Out of School, Out of Mind:

The need for an Independent Education Review Tribunal

YouthLaw
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Introduction

In any given year, YouthLaw provides free advice to young people and their parents on a variety of education-related issues on a daily basis. The most prominent of these concern decisions by schools to stand-down, suspend, exclude or expel students.

For students directly affected, these decisions are accompanied by serious consequences. Prolonged periods of exclusion from school can cause significant disruption to a young person's academic progress, limiting future career opportunities and increasing their propensity for anti-social behaviour. A burden is placed upon wider society to ameliorate these conditions through increased expenditure in the health, education, and welfare sectors. In light of such concerns, the need for principals and Boards of Trustees to get it right when decisions are being made about a young person's ongoing education is profound.

Yet despite the gravity of the issues at stake, the current disciplinary regime under section 14 of the Education Act 1989 affords students and parents very few opportunities for recourse. A decision by a principal to stand-down or suspend, or a board of trustees to exclude or expel is effectively final, with no direct right of appeal or challenge. To attain even a modicum of justice, students and parents must rely upon a patchwork of legal and quasi-legal mechanisms which can be time-consuming, costly, and provide little in the way of actual remedy.

This process differs markedly from that seen in England[1]. In the event of an adverse determination from the local equivalent of a Board of Trustees, students and parents have the right to appeal to an Independent Appeal Panel. The Panel provides an impartial forum in which both the substance and the procedural propriety of school disciplinary decisions can be challenged, with the authority to order the direct reinstatement of students. The implementation of a similar panel in New Zealand would, we believe, preserve the flexibility of a broad discretionary power under s14, whilst also ensuring that students in the most serious of cases will be able to fully realise their right to natural justice.

This report is divided into three sections. The first section will outline section 14 of the Education Act, the implications this has for students, and the limited avenues available for appeal and challenge. The second section will provide a comparative evaluation of the appeals processes available in other jurisdictions, examining mechanisms in Australia, Canada, South Africa and England. The third section will put forward the key recommendations of this report, namely the incorporation of an appeals process modelled upon the English Independent Appeal Panel with appropriate modifications to suit a New Zealand context.

[1] Each nation of the UK has a different educational and legislative framework.

Stand-downs, Suspensions, Exclusions, and Expulsions

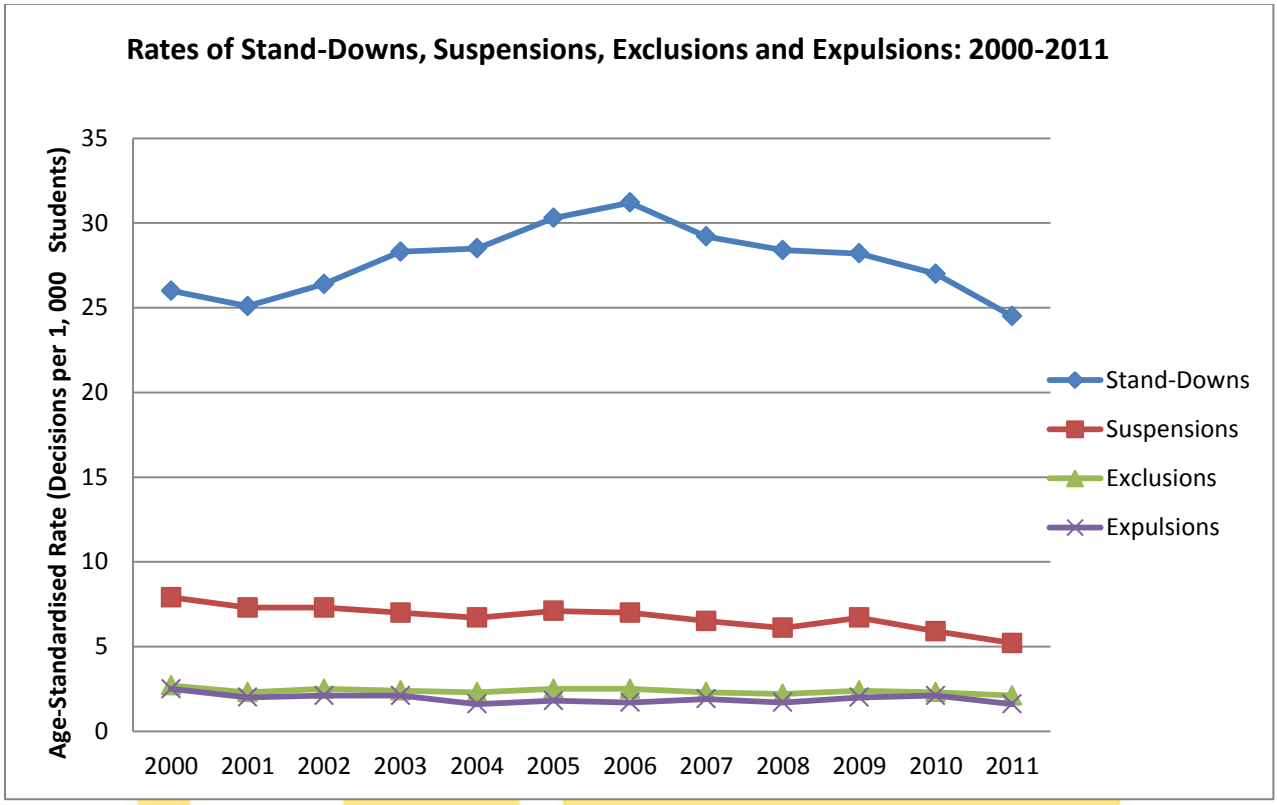
Section 14 Education Act 1989

The regime for stand-downs, suspensions, exclusions and expulsions is laid out in section 14 of the Education Act 1989. A stand-down refers to the process of formally removing a student from school for no more than five days in a school term or ten days in a year, while a suspension is the removal of a student from school pending a Board of Trustees hearing. The Board has the power to lift the suspension (with or without conditions), extend the suspension (with conditions), or terminate the student's enrolment at the school. In the event of the latter, the Board will exclude a student aged under 16 or expel a student aged over 16.

Recent statistics from the Ministry of Education show that rates of stand-downs, suspensions, exclusions and expulsions have remained relatively constant in the last twelve years of recorded data, although 2012 has seen a slight reduction in these occurrences[2]. Nonetheless, significant gender, ethnic, and socio-economic disparities remain prevalent. In addition the majority of excluded students remain out of school for more than one month, while a significant proportion remains out of school for six months or more. Finally, the Ministry of Education has no obligation to assist students find a school who were excluded but have

[2] Ministry of Education "Stand-Downs, Suspensions, Exclusions from School" (July 2012) Education Counts http://www.educationcounts.govt.nz/indicators/main/student-engagement-participation/80346

since reached the age of 16, irrespective of the time they have spent out of education. These deficiencies cannot continue to be overlooked.



It is acknowledged that many principals, school trustees and Ministry staff work hard to ensure that decisions under section 14 are primarily utilised as a last resort when all other disciplinary measures have failed. Indeed the statistics above show a small reduction in the rates of the use of section 14 in 2011. Yet every year a number of students are denied their right to an education by principals, Boards or the Ministry due to decisions made on the basis of an incorrect or incomplete set of facts, or decisions which are grossly disproportionate to the alleged misbehaviour, or simply inaction on the part of the Ministry of Education. It is to this issue which this report now turns.

Consequences of School Exclusions

Section 14 decisions can carry considerable consequences for a student's educational future, with stand-downs and suspensions often leading to extended periods of school exclusion. Around a third of all students suspended, for instance, will later go on to be either excluded or expelled. Upon exclusion, students face the prospect of being deprived of their right to education for a significant period of time, with the average length of time from the date of a student's exclusion to their reenrolment being 36 days at the excluding school or 40 days at another school. Disconcertingly, some students are excluded from school well in excess of this average time period – in 2010, for instance, 190 students were not enrolled with an education provider for at least six months following their exclusion, with 69 of those being out of school for more than nine months.[3]

> "Around a third of all students suspended will later go on to either be excluded or expelled"

> "The average length of time from the date of a student's exclusion to their reenrollment is 36 days at the excluding school or 40 days at another school."

[3] Statistics on Stand-downs, Suspensions, Exclusions and Expulsions, 2010 (Obtained under Official Information Act 1982 Request to the Ministry of Education)

Long periods of absence can have a highly detrimental effect upon a student's educational development. Most obviously, lost class time causes significant disruption to a student's academic progress. Given that many of the students affected are already likely to exhibit learning difficulties and other forms of problem behaviour, formal exclusions and expulsions may only serve to exacerbate these problems. More significantly, upon their return to school, students may feel 'lost' and resist doing school work, causing significant disruption to others in the classroom.[4] Poor academic performance, in conjunction with the negative stigma which surrounds exclusions or expulsions, may only serve to limit a student's future career opportunities.

> "20.81% of all recipients of unemployment-related benefits had not attained a formal school qualification and 63.47% had no post-secondary school qualification"
>
> (March 2012 Unemployment Figures)

Extended periods of absence from school may also lead to the creation of wider social problems. Exclusion can "trigger a complex chain of events" which may serve to "loosen the young person's affiliation and commitment to a conventional way of life" through factors such as the loss of time structures, a recasting of identity, the erosion of contact with pro-social peers and adults, closer associations with similarly situated young people, and heightened vulnerability to police surveillance.[5] Although no formal New Zealand studies are available,

[4] Nadia Freeman *When One Door Closes: Evidence Based Solutions to Improve Outcomes and Open New Doors for Students Excluded or Expelled from School in New Zealand* (Regional Public Health, Information Paper, April 2011) at 9.

[5] David Berridge, Isabelle Brodie, John Pitts, Davis Proteous and Roger Tarling *The Independent Effects of Permanent Exclusion on the Offending Careers of Young People* (United Kingdom Home Office, RDS Occasional Paper No 71, 2001) at 6.

Youth Court Chief Justice Andrew Becroft has remarked that up to 80 percent of all offenders in the Youth Court are not formally engaged in the education system – be it through exclusions, truancy, or otherwise – and that this group constitutes "virtually the whole of the problem in the Youth Court".[6] These anecdotal observations are borne out by international findings. A longitudinal study conducted in the United Kingdom of excluded students between the ages of 11-15 across a four year period found that excluded students were two-and-a-half times more likely to be in trouble with the police than non-excluded students, three times as likely to be arrested, and nine times as likely to be summoned to court for an offence.[7] Similarly, in an international study of students in Victoria, Australia and Washington, United States it was found that excluded students were 50 percent more likely to engage in anti-social behaviour and 70 percent more likely to engage in violent behaviour than non-excluded students.

Excluded students are:

- 2.5x more likely to be in trouble with the police
- 3x as likely to be arrested
- 9x as likely to be summoned to court

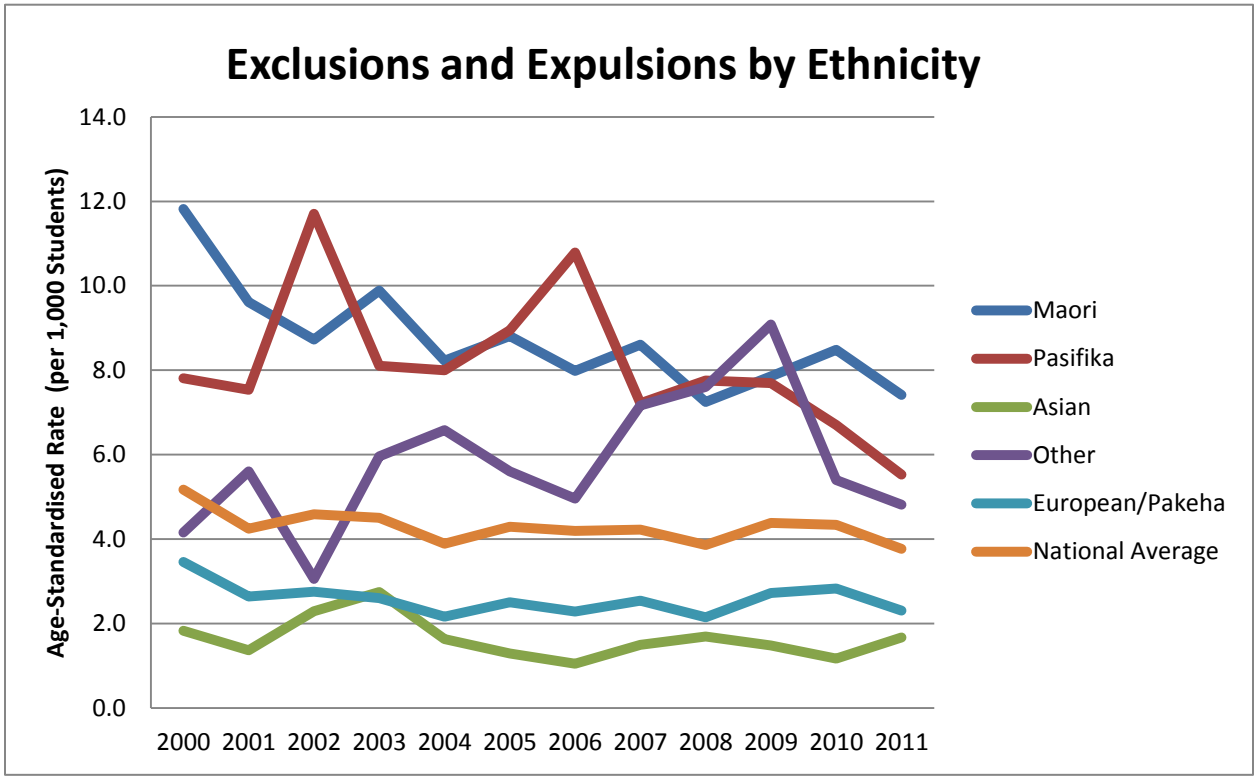
[6] A J Becroft, Principal Youth Court Judge "Youth Offending: Factors that Contribute and how the System Responds" (Symposium on Child and Youth Offenders: What Works, 22 August 2006).

[7] Patrick McCrystal, Andrew Percy and Kathryn Higgins "Exclusion and Marginalization in Adolescence: The Experience of School Exclusion on Drug Use and Antisocial Behaviour" (2007) 10 Journal of Youth Studies 35 at 45.

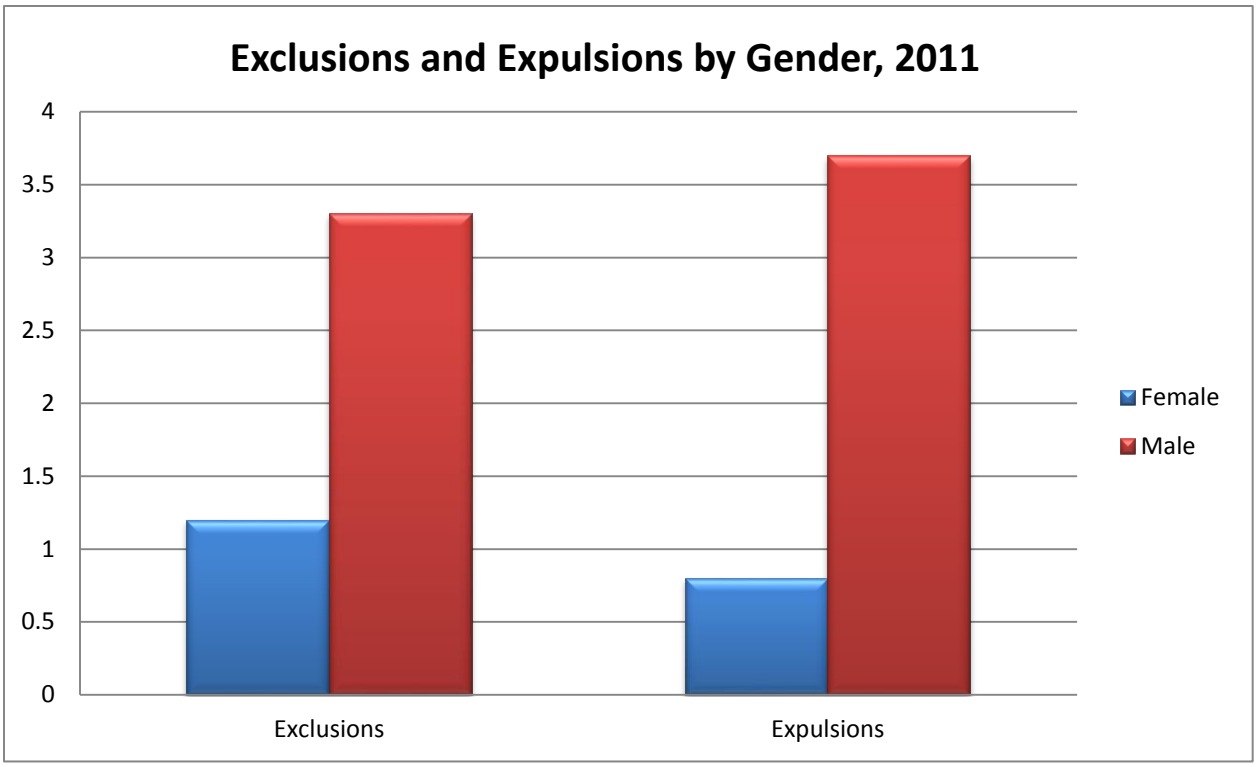
> "Involvement in education is one of the "big four" protective factors against future criminal offending. Helping young people feel part of society through school involvement assists in keeping them out of trouble and thus it is absolutely critical that young people are kept at school for as long as possible. When faithfully attending school they are much less likely to become involved in crime - even if not achieving academically. Thus, alternatives to stand-downs, suspensions, exclusions and expulsions are necessary as are decisive responses to truancy."
>
> (Andrew Becroft, "Youth Offending: Factors that Contribute and How the System Responds")

Disconcertingly, these consequences are likely to be disproportionately felt along gender, socio-economic, and ethnic lines. In 2011, boys were 2.7 times more likely to be excluded than girls, and 4.3 times more likely to be expelled. Students in lower quintile, decile one and two schools are 5 times more likely to be excluded and 2.5 times more likely to be expelled than those from higher quintile, decile nine and ten schools. Most disconcertingly, section 14 disciplinary procedures disproportionately affect Maori. Age-standardised rates for suspensions and exclusions are more than double the rate for European/Pakeha students.[8] Pasifika expulsions are more than three times the rate for European/Pakeha students.[9]

[8] Ministry of Education, above n 1.
[9] Ministry of Education, above n 1.



Despite some decrease in the past twelve years, the rate of exclusions and expulsions is nearly 50 percent higher than the national average for Pasifika students and twice that for Maori students.



In 2011, age-standardised rates of exclusion were 2.7 times higher for males than for females, while the age-standardised expulsion rate was 4.3 times higher.

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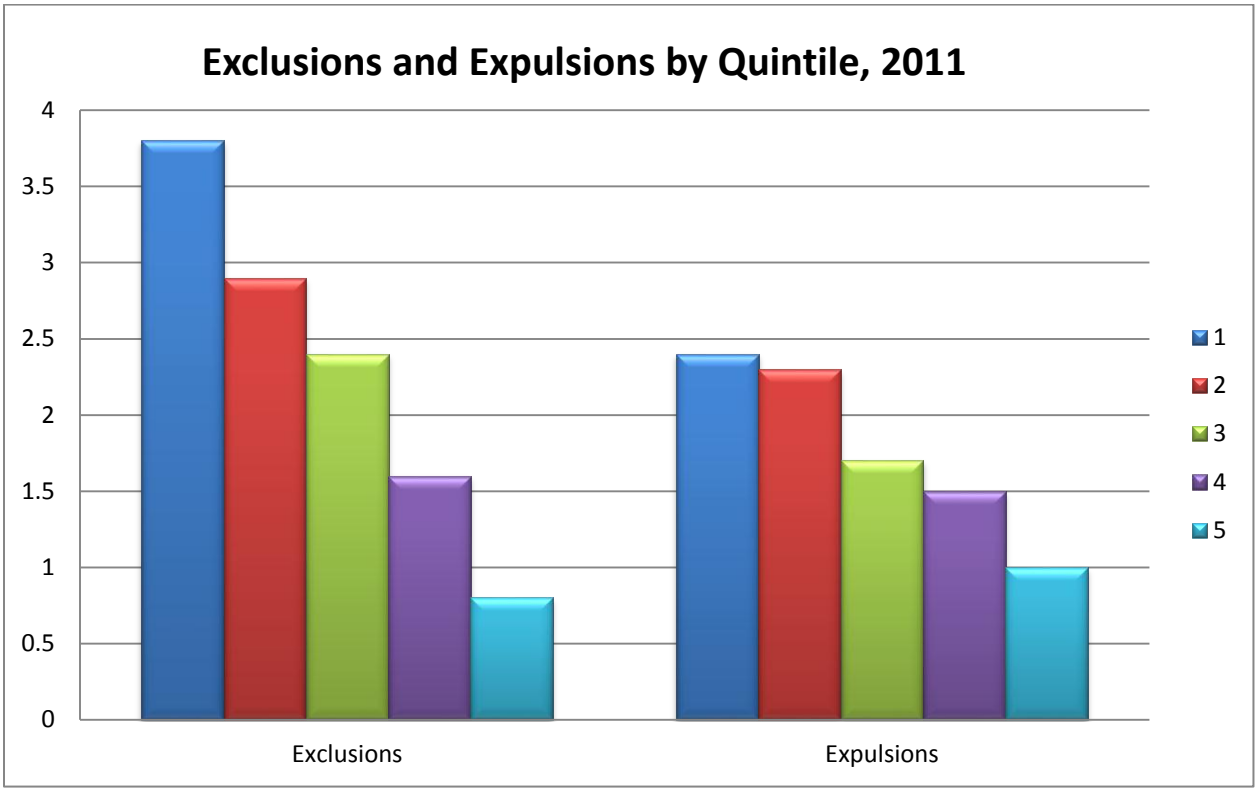

Students from lower quintile (deciles one and two) schools are nearly five times more likely to be excluded and over twice as likely to be expelled as those from higher quintile (deciles nine and ten) schools.

Extended periods of absence from school also have the potential to come at a significant financial cost to society. In the short-term, the greater the time an excluded child has spent without an education the more resources will likely need to be expended to help that child catch up with the remainder of the class. In the long-term, society will also have to consider the financial costs arising out of crime, drug use, and unemployment. Currently, no government ministry or department has examined the links between school exclusion and the financial cost to the state through crime or increased dependency on social services. However, studies from overseas show that the costs involved can be high. A 2005 report by British think-tank New Philanthropy Capital estimated the cost of an exclusion to be £63, 851 per student, or around £650 million per annum. Around one quarter of this amount (£14, 187) was to be incurred by the student in terms of lost future earnings, with the bulk of the costs (£49, 664) borne by society through additional spending in education, health, crime, and social services.[10]

"In the long-term, society will have to consider the financial costs arising out of crime, drug use, and unemployment"

In light of these costs – both social and financial – it is essential that any decision to stand-down, suspend, exclude or expel is not taken lightly by principals or boards of trustees. However, as we will see, the current process under section 14 provide very little in the way of safeguards against improper or unlawful determinations.

[10] Martin Brookes, Emilie Goodall and Lucy Heady *Misspent Youth: The Costs of Truancy and Exclusion* (New Philanthropy Capital, June 2007) at 12.

Possibilities for Abuse

The current school disciplinary regime places a considerable amount of discretionary power in the hands of principals and boards of trustees. A principal need only be satisfied on "reasonable grounds" that a student's disobedience or misbehaviour poses a risk to other students before making a decision to stand-down or suspend. Little to no guidance is provided by the Act or the Ministry as to how this power is to be exercised.

The lack of any standardised procedure under section 14 has the potential to result in wide variations between schools as to the types of misbehaviour which warrants a stand-down or a suspension. In his 2011 report into a series of bullying incidents at Hutt Valley High School, the Ombudsman criticised this potential for inconsistency. Although of the view that a rigid template for stand-downs and exclusions would be of "little merit" due to the unique factors often involved in each incident, an entirely discretionary system "risked producing arbitrary disciplinary outcomes both between and within schools."[11]

Students also face the risk of being suspended informally and unlawfully, outside the proper boundaries of the section 14 process. In what is commonly known as a 'kiwi suspension,' a principal may advise parents to voluntarily withdraw their child from school, often on the grounds that it would be in both parties' best interests. However, by doing so, students relinquish any rights they were previously entitled to under formal section 14 procedures, including the right to counselling; the right to have the school seek out alternative

[11] David McGee *Complaints Arising out of Bullying at Hutt Valley High School in December 2007* (Office of the Ombudsman, September 2011) at 40.

educational opportunities for the child; and the right to have allegations considered by the board of trustees, with the possibility of reinstatement.

Other forms of informal suspensions can include 'partial enrolments' or 'in-school suspensions'. With 'partial enrolments' schools may allow a child to attend school for only part of the week, presented as a special 'concession' to students and parents, with the alternative being formal exclusion or expulsion from school. Similarly, 'in-school suspensions' involve the school continuing to supervise the child, but removing them from the classroom, in a manner akin to a lengthy detention.[12]

Given the lack of formality, it is near impossible to ascertain precisely how many students have been unlawfully stood-down, suspended or excluded outside of proper section 14 procedures. However, anecdotal evidence suggests that the problem of school exclusions may be even more endemic than that which appears in official Ministry of Education statistics. In a qualitative study conducted by Andrew Smith to investigate the emotional impact school exclusion had upon students and their families, it was found that only one of the eight participating students had been formally excluded. "The routes to exclusion," he observed, "were diverse and did not neatly follow the MOE Guidelines," and that there was a "disparity between exclusion as an objective process and exclusion as a subjective experience".[13]

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[12] *Briefing Paper for the Minister of Education on the Need for an Education Review Tribunal* (Office of the Commissioner for Children, April 1997) at 13.

[13] Andrew Smith *Sent Home: The Impact on the Family of a Child's Exclusion from School* (Families Commission, Blue Skies Report No 26/09, April 2009) at 32.

Informal Suspensions: The Case of B

Although precise figures are not available, informal exclusions outside the boundaries of proper section 14 processes do not seem to be atypical. This can be seen in the case of B.

B is a Year 2 student diagnosed with hydrocephalus which causes, among other things, irritable and aggressive behaviour. In the course of being restrained by a teacher aide, B threw his head back and accidentally fractured the aide's nose.

The school requested that B be kept home from school for a short period of time so that a safety plan could be developed. B's parents agreed to the proposal as it was felt that it was appropriate for the school not to be treating the issue as a disciplinary matter and that a safety plan would benefit both B and his teachers in the future. This, however, took longer than expected, with B being kept out of school for three weeks.

Upon his return to school, it was requested that B attend school only for half-days in order to assist reintegration. Once again, this was agreed to by B's mother, who believed that it would be in his best interests for a short period of time. And, once again, this arrangement continued for a period of up to six months, despite the school having the assistance of two full-time teacher aides during whole days, including lunch times.

Mechanisms for Accountability

Despite the very real prospect of the discretionary power of principals under section 14 being misappropriated, the current statutory regime provides little in the way of sanctions or safeguards to ensure that any decision to stand-down or suspend is reasonable or within the boundaries of the law. Although section 13 of the Education Act requires that individual cases be "dealt with in accordance with the principles of natural justice," this requirement is construed narrowly, with minimal opportunity granted to students or parents to state their case. Under current Ministry Guidelines, principals are merely required to inform parents that their child has been stood-down or suspended, convene a meeting if the parents so request,

provide an information pamphlet outlining the process, and ensure that the student receives appropriate guidance and counselling.[14]

Where a decision has been made by a principal to suspend, the matter must be referred to the board of trustees for consideration. However, the board is often a flawed mechanism of accountability. Boards can be subject to a variety of institutional pressures from competing groups, resulting in their attention being distracted from issues surrounding the educational welfare of the individual student whose case they are considering. Parental majorities may, quite understandably, seek to maintain tough disciplinary policies to ensure the safety of other students at school or exhibit a strong sense of deference and loyalty towards the judgment of the principal.[15] This can be seen in the fact that, for the most part, decisions by boards to lift suspensions are relatively infrequent – in 2009, for instance, boards resolved to lift only 44 percent of all suspensions, with around 90 percent of these placing conditions upon returning students.[16]

Similar concerns have been raised by the Ombudsman during his investigation into Hutt Valley High School. Under the current disciplinary regime, he was reported as observing, lay people were making far-reaching decisions into young people's lives with little in the way of training and minimal oversight. It was necessary, he was reported as stating, to implement a

[14] Ministry of Education, "Stand-downs, Suspensions, Exclusions, and Expulsions Guidelines" http://www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/StanddownsSuspensionsExclusionsExpulsions.aspx

[15] Office of the Commissioner for Children, above n 10, at 34.

[16] Ministry of Education, above n 1.

means by which the Ministry of Education and the Education Review Office could give boards better guidance in order to "make sure that standards are maintained."[17]

Disproportionate Decision Making: The Case of A

Although Boards of Trustees are intended to act as a check on the discretionary power of principals in the case of suspensions, they can be just as fallible and prone to disproportionate decision-making. This can be seen in the case of A.

A was suspended following a fight with other students in May that year. Under s15 of the Education Act, a suspension can be extended by boards of trustees for a "reasonable period of time" so that the student can complete conditions which were aimed at facilitating his or her return to school.

A's suspension, however, was extended until the beginning of the next school year. Whilst A was later able to return to school following pressure from YouthLaw, A nevertheless remained out of school until August of that year – a period of nearly three-and-a-half months.

Yet despite this risk of bias, students hold very little in the way of procedural rights. Under Ministry Guidelines, the student, along with their parents and any other representative, are entitled to attend the board meeting, speak at it, and have their views duly considered. Students, however, do not have the opportunity to cross-examine principals or any witnesses, with any questions first needing to be submitted to the chair of the board.

[17] Lane Nichols "Call for Curbs on School Exclusions" (16 February 2012) Dominion Post http://www.stuff.co.nz/dominion-post/news/6426120/Call-for-curbs-on-school-exclusions

Procedural Impropriety: The Case of T

Following her son's suspension, T's mother was informed that she must attend a board of trustees meeting. In preparation for the meeting, a multi-agency plan addressing T's learning and behavioral difficulties was developed with the aim of assisting the board in ordering reinstatement.

The night of the board meeting, the CYFS worker in charge of T's place showed up to attend. However, despite arriving on time, the social worker was told by the principal hr or she would not be invited into the meeting. T's parents, who were already in the meeting room at this time, were unaware of this decision and the plan was not discussed.

Once a decision has been made by a principal to suspend, or a board to exclude or expel there is no further right of challenge or appeal to an independent body. Students and parents are forced to make do with a number of informal avenues for appeal, which are oft-time consuming and hold few powers of redress, such as judicial review proceedings or complaints to the Ombudsman or Education Review Office.

At first glance, judicial review proceedings in the High Court may be the most appropriate venue from which to challenge board decisions. However, court action comes at a significant financial cost which is out of reach of most families – around $20, 000 to $30, 000 – which is out of reach for most families, particularly in lower socio-economic areas where exclusion is most common. Further, even for those willing and able to initiate proceedings, the lack of coherency in recent judicial decision-making renders the viability of this avenue uncertain. Although the New Zealand courts have been historically reluctant to interfere with the decisions of school boards, more recent decisions such as *M&R v Syms and the Board of Trustees of Palmerston North Boys High School illustrate* a much more interventionist approach to upholding the rights of natural justice and procedural fairness on behalf of students. In that

case, a decision to suspend two students as a result of a 'zero tolerance' alcohol policy was quashed on the grounds that schools could not suspend a student automatically, but were required to consider and weigh the circumstances of each individual case.[18] Yet despite this advance, it is also clear that the judiciary still holds a somewhat conservative stance on the role of judicial intervention *vis-à-vis* school decision making. In *Thompson v Grey Lynn Board of Trustees*, Potter J expressed the view that there was "no warrant for the court to interfere in the procedural, managerial, or administrative matters" of schools unless the rights of students were "seriously threatened" in a manner grossly inconsistent with the guidelines and procedures laid out in the Education Act. This approach has resulted in a lack of predictive value for parents contemplating judicial action.[19]

Complaints to the Ombudsman and the Education Review Office are also less than ideal mechanisms for accountability. The powers of the Ombudsman are strictly limited to considering the procedural elements of the case (such as whether the requirements of the Education Act have been properly observed) and may only issue a non-binding recommendation that schools are not legally obliged to follow. Most detrimentally, the average time for a complaint to be considered by the Ombudsman is around 50 days, meaning that even if a student is reinstated he or she will have lost out on educational opportunities which had been improperly denied. Similarly, the Education Review Office, although capable of investigating specific complaints by parents or students against a particular school, is only

[18] Sally Varnham "'Getting Rid of Troublemakers': The Right to Education and School Safety - Individual Student vs. School Community" (2004) 9 ANZJLE 53 at 61.
[19] At 62.

empowered to report to the Minister and is accordingly limited in its ability to act as a complaints tribunal in relation to school exclusions.[20]

[20] Office of the Commissioner for Children, above n 10, at 25.

Alternative Systems of Appeal for Suspensions, Exclusions and Expulsions: A Comparative Analysis

The current system of stand-downs, suspensions, exclusions and expulsions under s14 of the Education Act fails to provide an appropriate means by which students and parents can hold decision-makers to account and ensure that any decision made is both reasonable and within the bounds of the law. In light of this, it is necessary to look at alternative appeals processes available to students and parents in other jurisdictions. This section will consider the models of appeal currently available in the Australian states, before going on to examine those in the Canadian provinces of Ontario and British Columbia, and concluding with the review of the Independent Appeal Panel system in England.

Australia

In Australia, the avenues of appeal available following exclusion will vary on a state-by-state basis. In South Australia, Victoria, and Queensland, students have no formal rights of appeal and can only make their case to the District Director of Education or the Ombudsman.[21]

[21] Government of South Australia "Suspension and Exclusion: Information for Parents and Caregivers" (2011) Department of Education and Children's Services http://www.decs.sa.gov.au/speced2/default.asp?id=25553&navgrp=2293; Young People's Legal Rights Centre "Your Rights at School - Suspensions" (2011) YouthLaw http://www.youthlaw.asn.au/legalinfo/suspensions.pdf; Queensland Government "Grounds for School Disciplinary Absence" (2011) Department of Education and Training http://education.qld.gov.au/studentservices/behaviour/sda/grounds.html

The appeals process in New South Wales is only slightly more elaborate. There, as with other Australian states, students and parents may appeal suspensions in writing to the School Education Director. However, unlike the other states, parents and students who may wish to have assistance throughout this undertaking are provided a support person to aid them in understanding the appeals process.[22]

Within all systems, the centralization of appellate decision-making in the hands of the Educational Director creates the risk for biased decision-making which would not be present if the matter was considered by an impartial fact-finding body. The South Australian, Victorian and Queensland systems also provide little in the way of support structures, being heavily contingent upon the ability of each individual parent knowing the rights of their children and taking the initiative in drafting an appeal. In light of this, the provision the New South Wales system makes for a support person is clearly an attractive one which any proposal for an Education Review Tribunal should include.

Canada

As with Australia, the appeals processes available to students following suspension or expulsion will vary according to each provincial government.

In the province of Ontario, as is the case here, exclusions and expulsions are handed down by school boards. However, unlike New Zealand, where a board does resolve to exclude

[22] New South Wales Department of Education and Training "Suspension and Expulsion of School Students – Procedures" (2011) Student Discipline in Government Schools (PD 2006/0316) https://www.det.nsw.edu.au/policies/student_serv/discipline/stu_discip_gov/suspol_07.pdf

or expel, the student or parents affected have an additional right of appeal to the Child and Family Services Review Board, an independent tribunal whose members are appointed by the Ontario Government. The Review Board has the authority to confirm the school board's expulsion decision, change the length or type of the expulsion, or allow the student to return to school. The decision of the Review Board is final, and can only be reviewed judicially.[23]

In British Columbia, suspension and exclusion decisions can be appealed to the Superintendent of Achievement, who has the discretion to delegate a review of that decision to an adjudicator. The Superintendent will conduct a new hearing, and determine whether to refer the appeal to mediation or adjudication, or to dismiss all or part of the appeal. Where the matter has been referred to adjudication, an adjudicator may confirm, vary, or revoke the decision under appeal; refer the matter back to the school board for reconsideration, with or without directions; or dismiss all or part of the appeal. A decision made by a Superintendent or an adjudicator is final and binding upon all parties involved.[24]

At the most fundamental of levels, the procedures available in British Columbia and Ontario are advantageous in that they both provide a more clearly delineated process of appeal than that seen in New Zealand or Australia. Between the two, Ontario's Child and Family Services Review Board is superior to British Columbia's adjudicatory model in that it provides an *automatic* right of appeal to a review body, as opposed to a system in which students and

[23] "I am being expelled from school - what are my rights?" Justice for Children and Youth (May 2010) http://yourlegalrights.on.ca/resource/76274

[24] "Suspension and Expulsion: What Parents Need to Know" Ontario Ministry of Education (2009) http://www.edu.gov.on.ca/eng/safeschools/suspexp.html

parents must convince a public official to have the opportunity to be referred onto adjudication. However, the Ontario model remains limited in that appeals to the Review Board are only available in the event of a formal exclusion, and not to those who have merely been suspended from school. The fact that in such cases a suspended student may only appeal to the school board, which may be aligned with the principal responsible for the suspension, limits the due process protections one may receive.

South Africa

In South Africa, students who have been expelled from a public school have the right to appeal the decision to the provincial Member of the Executive Council.[25] The Council is responsible for the education policy of a given province, and must "provide for due process safeguarding the interest of the learner and any other party involved in disciplinary proceedings".[26]

Thus, South Africa, in contrast to New Zealand, has a legislation based appeals system in place. However, much like the models seen in some Australian states and Canadian provinces, the concentration of appellate decision-making power in the hands of a single individual raises the spectre of bias and limits the potential for an impartial outcome.

[25] South African Schools Act 1996, s 9(4).

[26] Aziza Allie "Expulsion of Learners from Secondary Schools in the Western Cape: Trends and Reasons" (Master of Education Dissertation, University of South Africa, 2001).

England

England's school disciplinary regime is governed by two types of orders: 'fixed-period' and 'permanent' exclusions. Fixed-period exclusions are akin to a stand-down in that a student is not permitted to attend school for a pre-determined period of time after having committed a disciplinary offence.[27] By contrast, a permanent exclusion is a more severe penalty, similar to an exclusion or expulsion, and is generally used as a last resort under "exceptional circumstances". A head teacher is only able to permanently exclude a student where, following a breach of the schools behaviour policy, staying in school would cause serious harm to the education or welfare of those around them.[28]

In the case of permanent exclusions and fixed-period exclusions over 15 days, the schools governing body must convene to meet with the parents of that student and consider whether or not he or she should be reinstated. Where exclusion does not meet these criteria, but still exceeds more than five days in a school term, parents may request to make a representation before the governing body. In such cases, the governing body has no power to reinstate a student, it only being able to place a copy of its findings in the student's record.[29]

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[27] Advisory Centre for Education *Fixed Period Exclusion: A Practical Guide for Parents Rights* (2008) at 2.

[28] Advisory Centre for Education *Permanent Exclusion: A Practical Guide to Parent's Legal Rights* (2008) at 4.

[29] Department for Children, Schools and Families *Improving Behaviour and Attendance: Guidance on Exclusions from Schools and Pupil Referral Units* (September 2008) at 37.

Where a permanent exclusion has been upheld by the governing body, parents and students have a further right of appeal to the Independent Appeal Panel.

The Independent Appeal Panel is a body empowered to determine whether the alleged facts necessitating the exclusion actually took place and, if so, whether the penalty is appropriate.[30] Each Panel consists of three to five members appointed by the Local Authority.[31] The Chair of the Panel must be a lay person who has not worked at a school in a paid capacity, and is permitted – although not required – to have a legal qualification.[32] All other members of the Panel, however, must have experience at a school in the same "phase or education" as the school from which the child has been excluded.[33] Of these, at least one member must be a current or past governor of a school, or a member of a management committee of a Pupil Referral Unit (PRU).[34] Another member must have prior or current experience as a head teacher of a state-funded school or as a teacher in charge of a PRU within the last five years. To ensure independence and objectivity, these members must not be affiliated with the existing school or local authority.[35]

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[30] Andrew Sharland "School Exclusions" (Paper presented at the 3rd Annual Education Law Seminar, Law Society, London, 13 June 2008) at 2.

[31] At 46.

[32] Ibid.

[33] At 47.

[34] Pupil Referral Units are centres for children who are not able to attend a mainstream or special school, generally due to emotional and/or behavioral difficulties.

[35] Ibid.

At the hearing, the Chair will outline the procedure to the parties involved.[36] After each individual statement, there will be the opportunity for questions from the parties involved and later for questions from the panel.[37] The excluded student, their parents, the head teacher, the governing body, and the local authority officer are all entitled to make an oral representation before the panel.[38] Although parents and students may bring a legal representative with them, the Panel is not considered a court of law and is intended to be as informal as possible. Parents are generally seen as the best people to present their case and to decide what to say at the appeal hearing.[39] In any event, the Panel has no power to award legal costs.

After all parties have been heard, the Panel will consider whether the school complied with the law and guidance.[40] The Panel may uphold the exclusion and refuse the appeal, direct the child to be reinstated, or decide that, due to exceptional circumstances, it is not practical for the child to be reinstated.[41] In making an order, the Panel applies a civil standard of proof on the balance of probabilities, in that it must be distinctly more probable than not that the child did what has been alleged.[42] Where the panel is not satisfied that the student has done what has been alleged, it will usually direct reinstatement.

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[36] At 51.

[37] Ibid.

[38] At 42.

[39] At 50.

[40] Department for Schools, Children, and Families, above n 78, at 52.

[41] At 54.

[42] Ibid.

Where parents are unhappy with a finding by the Panel, they can make a complaint of maladministration to the Local Government Ombudsman. Maladministration must relate to a procedural issue, for instance, a claim that the Panel was not properly set up or procedure was not properly followed. If the Ombudsman investigates and finds there has been maladministration resulting in injustice, it may order a new hearing with different panel members.[43] If parents feel the Panel is legally in error, they or the governing body may also apply for judicial review.

[43] Sharland, above n 28, at 56.

Recommendations for Reform

School exclusions threaten the fundamental right to an education and come at a significant social and financial cost. Yet despite this, the current regime of stand-downs, suspensions, expulsions, and exclusions under section 14 of the Education Act 1989 fails to provide an adequate means by which students or parents can challenge decisions made by principals or boards of trustees which may be improperly decided. It is our view that this system needs to be urgently supplemented by the creation of an independent Education Review Tribunal, capable of ensuring that the suspension, exclusion or expulsion of any student is both necessary and legally justified.

An Education Review Tribunal, we believe, should ideally be modelled after England's Independent Appeal Panel. The Panel provides an appropriate foundation for any proposed tribunal in that it guarantees a well-developed, uniform, widely accessible and impartial process of appeal.

In the case of permanent exclusions, parents and students are entitled as of right to appeal to the Independent Appeal Panel. In this way, even if the parent's appeal is ultimately unsuccessful, they will nevertheless be able to feel that their case has been taken seriously and can abide by the ruling. Moreover, unlike other mechanisms of appeal or challenge, the Panel actually has the ability to take direct action by reinstating students back in school.

The separation of the Panel from other entities in the appeals process is another positive aspect of the English system. The Panel is an entirely independent body, and under the

principles of natural justice, its members are required to be impartial, unprejudiced, and having no personal or school interest in the result. Appeals panels are thus set up to be removed from any 'education politics' and should base their decision upon their own independent analysis of the case. This detachment illustrates the importance the system places on informed and uninfluenced decision-making, and helps offer parents further assurance that their child's case will be properly heard and decided.

Whilst the Independent Appeal Panel serves as an ideal starting point for the implementation of any Education Review Tribunal, it should not also be an end point. Any proposed Tribunal should ideally expand and improve upon the concept, with appropriate modifications to better reflect the needs of New Zealand's education system.

Jurisdiction

The right to a hearing before the Independent Appeal Panel is currently only limited to instances of permanent exclusions, with the English equivalent of a stand-down or suspension not capable of being appealed. It is our view, however, that a tribunal should have a broad jurisdiction to consider situations where a student's right to education has been denied, terminated or disrupted. This would not only encompass formal actions undertaken under s14, but any decision of a school principal or board which removes or limits the right to be educated at the school in question, such as 'kiwi suspensions' and 'partial enrolments'.

The Panel has come under some political controversy in England, primarily due to the backlash against the overruling of head teacher decisions.[44] It may be argued that similar concerns would be equally present following the implementation of an Education Review Tribunal. However, accusations that access to an Independent Appeal Tribunal has opened the 'floodgates' to the indiscriminate reinstatement of students has proven to be largely unfounded. In 2009/10, of the 8100 permanent exclusions, only 710 students – one in eleven – were contested in front of appeals panels. Of these, the Panel found in favour of the pupil in only 180 cases, or around 25 percent of all appeals. Reinstatement was even less common. In only 60 cases did a child actually return to the school he or she was originally excluded from (around 2 percent of all exclusions) with other appellants electing to be taught at another school or a Pupil Referral Unit.[45]

Membership

The membership of the Independent Appeal Panel is comprised of a mixture of former school personnel as well as lay people. Any implementation of a review tribunal in New Zealand should ideally adopt a similar constitution, although we are also of the opinion that the Ministry should ensure that at least one or two panel members have a legal background. This would help counterbalance any potential bias from members of the panel whose sole experience is in the

[44] Warwick Mansell "Threat Hangs Over Appeals Panel for Excluded Children" (28 June 2010) The Guardian http://www.guardian.co.uk/education/2010/jun/28/school-exclusion-appeal-panels-threatened

[45] Andrew Clarke *Permanent and Fixed Period Exclusions from Schools in England 2009/10* (Department for Education, July 2011) at 3.

field of education. More significantly, as hearings would almost certainly involve consideration of the statutory criteria of the Education Act and the principles of natural justice, it is highly desirable that at least one member is familiar with its application.

Further, a prominent criticism of the Independent Appeal Panel is the lack of ethnic diversity in its membership. Despite the fact that Caribbean pupils in England are nearly three times more likely to face exclusion or expulsion than other students, approximately 96 percent of Panel members are of European descent.[46] A panel or tribunal composed of individuals with a different ethnic or cultural background has the potential to be less sympathetic or understanding of a student's cultural needs, adversely affecting the outcome of appeal. Given that Maori students are considerably more likely to be stood-down, excluded or expelled than non-Maori students, it is urged that there be some form of permanent Maori representation on the panel or, at the very least, some form of Maori representation available when hearing an appeal from a Maori student.

Assistance

Another deficiency of the Independent Appeal Panel process is the lack of assistance it provides for parents and students. For many parents, the responsibility of fighting what is ostensibly a quasi-legal battle can be intimidating. Whilst parents are permitted to have an advocate or legal representative at proceedings, many do not have the funds to afford this, with figures indicating that only around 30 percent of parents are able to avail themselves of experienced representation at hearings.

[46] Debbie Weekes-Bernard *Did They Get it Right? A Re-examination of School Exclusions and Race Equality* (Runnymede Trust, 2008) at 13.

Given that students from lower decile schools are disproportionately impacted by school disciplinary actions, it is likely that this problem will be equally acute – if not more so – in New Zealand. It is our view that should an independent appeals tribunal be implemented here, adequate provision for support and assistance should be made where parents are unable to afford assistance on their own accord. This can include, but does not necessarily require, the provision of legal aid. Alternatively, a system akin to that currently implemented in New South Wales could be established. As discussed earlier, those applying to the Education Director can be allocated a support person to guide them through the appeals process. Whilst this would not necessarily amount to legal representation *per se*, it would, at the very least, provide parents with a degree of certainty and knowledge of what to expect when making their appeal before the panel.