained between protecting students who feared reprisal and providing a fair hearing for those accused of misconduct.⁶⁶ In some cases, the solution is to get the other students to prepare written statements, then to remove anything from the statements that could identify those who made them, and finally to give these anonymised statements to the accused student and his or her parents. In other cases, it will be enough to provide an outline of the material in the statements. If neither of these options is possible, the school must either seek to make findings without the benefit of the evidence of the other students or "drop the case" against the accused student. The Department of Education and Training has taken a similar

⁶³ English Court of Appeal, Civil Division, 21 December 1999, at [23]; see also *R v Governors of Bacons College, ex parte W* [1998] ELR 488 where Collins J said in similar circumstances that "to rely on something by hearsay without seeing any of the material and without giving the parents the opportunity to see that material is unquestionably unfair."

⁶⁴ English Court of Appeal, Civil Division, 21 December 1999, at 20 of Westlaw report
⁶⁵ *CF (by her Tutor JF) v State of New South Wales (Department of Education)* (2003) 58 NSWLR 135 at [13]

⁶⁶ English Court of Appeal, Civil Division, 21 December 1999, at [22]

approach in its *Procedures for Suspension and Expulsion of School Students*:

Should principals be of the view that it is not appropriate to provide copies of statements, for example, because of a fear that witnesses may be intimidated, full details of the allegation(s) outlined in the statements should be provided.

Providing an appeal process in some situations

The Board of Studies notes that the “hearing rule” includes the right of a student to know how to seek a review of the decision made in response to the allegations. This suggests that a discipline policy based on principles of procedural fairness should include a right of review or appeal. The Department of Education and Training’s Legal Issues Bulletin No. 3 also says that procedural fairness requires a right to an appeal.

However, the better view is that procedural fairness does not always require there to be a right to an appeal. As mentioned earlier, one must consider all the circumstances when deciding what is fair. A school would not function if all disciplinary actions, no matter how minor, were subject to appeal. Indeed, the Department itself has recognised this in its *Procedures for Suspension and Expulsion of School Students*:

Though the right to appeal is not necessarily an essential element of procedural fairness, it is considered appropriate to incorporate such rights in respect of suspensions and expulsions from government schools. (Appendix 2)

So what must a school do?

Put very simply, schools in New South Wales must ensure that their discipline policies are based on principles of procedural fairness. Hopefully, it is clear that it is not enough to include a statement like: *This policy is based on principles of procedural fairness*. Rather, the principles discussed in this paper must be woven into the fabric of a school’s discipline policy. And then, like all other school policies, the discipline policy must translate into action when students are disciplined.

***These men ask for just the same thing, fairness, and fairness only.
This, so far as in my power, they, and all others, shall have.***

Abraham Lincoln