ACT CIVIL & ADMINISTRATIVE TRIBUNAL

APPLICANT 201987 v DIRECTOR-GENERAL, EDUCATION DIRECTORATE (Administrative Review) [2020] ACAT 120

AT 87/2019

Catchwords: **ADMINISTRATIVE REVIEW** – suspension of student at public school – where power to suspend delegated to school principal – events leading up to suspension – whether these events enlivened the discretion to suspend – whether the discretion, once enlivened, should be exercised – whether alternatives to suspension available – decision set aside and substituted

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 ss 8, 9, 26, 68
Administrative Appeals Tribunal Act 1975 (Cth) s 44
Administrative Decisions Review Act 1997 (NSW) s 63
Education Act 2004 ss 7, 18, 36, 142, 144
Legislation Act 2001 ss 146, 152, 236
Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 51

Subordinate Legislation cited: Disability Standards for Education 2005 (and accompanying Guidance Notes)

Cases cited:
CIC Australia Ltd v ACT Planning and Land Authority, and ACT Civil and Administrative Tribunal [2013] ACTSC 96
Cooper v Board of Works for the Wandsworth District (1863) 143 ER 414
Drake v Minister for Immigration and Ethnic Affairs [1979] AATA 179
Re Fletcher & Ors v the Commissioner of Taxation of the Commonwealth of Australia [1988] FCA 362
George v Rocket [1990] HCA 26
Greenham and Minister for Capital Territory (1979) 2 ALD 137
John v Rees [1969] 2 All E.R. 274
M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32
Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21

NSW v Tyszyk [2008] NSWCA 107
O'Donnell v Environment Protection Authority [2012] ACTSC 140
PAAN Investments Pty Ltd (in liq) v Commissioner for Revenue for the ACT [2014] ACTSC 161
Prior v Mole [2017] HCA 10
R v Connell [1944] HCA 42
R v Way [2004] NSWCCA 131
Samad v District Court of New South Wales [2002] HCA 24
Secretary, Department of Social Security v Hodgson [1992] FCA 338
Shi v Migration Agents Registration Authority [2008] HCA 31
XY and Director-General, Education Directorate [2018] ACAT 68

List of Texts/Papers cited:

Policy on Suspension, Exclusion or Transfer of Students in ACT Public Schools, and supporting procedures and guidelines
Safe and Supportive Schools Policy and supporting procedures
Students with a Disability: Meeting their Educational Needs Policy and supporting procedure
ACT Student Disability Criteria 2019
Student Centred Appraisal of Need Booklet
Australian Education Council – Nationally Consistent Collection of Data on School Students with Disability
Teachers' Code of Professional Practice (ACT)

Tribunal: Senior Member M Hyman
Member L McGlynn

Date of Orders: 24 December 2020
Date of Reasons for Decision: 24 December 2020

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AT 87/2019

BETWEEN:

APPLICANT 201987
Applicant

AND:

DIRECTOR-GENERAL, EDUCATION DIRECTORATE
Respondent

TRIBUNAL: Senior Member M Hyman
Member L McGlynn

DATE: 24 December 2020

ORDER

The Tribunal orders that:

1. The decision under review is set aside and substituted with a decision that no action is to be taken under section 36 of the *Education Act 2004*.

.....
Senior Member M Hyman
For and on behalf of the Tribunal

REASONS FOR DECISION

Introduction

1. This decision is about whether the applicant's son should be suspended for one day from attending his school. In July 2019 the applicant's son was in a year 2 class in a Canberra primary school. As a result of events that took place on 3 July, the school principal suspended him for one day under section 36 of the *Education Act 2004* (**the Act**). The applicant applied for internal review of that decision; a senior official of the Education Directorate (**the Directorate**) conducted an internal review and on 26 August 2019 confirmed the decision to suspend. On 24 September 2019 the applicant applied to this tribunal for review of the Directorate's internal review decision.

2. Where a student is suspended, transferred or excluded under section 36 of the Act, section 142 and Schedule 1 together allow the student's parents to seek internal review of the decision; section 144 provides for the decision-maker (here the Director-General) to undertake the internal review within 28 days of receiving the application for review. On 18 July 2019 the applicant sought review under that provision, and on 26 August 2019 a delegate of the Director-General confirmed the suspension. Section 145A and Schedule 1 of the Act together allow the parents to apply for further review by this Tribunal. On 20 September 2019 the applicant sought review under that provision.

3. Section 9 of the *ACT Civil and Administrative Tribunal Act 2008* (**the ACAT Act**) provides for application to be made under an authorising Act. As the applicant has made such an application, the Tribunal has jurisdiction to undertake a review in accordance with section 68 of the ACAT Act. That section gives to the Tribunal the powers of the decision-maker under the authorising Act in respect of the decision and empowers the Tribunal to make a decision confirming, varying or setting aside the decision under review.

4. On 13 July 2020 the Tribunal made an order prohibiting publication of the names of the applicant, his wife, his children and any other children at the school. Those covered by that order are accordingly anonymised in this decision.

5. For the reasons set out below, the decision under review is set aside and substituted by a decision not to take action under section 36 of the Act.

The hearing

6. The Tribunal held a hearing over three days from 9 to 11 September 2020. The applicant appeared in person, representing himself. Dr Douglas Jarvis of Counsel appeared for the respondent. The applicant called one witness under subpoena, Ms Beth Matters, a Senior Psychologist in the Directorate. The respondent called six witnesses, all of whom are employed in providing educational services at the school: the Principal, Ms Wendy Cave; the Deputy Principal, Ms Sophie Bissell; two teachers, Ms Catharine Dee and Ms Isobel Short; a more senior teacher, Ms Ann Westerman (**School Leader C**); and a Learning Support Assistant (**LSA**), Mr Harry Muir. All witnesses appeared in person except for Ms Bissell, who was away from Canberra at the time of the hearing and was given leave to appear by telephone.

7. The documentary evidence before the Tribunal comprised documents provided by the Directorate as a record of events and other relevant records (**the T Documents**); and documents tendered by the parties and assigned exhibit numbers as set out in the table below.

Document	Date	Exhibit number
Applicant's submission, paragraphs 3-47	28 February 2020	A1
Applicant's bundle of emails	From 15 November 2018 to 3 July 2019	A2
Documents returned under applicant's subpoena issued to Ms Matters	various	A3
Movement Assessment Battery for Children – test record form and checklist completed for applicant's son	Test record form completed 4 September 2018; checklist completed 10 October 2018	A4
Reports and letters by Dr Michael Rosier; other documents relating to applicant's son's disabilities	various	A5
Document detailing number of suspensions by ACT schools over	July 2019	A6

2015-2018		
Emails between Ms Bissell and applicant's wife	31 May 2019	A7
Witness statement by Ms Sophie Bissell	27 February 2020	R1
Witness statement by Ms Catharine Dee	26 February 2020	R2
Witness statement by Ms Isobel Short	27 February 2020	R3
Witness statement by Mr Harry Muir	27 February 2020	R4
Delegation of Director-General's powers and functions under the *Education Act 2004*	18 August 2017	R5
Witness statement of Ms Wendy Cave	27 February 2020	R6
Additional emails supplementing those provided by the applicant	Various, but most from 30 April and 1 May 2019	R7
Additional emails supplementing those provided by the applicant	Various, but most from 8 and 9 May 2019	R8
Map of school and dates of school terms	various	R9
Witness statement by Ms Anne Westerman	17 March 2020	R10

8. Some of the exhibits listed above were subject to objections and were taken into evidence with caveats attached to the reliance to be placed on them. The applicant had not provided a witness statement, but an extensive introductory section of his submissions was focused on his account of the facts leading up to his son's suspension. That material was taken into evidence as Exhibit A1, but with the caveat that the Tribunal would not rely on those elements that were in the nature of submissions, or offered opinions that the applicant was not qualified to express (e.g. medical opinions regarding his son's diagnosis and the side effects of his medication), or were otherwise of doubtful evidentiary value. The emails taken into evidence as Exhibit A2 constitute an extensive and detailed exchange, most of it between the applicant or his wife on the one hand and the school or the Directorate on the other. With the consent of the parties, we will rely only on those emails that were the subject of questioning of witnesses by the parties or were referred to in submissions. In some cases the applicant had extracted emails from longer exchanges, and both applicant and respondent have supplemented some extracts with additional emails to give a

more extended context to the exchanges (Exhibits A7, R7, R8). The index of emails at the beginning of the Exhibit A2 was excluded, as it contained a brief summary of the content of each email.

9. Finally, at our request the Directorate provided a substantial compilation of policies, criteria, procedures, standards, and related materials which, judging from their titles, we considered might have some influence on the Tribunal's decision in the matter. After submissions from Dr Jarvis, we decided that if any substantial reliance were to be placed on these documents, the parties would be given an opportunity to make submissions. That caveat does not extend to all of the documents in the exhibit, as two policies, namely the Suspension, Transfer or Exclusion Policy and the Safe and Supportive Schools Policy were included in both the applicant's and the respondent's documents, giving the parties ample opportunity to make submissions during the hearing.

10. It is common but by no means essential for applicants to appear as witnesses in their own cause. In the present matter the applicant did not provide a witness statement and did not propose to appear as a witness. We raised with the parties whether he should appear as a witness if only for cross-examination purposes. Dr Jarvis advised that he did not wish to cross-examine the applicant.

Issues

11. In their submissions, both applicant and respondent addressed whether the decision at first instance by Ms Cave and the internal review decision were affected by procedural errors. The applicant contended that the decisions were so affected, and the respondent that they were not. In the applicant's submission, the errors were such as to justify the setting aside of the decision under review.

12. This Tribunal, like those in other jurisdictions, is set up, in its administrative review jurisdiction, to undertake reviews of government decisions "on the merits". There is an established body of jurisprudence relating to such tribunals, which this Tribunal, and on occasion the ACT Supreme Court, has drawn on. Based on that case law and the close parallels between the legislation

establishing those other tribunals and the ACAT Act, the role of ACAT has been identified as aligning closely with the role of other tribunals such as the Commonwealth's Administrative Appeals Tribunal (AAT), the Victorian Civil and Administrative Tribunal (VCAT) and the NSW Civil and Administrative Tribunal (NCAT).[1] In general, those legislative similarities encourage this Tribunal to follow the jurisprudential guidance regarding tribunal practice in Australian jurisdictions generally; we believe it is appropriate to do so unless the ACAT Act itself departs from the pattern established among Australian tribunals, or the legislation governing the decision under review makes special provision that takes us in other directions.

13. ACAT's essential role in administrative review is set by section 68 of the ACAT Act, which assigns to the Tribunal in reviewing a decision all the powers and functions of the entity that made the decision under review, and requires the tribunal to confirm, vary or set aside the decision (in setting a decision aside the tribunal may substitute its own decision or remit the matter to the decision-maker with directions or recommendations). The section is drafted slightly differently from, but is in its thrust and effect entirely consistent, with subsection 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), subsections 63(2) and (3) of the *Administrative Decisions Review Act 1997* (NSW) and subsections 51(1) and (2) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). The legislation and the case law establish that when undertaking administrative review, it is not the role of the tribunal to search for error in the decision under review, or to review the previous decision-maker's reasons; rather, the tribunal "stands in the shoes" of the decision-maker, and takes a fresh decision, doing a second time what the decision-maker was asked

[1] See for example *CIC Australia Ltd v ACT Planning and Land Authority, and ACT Civil and Administrative Tribunal* [2013] ACTSC 96;[1] *O'Donnell v Environment Protection Authority* [2012] ACTSC 140; *PAAN Investments Pty Ltd (in liq) v Commissioner for Revenue for the ACT* [2014] ACTSC 161

to do at first instance.[2] Nothing in the review provisions in the *Education Act 2004* leads us to a different conclusion.

14. It follows from the above that if the Tribunal's own procedures are unimpeachable, then any procedural imperfections or errors at an earlier stage of decision-making will be cured in the Tribunal's own decision-making process. Thus, the procedures followed at first instance or at internal review are not themselves a focus for attention in the current review. The question to be answered is not whether a mistake was made by an earlier decision-maker, but rather whether the Tribunal should proceed to suspend the applicant's son or come to a different decision. The Tribunal arrives at a decision on such a question by considering the evidence before it and applying the relevant statute to the facts found from that evidence, in a fresh decision.

15. Viewed in this light the issues before the Tribunal are:

    (a) What were the events that led up to the decision to suspend the applicant's son?

    (b) Whether those events enliven the discretion to suspend a student; and

    (c) if so, whether that discretion should be exercised.

The legislative framework

16. The Act sets out a framework for school education in the ACT, covering the entirety of the span of a student's school years. Section 7 sets down underlying principles for education in the ACT. Subsection 7(1) identifies the overriding principle that "every child has a right to receive a high-quality education". Subsidiary principles set out in subsection 7(2) include that parents are encouraged to be involved in their children's education (subparagraph 7(2)(b)(iii)) and respect for and tolerance of others (subparagraph 7(2)(b)(iv)). Subsection 7(3) sets out principles relating to children with disabilities, including the requirement to recognise the individual needs of such children

[2] *Greenham and Minister for Capital Territory* (1979) 2 ALD 137, at 141-2 (Senior Member Hall and Members Skermer and Woodley); *Drake v Minister for Immigration and Ethnic Affairs*(1979) 46 FLR 409, at 419 (Bowen CJ and Deane J); *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 296-300 (Kirby J), 314-6 (Hayne and Heydon JJ), 327-8 (Kiefel J) (***Shi***)

(paragraph 7(3)(a)) and the requirement to meet those needs "unless it would impose unjustifiable hardship on the provider of the school education" (paragraph 7(3)(b)).

17. Separate chapters of the Act deal with government and non-government schools, and with home schooling. Chapter 3 deals in detail with government schools, and section 18 sets out principles governing the chapter, including (relevantly) "equity, universality and nondiscrimination";[3] a "broad and balanced secular education";[4] and "developing emotional, physical and intellectual wellbeing of all students".[5]

18. Section 36 of the Act provides for the suspension, transfer or exclusion of a student from a government school. The section reads as follows, with the omission of subsection 36(4), which deals only with exclusion decisions (neither party has broached any possibility of excluding the applicant's son during the proceedings and we are of the view that the circumstances make consideration of exclusion unnecessary).

> *36. Suspension, exclusion or transfer of student by director-general*
>
> *(1) This section applies if—*
>
> *(a) a student attending a government school—*
>
> *(i) is persistently and wilfully noncompliant; or*
>
> *(ii) threatens to be violent or is violent to another student attending the school, a member of the staff of the school or anyone else involved in the school's operation; or*
>
> *(iii) acts in a way that otherwise threatens the good order of the school or the safety or wellbeing of another student attending the school, a member of staff of the school or anyone else involved in the school's operation; or*
>
> *(iv) displays behaviour that is disruptive to the student's learning or that of other students; and*

[3] The Act section 18(a)
[4] The Act section 18(c)
[5] The Act section 18(d)(iii)

(b) the principal of the school is satisfied that action should be taken under this section.

(2) The principal may recommend to the director-general that the director-general—

(a) suspend the student from the school for a stated period of not longer than 20 days; or

(b) transfer the student to another government school; or

(c) exclude the student from all government schools.

(3) After considering the principal's recommendation, the director-general may—

(a) give effect to the recommendation; or

(b) take any other action mentioned in subsection (2) that the director-general considers appropriate; or

(c) suspend the student for not longer than 20 days.

...

(5) The director-general may suspend or transfer the student only if—

(a) the student's parents have been given an opportunity to be consulted, and told in writing, about the proposed suspension or transfer of the student and the reasons for it; and

(b) as far as the student's maturity and capacity for understanding allow, the participation of the student has been sought, and any views of the student considered, in deciding whether to suspend or transfer the student; and

(c) the student has been given sufficient information about the decision-making process, in a language and way that the student can understand, to allow the student to take part in the process; and

(d) the student has been given a reasonable opportunity to continue the child's education during the suspension.

(6) Despite subsection (5), the director-general may immediately suspend the student for not longer than 5 days if, in the director-general's opinion, the circumstances are of such urgency or seriousness to require the child's immediate suspension.

> *(7) However, before suspending the student under subsection (6), the director-general must comply with the requirements of subsection (5) (a) to (d) to the extent that it is practicable and appropriate to do so.*
>
> *(8) To remove any doubt, the director-general may suspend the student under subsection (6) while deciding what other action (if any) should be taken in relation to the student under this section.*
>
> *(9) If the student is suspended for 7 or more school days in a school term (whether or not consecutive school days), the director-general must ensure that the student is given a reasonable opportunity to attend appropriate counselling.*
>
> *(10) The director-general may delegate the director-general's power to suspend a student from a government school for not longer than 15 days to the principal of the school.*
>
> *Note For the making of delegations and the exercise of delegated functions, see Legislation Act, pt 19.4.*

19. The process set out in section 36 has some noteworthy aspects. Subsections 36(1) and (2) establish a directory process in which three things must happen: there must be student behaviour of the kind specified; the school principal must have reached a state of satisfaction that a response under the section is needed; and the principal must have made a recommendation to the Director-General. The making of the recommendation triggers a deliberative decision-making process by the Director-General as set out in subsection 36(3). The Director-General, having received the recommendation, chooses among acceptance of the principal's recommendation; any other action available under the section; or to take no action (subsection 146(1) of the *Legislation Act 2001* provides that where a discretion is created in a legislative provision by use of the word 'may' or a similar term, the option of not taking action is always available; see also *Samad v District Court of New South Wales*[6]).

20. The Director-General's decision is deliberative in two senses: first, it allows a full range of options to be taken into consideration; and second, additional requirements are imposed by subsection 36(5), which allows a decision to

[6] [2002] HCA 24, at [31]-[38] (Gleeson CJ and McHugh J), [66]-[77] (Gaudron, Gummow and Callinan JJ)

suspend to be made only where consultation has occurred (or has at least been attempted) with parents and the child (including allowing the student "to take part in" the decision-making process) and provision has been made for the student to continue being educated if suspended.

21. The above outlines what might be described as the usual or default decision-making process. But the section further establishes, in subsection 36(6), an alternative process, in which for reasons of urgency or seriousness the Director-General may impose a short, immediate suspension. But even where an immediate suspension is imposed, subsection 36(7) obliges the Director-General to abide by the requirements of subsection 36(5) to the extent that it is "practicable and appropriate" to do so, and subsection 36(8) makes it clear that one reason for action under subsection 36(6) is to allow time to decide on any further action under the section. Finally, subsection 36(10) allows the Director-General to delegate to school principals the power to suspend a student for up to 15 days.

22. There are a number of other documents which may have a bearing on the exercise of the discretion in section 36 of the Act. Some of these documents deal with threats and risks to the safety and order of schools; others assist in the assessment of student disabilities and in the education of students with disabilities; and one provides general guidance on teachers' professional standards. Some of these documents take the form of delegated legislation; others are policy and supporting procedures, usually made in the context of some legislative framework.

23. These documents comprise:

    (a) Policy on Suspension, Exclusion or Transfer of Students in ACT Public Schools, and supporting procedures and guidelines.

    (b) Safe and Supportive Schools Policy and supporting procedures.

    (c) Students with a Disability: Meeting their Educational Needs Policy and supporting procedure.

(d) ACT Student Disability Criteria 2019.

(e) Disability Standards for Education 2005 and accompanying Guidance Notes.

(f) Student Centred Appraisal of Need Booklet.

(g) Australian Education Council – Nationally Consistent Collection of Data on School Students with Disability.

(h) Teachers' Code of Professional Practice (ACT).

24. The Suspension, Exclusion or Transfer of Students in ACT Public Schools Policy (**the Policy**) apparently dates from 2010. It provides policy guidance on the implementation of section 36 of the Act and is in turn accompanied by procedures and guidelines. Some complexity is introduced into assessing its relevance because more than one version appears to exist, and it is not clear which applied at the time of the applicant's son's suspension. What follows comes from the printed version provided by the Directorate on the final day of the hearing, referred to as "Suspension Exclusion Transfer Policy 2010". Clause 2.2 of the Policy provides that the purpose of suspension is to restore a safe working environment; allow the school to review its practices and develop support plans for a suspended student; and communicate the significance of the behaviour that prompted the suspension and encourage the student to take responsibility. Clause 7 provides that when a student returns after a suspension the principal or delegate must hold a "re-entry" meeting with the student and consult with the parents.

25. One alternative version appears to be an Internet version taken from the Directorate's website and identified as "Published: January 2016".[7] There is a good deal of common material with the other document but some material is different. This version lays more emphasis on suspensions being a last resort, e.g. clause 2.2 says that suspensions may be used "where all reasonable action taken by the school to engage the student has been unsuccessful". There is also a section headed "responsibilities" which is absent from the version referred to

[7] T Documents pages 206-211

earlier. It states that principals must be satisfied that all reasonable alternatives have been considered or unsuccessful and that suspension is warranted.[8]

26. The procedures supporting the Policy place emphasis on the elements of procedural fairness (going beyond the special provisions of subsection 36(5) and elaborating on the need to ensure that the student is heard and that the decision-making process is unbiased). The procedures include guidance on procedural fairness in general, an excerpted section 36 of the Act, and an explanation of the appeal (i.e. review) provisions. From the abovementioned website material[9] it appears that the Guidelines that accompany the Policy and procedures are intended for school staff only and are not generally available to the public. The Guidelines offer a little more detail that principals can consider when a suspension is contemplated.[10] The 'Definitions' section of the Guidelines, for example, provides suggested alternatives to suspension, including an "in-school alternate program", where a student is kept apart from other students at the school but not suspended. There is considerable detail regarding consultation with the student, and the effort required to ensure that the student can comment on what is proposed and "take part in" the process, as required by subsection 36(5). The student "must be offered a choice of having an advocate present".[11] There is further detail on consultation with parents. The guidelines emphasise the need to maintain proper records. There is a sample letter of notification to parents and a checklist for use by the principal.

27. Nowhere in the Policy, procedures or guidelines is there recognition of the two decision-making pathways in section 36 (subsections 36(3) and 36(6)), nor of the changes that result in the process when a principal is taking the suspension decision under delegation.

28. The Safe and Supportive Schools Policy (**SSS Policy**) and its accompanying procedures are dated 9 November 2016. The SSS Policy provides general

[8] Clause 5.1, T Documents 208
[9] T Documents pages 206-212
[10] T Documents pages 213-225
[11] T Documents page 222

guidance on the school environment, calling on a range of legislation, including the *Education Act 2004* but also other legislation both Commonwealth and ACT, such as the *Discrimination Act 1991*, the *Human Rights Act 2004*, the *Children and Young People Act 2008* and Commonwealth discrimination legislation. The emphasis of the SSS Policy is on values such as safety, respect, inclusiveness and self-awareness. The accompanying procedures include Procedure A, aimed at preventing and addressing bullying, harassment and violence; and Procedure B, about responding to "complex and challenging behaviour".

29. In 2005 the Commonwealth issued *Disability Standards for Education 2005* (**the Standards**), delegated legislation made under the *Disability Discrimination Act 1992* (Cth). The Standards set out how education must be made accessible to students with disabilities. The instrument specifies the rights of students with disabilities; the obligations of schools, which constitute the Standards; and the measures that would constitute evidence of compliance. The Standards extend to participation, the curriculum, student support services, and the prevention of harassment and victimisation. There are exceptions (which do not make it unlawful for the school to fail to comply), including unjustifiable hardship to the school. The Standards are accompanied by guidance notes to help in interpretation.

30. In January 2016 the ACT adopted a Policy on Students with a Disability: Meeting their Educational Needs (**Disability Policy**), accompanied by a set of procedures, to meet the Commonwealth Standards described in the preceding paragraph. The Disability Policy is a general statement committing to implementation of the Standards within the ACT education framework. The accompanying procedures spell out the kinds of processes to be adopted by schools and the Directorate to give effect to the Disability Policy, including the provision of additional resources, the use of the Student Centred Appraisal of Need process (for assessing the needs of disabled children) and the development of Individual Learning Plans for students with disabilities.

31. Two documents deal with the assessment of students with disabilities. The ACT Student Disability Criteria 2019 provide criteria for assessing whether a student has a disability and the nature and degree of any such disability. The kinds of disability covered include intellectual, physical and mental health disabilities, among others. The Student Centred Appraisal of Need booklet sets out a template for a practical assessment of the educational needs of a student with one or more disabilities.

32. The 2019 Guidelines for the Nationally Consistent Collection of Data on School Students with a Disability provide the basis for the collection and provision of data on students with disabilities on a national basis. Commonwealth funding for students with disabilities is calculated on the basis of the submitted data, which also allows a national picture of students with disabilities and facilitates comparison of results in different States and Territories.

33. The Teachers' Code of Professional Practice (**the Code)** for ACT teachers dates from 2006. It sets out the standards expected of teachers as members of a profession, in areas such as service to the public, responsiveness (to government and the public), accountability, fairness and integrity and efficiency and effectiveness. Supporting guidelines elaborate on the Code, which is additional to other expectations of teachers as members of the ACT public service.

34. The extent to which the policies, procedures, standards and guidelines should influence the Tribunal's decision varies according to the origin and nature of the document. Where the Director-General is formally bound, for example by the Commonwealth's delegated legislation under the *Disability Discrimination Act 1992* (Cth), the Tribunal, standing in the Director-General's shoes, will be equally bound. Regarding the policies, it is well established that the Tribunal is not formally bound by policies made under legislation, but may take them into account, assuming those policies are consistent with the legislation; but in doing so the Tribunal must not lose sight of the specific circumstances of the party applying for review.[12] Documents that are more in the nature of procedures are

[12] *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179

less likely to influence a tribunal's decision; the tribunal has its own procedures, and the procedures to be followed in some other administrative context are unlikely to be relevant. Documents used in assessment processes (here in assessing the nature and extent of a child's disabilities) will feed into matters such as how the child's education is conducted by the school; but the application of such assessments is a step anterior to the kind of decision under review here and the specifications for such assessments are therefore less relevant in the present context. An overriding consideration, however, is that these documents, taken together, provide a context and set of expectations for the applicant's son's participation in the ACT's public school system. If the evidence were to show that the educational practices set out in the documents had been systematically departed from or ignored, that might in turn influence what we might consider to be the appropriate response to the events of 3 July 2019.

The evidence

35. We made reference above to the caveats attached to some of the evidence. Quite apart from those caveats, which reflect the way the documentary evidence in question has come forward, we are also dealing in the present matter with significant issues associated with hearsay evidence. Certain matters have arrived as hearsay, reported by staff of the school or by the applicant or his wife, based on what has been told to them by young children (sometimes the applicant's son, sometimes other children at the school). We are not bound by the rules of evidence, which would prevent admission of this kind of evidence by a court; we may inform ourselves as we see fit.[13] But the rules of evidence that bind the courts are there for a reason: they reflect the varying degree to which evidence of different kinds can typically be relied on to reveal the truth.

36. That evidence is hearsay at all implies that reliance should be placed on it with caution; hearsay relaying the report of a young child needs to be viewed more cautiously still. For that reason we have sought to ensure that on crucial

[13] ACAT Act sections 8, 26

questions of fact we only arrive at findings where hearsay evidence reported from children is corroborated by other evidence.

The applicant

37. As explained above, the applicant did not appear as a witness, and there is no witness statement from him. Three documents provide factual information from the applicant relating to the events relevant to the decision:

    (a) A document entitled "Notes of discussion with Wendy Cave July 3 2019" attached to his application for review of the decision at first instance and included at page 32 of the T Documents.

    (b) The extract from the applicant's submission at Exhibit A1, subject to the caveats outlined above.

    (c) Information supplied through the email exchange between the applicant and his wife and the school or Directorate (most of these are compiled at Exhibit A2 and are subject to the caveats set out earlier, but some are supplemented by additional emails at Exhibits A7, R7 and R8).

38. Some of the above evidence is, as noted, subject to caveats, and some is of limited evidentiary value. These limitations are explored later in this decision. Other information supplied is useful for context, setting the events in a broader picture but not necessarily bearing directly on the events immediately preceding the suspension.

Medical evidence relating to disability

39. Dr Jarvis challenged some material (e.g. comments in Exhibit A1 relating to the applicant's son's medical diagnosis and the side effects of his medication) on the basis that the applicant was not qualified to provide an expert opinion on the matters covered. Additional information provided by the applicant in Exhibit A5 supplies more authoritative opinion from doctors and allied health professionals regarding his son's medical circumstances.

40. The applicant's son was diagnosed with a form of epilepsy at the age of two years. His paediatrician, Dr Michael Rosier, also identified a global

development delay and further noted gross and fine motor skill deficits. He described the epilepsy as "poorly controlled" and expected the child to need occupational therapy and physiotherapy and possibly psychological support.[14] An assessment by Ms Emily Heckendorf, a physiotherapist with the Southern NSW Local Health Network, found the child to have deficits in manual dexterity, aiming and catching, and balance, and noted deficits in core strength and endurance.[15] Ms Heckendorf recommended ongoing physiotherapy and occupational therapy and mentioned behavioural concerns, with a recommendation for child psychology or behavioural management.

41. Ms Heckendorf was the person who conducted the Movement Assessment Battery and Checklist for the applicant's son, on 4 September 2018 and 10 October 2018 respectively (the results are at Exhibit A4). These tests identified significant disabilities in fine and gross motor skills, putting the child in the 1% percentile range among his peers. These disabilities were judged as likely to have a very marked effect on the child's learning and other experience at school.

42. The applicant and his wife sought support for their son through the National Disability Insurance Scheme (NDIS). As part of preparing their case, they obtained a report from Ms Katherine McCorkindale, a paediatric occupational therapist at Queanbeyan District Hospital. That report[16] again identifies their son as suffering from epilepsy ("early onset absent seizures", described elsewhere in the documents as "absence seizures"), with developmental delay in fine and gross motor skills. Ms McCorkindale again recommends occupational therapy and physiotherapy. The report also identifies psychological problems, specifically "emotion regulation and mood management". The report notes that when challenged by a task (such as one requiring skills he lacks) the applicant's son "feels threatened and becomes distressed and angry". Fortnightly psychological support is recommended.

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[14] All at Exhibit A5; open letters dated 18 August 2018, 27 March 2019 and 12 June 2019
[15] Exhibit A5, open letter of 7 June 2019
[16] Exhibit A5, report of 24 April 2019

The applicant's son – last term of 2018

43. At the time of the incidents leading to the suspension, the applicant's son was a few months short of eight years old. About nine months before those incidents, at the beginning of the fourth term of 2018, he was moved from a different school to the school at which the incidents occurred. We have limited evidence about the previous school but there is sufficient information available to say that the child's experience at that school had been less than satisfactory.

44. At his new school the applicant's son entered a Year 1 class taught by Ms Short with the assistance of a dedicated LSA. He made a slow start but during the course of the term he made considerable adjustments, developing relationships of trust with his teacher and LSA, sitting down with other children, and making friends in the class.[17] Ms Short developed an individual learning plan (**ILP**) in cooperation with the applicant and his wife and other staff at the school.[18] The ILP notes the applicant's son's difficulties in maintaining concentration and focus and his gross and fine motor deficits. The path forward concentrated on allowing him time to engage to the extent he could; on providing positive reinforcement for participation; on focusing closely when he was engaged in communication; and on building relationships with staff and students.

The applicant's son - first half of 2019

45. In contrast to the last term of 2018, the applicant and his wife did not see the early part of 2019 as successful in the same way.[19] Their son, now in year 2, and with a new teacher and an LSA shared across classes, missed the first week and a half of Term 1 with illness. When he did attend, the applicant and his wife formed the view that the new teacher was not exhibiting the engagement and positive reinforcement that Ms Short had provided in 2018. The applicant or his wife reported on numerous occasions that their son was out of the classroom and that when in the playground he was excluded or threatened by other students.

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[17] Exhibit A1 paragraphs 15-18
[18] T Documents pages 56-60, dated 30 October 2018
[19] Exhibit A1 paragraphs 27-33

46. On a number of occasions they raised concerns with the school regarding particular incidents. An email of 22 February from the child's mother noted their son having been unsupervised;[20] an email of 1 April from his teacher to the applicant[21] reported both that he had been apart from other students for most of the day and that in recess he had kicked two other students, and was not able to talk about it. Another email of 1 April from the child's mother[22] described her son as "really upset about school and being excluded in the playground". In an email of 30 April to Ms Bissell[23] the applicant reported that he had found his son at lunch time (on being collected for a physiotherapy appointment) alone, distressed and dishevelled inside a locked classroom. Ms Westerman had been in an adjoining room. The applicant reported that his son told him he had been called a baby by four boys, punched and thrown to the ground. There are two emails from the child's mother dated 8 May.[24] The first records her general dismay that her son had no friends and did not want to attend school. The second reports a particular incident in which her son was distressed after witnessing another child putting his hands around a boy's neck and hurting another child. The email also reports that her son had been unable to cope with the demands of a cross country event, for reasons of both capacity and stamina. An email of 20 May from the child's mother reports her increasing frustration with the course of events.[25] Email exchanges of 23 May[26] between her and Ms Bissell report continued frustration and that the expected meeting with Ms Matters on psychological support for the applicant's son had been cancelled.

47. Shortly afterwards the applicant's son was transferred into Ms Short's class (see below). But that did not prevent other incidents from occurring. An email of 18 June[27] from his mother to the Directorate reported that her son had climbed

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[20] Exhibit A2 at 2.51pm
[21] Exhibit A2 at 3.42 pm
[22] Exhibit A2 at 10.32 pm
[23] Exhibit A2 at 6.18 pm
[24] Exhibit A2 9:32am and 2:43pm
[25] Exhibit A2 at 10:31am
[26] Exhibit A2 at various times, ending at 3:02pm
[27] Exhibit A2 at 7:10am

onto the roof of the school, apparently in imitation of similar behaviour by his older sibling, who had done this several times in the recent past.

48. The applicant's notes of his discussion with Ms Cave on 3 July 2019[28] record that he dropped off his son's epilepsy medication at the school that day at about 12:30pm. He returned at 2:30pm to collect his son (early, in order to collect his son's younger sibling from childcare). Ms Cave told him that his son was suspended "for at least a day" because he had been violent to other children. In response to his questions she said that his son had shown similar behaviour on the previous day. On the previous day he had calmed himself, but on this occasion he had not been able to do so. The applicant found his son "hiding under the desk in Ms Bissell's room"; he was "upset or scared and non-responsive to my requests to leave the school". The applicant took his son home.

Ms Beth Matters

49. Ms Beth Matters, a senior psychologist in the Education Directorate, appeared as a witness for the applicant under subpoena; she also returned documents under the subpoena. These documents were tendered and are identified as Exhibit A3.

50. Ms Matters said in evidence that she spends half her week at a particular primary school (not the school attended by the applicant's son) and half in the Directorate. At the Directorate, psychologists, teachers, occupational therapists and other allied health professionals contribute to schools as and when required through Network Student Engagement Teams (**NSET**) in support of students with particular needs, supplementing resources within the school, such as school psychologists. Ms Matters, as a senior psychologist, has supervisory responsibility for other psychologists at the Directorate.

51. Ms Matters said that she had a "client" relationship with the applicant's son's older sibling (a year 5 student at the same school in 2019), but not the same direct relationship with the applicant's son. Under questioning, she was unaware

[28] T Documents page 32

of a number of incidents at the school involving the applicant's son that the applicant described as having occurred in the first half of 2019 – that the applicant's son was often unsupervised in the playground during class periods, that a LSA had been provided to support the applicant's son, of the applicant's son having been reported on 2 May as "isolated", of a meeting about the child attended by NSET on 8 May, of a meeting with the child's mother on 8 May, of the episode on 18 June where the applicant's son had climbed onto the roof of the school. Ms Matters had a "vague recollection" of a report that the applicant's son on 8 May had witnessed a child putting his hands around the neck of another child. Ms Matters recalled that the applicant's older sibling had suffered a seizure at school on 6 May and that the applicant's son had witnessed this and had been distressed.

52. Ms Matters noted that other members of NSET had had greater involvement with the applicant's son than she had, including an occupational therapist, who had gone to the school to observe him. Eventually a meeting had been set up to consider (among other things) the additional support that the applicant's son might need. This was first scheduled for 15 May but was later postponed to 30 May. Ms Matters did not know who had postponed the meeting or why.

53. In response to questioning by the Tribunal Ms Matters advised that NSET assistance could be made available to a child through a request by the school or a parent, but who from the team might be assigned depended on the particular issues being addressed. She herself did not know what had occurred in the applicant's son's case. When a child with particular needs entered the school system there was an intake procedure that should have brought those needs to the attention of the NSET personnel. In the applicant's son's case there might have been an issue with the timing of the intake meeting, or it might have been his gross motor disability that was the initial focus. Ms Matters was not aware of issues concerning him having come forward through an incident reporting or risk assessment and management process.

54. The documents returned by Ms Matters (Exhibit A3) comprised an exchange of emails with school staff in the first half of May 2019 and a document identified as "NSET Case Notes" for the applicant's son. The case notes are in tabular form. They record a number of events: commencement of NSET activity with respect to the applicant's son in December 2018; observation of him by an occupational therapist and an NSET Inclusion Officer on 20 February 2019, followed by a meeting with school staff focused on the needs of the child; report of a discussion with the applicant in which he reported that his son was out of the classroom for much of the school day; and a note that further work had not been undertaken by NSET because the school had requested that priority should be given to the older sibling.

55. There is a long entry in the table dated 30 May 2019 recording a meeting focused on the applicant's son, and discussing the perception of his mother that the settings at the school, and especially his current teacher, were not helping her son. The record notes the decision that the child should return to Ms Short's class, which would then become a Year 1/2 class.

Ms Catharine Dee

56. Ms Dee was a classroom teacher at the primary school, taking a Year 1 class. Her statement was admitted into evidence as Exhibit R2. The statement records that two girls came up to Ms Dee at the end of the lunch break on 3 July 2019 and one girl said that the applicant's son had tried to strangle the other girl, who was crying. Both girls pointed to their necks. The girls said that the applicant's son had been drinking water that was dripping from a join in the building's gutters, and the girl whom he had later tried to strangle told him it was not a good idea because the water was dirty. At that point he had "lunged" for the girl who had spoken to him, and had grabbed her neck. Ms Dee reported what she had heard to the Deputy Principal, Ms Bissell, and then took both Year 1 classes to the library, while her colleague Ms Short was attempting to moderate the applicant's son's behaviour.

57. In oral evidence Ms Dee repeated some of what was in her witness statement, adding that the two girls who came to her were in her Year 1 class (and were

thus about seven years old). She denied witnessing herself the events described by the two girls and also disclaimed any understanding of why the applicant's son had reacted so strongly to what was said to him.

Ms Isobel Short

58. Ms Short taught Year 1 during 2018 and for most of the first half of 2019. Her statement is in evidence as Exhibit R3. The applicant's son joined her Year 1 class from another school during the fourth term of 2018. She noted that he had trouble concentrating and in connecting with other children. Over the term she built a rapport with him and he improved. In 2019 he joined another teacher's Year 2 class. This did not go so well, and Ms Cave, the principal, asked if he could be placed once again in her class. She noted that on arriving back in her class in June 2019 the child exhibited similar limitations as when he had originally come to her class about eight months earlier.

59. On 3 July Ms Short did not witness the events in the playground but was told about them by another teacher. She went up to her classroom area, where the applicant's son was attempting to close and tape up the doors; his intention, in her understanding, was to prevent children from resuming class after the lunch break. As he did this he was muttering or at times perhaps yelling phrases of uncertain coherency but including in particular "stupid little girls" and "I'm going to kill them". Her own attempts to engage with the child, and those of Mr Muir, who was also present, were unavailing. The child, who was becoming increasingly heightened in mood, also attempted to put a chair under the handle of the door, which might have made entry into the classroom difficult. Ms Bissell arrived after a short period, and Ms Short then returned to take charge of her class.

60. Under cross-examination Ms Short agreed that the applicant's son had difficulty engaging with other children and the class in general on arrival, and that he was limited in particular by poor fine motor skills. In late 2018 she and her LSA at that time had worked with him by close engagement and offering a good deal of positive reinforcement and encouragement. Ms Short agreed she had drafted the child's ILP. When the child had returned to her class at the beginning of June in

2019 he did not make the same progress that he had made the previous year. Under further questioning, Ms Short suggested that progress may have been slower because 2019 had been a disjointed year for him.

61. Ms Short said that the applicant's son had good verbal skills for his age, but his threats and statements on 3 July 2019 had been atypical for his age group and suggested considerable anger. She had not seen that kind of behaviour previously.

Mr Harry Muir

62. Mr Muir was the Learning Support Assistant for Year 1 at the school during 2019. His witness statement is at Exhibit R4. On 3 July 2019 Mr Muir was walking from the playground towards the school buildings just at the end of the lunch period. He saw the applicant's child "swipe" his hand across the face of a little girl, and then push her into the wall. The child then ran upstairs to the Year 1 classroom area. Mr Muir saw the little girl and her friend, who was with her, run over to their teacher, Ms Dee, and then he too went up to the Year 1 classroom area. He found the applicant's son attempting to tape some of the doors shut. The child, while engaged in that task, also tried to kick other students who were returning to class after lunch. He lashed out several times, connecting with at least one child. Mr Muir tried to calm and distract him, but without effect. Shortly afterwards, Ms Bissell arrived and took over the task of attempting to engage with and calm the child. A short while afterwards the child left and ran downstairs, in the process pushing another student to the ground. He went into Ms Bissell's office. Mr Muir followed him down and found him fiddling with the heater.

63. Under oral examination Mr Muir said that the "swipe" of the little girl's face had been a kind of scratching movement across the face, and the push against the wall had been with medium force. The later action of pushing another child to the ground had been with medium to high force. Mr Muir judged the children to have been alarmed and to have been hurt, including the child who was kicked, but was unaware of any injury. By the time the child was in Ms Bissell's

office he was reasonably calm. Mr Muir agreed that he had not previously seen the child "lash out" in the way that occurred on that day.

Ms Anne Westerman

64. Ms Westerman is School Leader C at the primary school. Her witness statement was entered into evidence as Exhibit R10. The statement is closely focused on the occasion when the applicant's son was locked by himself in a classroom. Ms Westerman was working in an adjoining room when she heard the child; he said that other students were "trying to get" him or words to that effect. Ms Westerman locked the door so that no-one could enter, but he could leave if he wished. She spent some time playing with him to encourage him to relax. She did not notice anything about his appearance or dirt or leaves on his back.

65. Under cross-examination by the applicant Ms Westerman described her role at the school as having included a supervisory role for the whole of Year 2 (and therefore for the applicant's son). She acknowledged that the child suffered from disabilities but had only a limited recollection or awareness of what those disabilities were. She could recall anxiety and a lack of socialisation, but nothing more, although she agreed that she had attended at least one meeting at which those disabilities would have been a focus. Ms Westerman said that during the first half of 2019 the child frequently left the classroom, to the point where he spent perhaps half of each day, on average, outside the class. When in class, he was frequently away from other children. The school's response had been to ensure that an LSA was available to support the child in alternative learning activities outside the classroom. As for the event when the child was locked in the classroom for a period, Ms Westerman repeated her account and agreed that a date of 30 April 2019 (derived from the applicant's email about the incident) was probably correct. She further said that the applicant's son was involved in many incidents in the playground; and that he showed aggression to other children, by hitting them.

Ms Sophie Bissell

66. Ms Bissell, who is Deputy Principal at the school, provided a witness statement, which is at Exhibit R1. In that statement, Ms Bissell noted that on 3 July Ms

Dee had alerted her to the applicant's son having hurt the two girls at the end of lunchtime. Ms Bissell encouraged her to ensure that Ms Short and/or Mr Muir were involved in helping the child to become calmer and more settled, noting in her statement that that had been a successful way of dealing with the child on other occasions. She spoke to the two girls, obtaining a story that is similar but not identical to that reported by Ms Dee, and included that the child had hit the second girl, or that he had pushed her against the wall. At about 2:15pm Ms Bissell was called to the upstairs area near the Year 1 classrooms, as the applicant's son was not becoming calmer. On arriving she found the child attempting to tape the doors shut. She spoke to him; he said he was angry and wanted to kill the two little girls; he agreed with an outline that she put to him of what had happened, and then ran downstairs, pushing another child over as he went.

67. Ms Bissell then followed the applicant's son downstairs and spoke to the Principal, Ms Cave, who immediately decided to suspend the child for a day so as to allow for a "Protective Action Plan" to be developed. By this time the applicant's son had gone to Ms Bissell's office, where he was "playing with the heater". The applicant arrived shortly afterwards (at about 2:30pm), commented that what had happened was "unbelievable", and had some further exchanges with Ms Bissell regarding the decision.

68. In oral evidence Ms Bissell outlined how the applicant's son had come to move from the class in which he had been placed in 2019 into Ms Short's class. The applicant and his wife had wished to obtain psychologist support for their son through NSET and after a meeting identified by Ms Bissell as occurring about the beginning of June and involving both school and Directorate staff, it was agreed that he would be moved back to Ms Short's class. There was also an account of an earlier meeting, occurring on 9 May, which the applicant's wife had departed in a state of marked asperity.

69. Under cross-examination Ms Bissell elaborated on the events of 3 July, without identifying any change to the essential parameters of the events as outlined in

her witness statement. She also mentioned a number of incidents during the first half of 2019 suggesting that the applicant's son had not settled successfully into his new class, had not made friends with other children, and was having a difficult time on the playground. During this time the applicant and his wife had agitated for changes in the way the school dealt with their son, and ultimately the decision was taken to move him into Ms Short's class once again.

70. Ms Bissell also reported on an incident that occurred on 2 July, in which the applicant's son had been involved in an incident in which a skipping rope had struck the face of a fellow female student. Ms Bissell said that the applicant's son had said on that occasion that the harm was unintended, and the two children had been able to reconcile. The incident had been recorded on the Directorate-wide student administration system (to which the Directorate had access). On 3 July, when the applicant's son had remained non-compliant for an extended period, it was possible, given his age, disabilities and the circumstances, that he had been unable, rather than unwilling, to de-escalate. The consultation with the applicant that is required under section 36 of the Act had occurred, Ms Bissell said, when he had arrived at the school on 3 July and had been informed of the decision to suspend his son.

Ms Wendy Cave

71. Ms Cave is the Principal of the school, which at the time had about 400 students. Of those there were ten who had formally recognised disabilities and perhaps a further 30 with conditions that required managing at school. Ms Cave has been Principal at the school for two years, with ten years' previous experience as Principal of another primary school. Her witness statement, at Exhibit R6, records that she was advised of the incidents of 3 July 2019 by Ms Bissell at about 2:20pm. She then made the decision to suspend the applicant's son for a day, in accordance with Act and the Policy. She said that she arrived at the decision in consultation with Ms Bissell, on the basis of the child's violence to other students, his non-compliance, and his failure to de-escalate. On the previous day he had de-escalated after a child was hurt, but on 3 July he did not, despite the same techniques being used by staff. She took the view that the

child's behaviour should be managed through a "Positive Behaviour Support Plan".

72. Ms Cave recorded her unsuccessful attempt to contact the applicant and his wife at about 2:30pm, her brief conversation with the applicant on his arrival at the school, her email and telephone exchanges with him and his wife that evening, and that she sent the paperwork associated with the suspension to them. Nothing further was heard from that point on from the applicant and his wife and the child did not return to the school.

73. In oral evidence Ms Cave emphasised the immediacy and urgency of the decision she had made, on the basis of the continuing physical and oral threats from the applicant's son and his failure to de-escalate. The events occurred on the third-last day of the school term, on a Wednesday, with a two-week break scheduled to start after the Friday of that week.

74. Under cross-examination Ms Cave was asked in detail about events occurring during the months leading up to 3 July (from the start of the school year in February). Many of these events were reported by the applicant or his wife, while others were reported by teachers. Ms Cave explained the school's response to such incidents, which usually involves those closest to the events seeking to resolve issues, to engage the children so that they can make sense of what is happening around them, and so that relations among the children do not break down or are restored ("mended"). Because of the close involvement of line teachers, it is only sometimes that as Principal Ms Cave herself would become involved or even be aware of what was happening. Ms Cave characterised the engagement of school staff with the applicant's son, and the family more broadly, as focused on ensuring that the child was properly supported and able to participate in the learning process. Psychological support for the child was provided by the school staff involved rather than through specialist psychologists. One of the major forms of support for him in 2019 was through an almost one-on-one allocation of a LSA.

75. Ms Cave said that on the afternoon of 3 July 2019 her priority was safety. Attempts by the school staff who had relationships of trust with the applicant's son to help him to calm himself and de-escalate proved unsuccessful; her judgement was that a break was needed to give him time to settle and enable the school to regroup. Not every incident that has some features in common with that of 3 July leads to suspension, as each student and each course of events is different. Context is centrally important. Ms Cave said she might make four suspensions a year, all of those in the past year or so under the "urgent and serious" provision in section 36(6) of the Act.

76. Under examination by the Tribunal Ms Cave suggested that although there appeared to be an element of emotional dysregulation in the applicant's son's behaviour on 3 July, she thought there was also, in his failure to de-escalate, an element of wilfulness. She insisted that she had little choice other than to suspend the child, as it was essential to give him an opportunity to settle, to allow other children to come to terms with what had occurred, and to prepare successfully for him to return to school in the re-entry scheduled for 5 July.

The applicant's arguments

77. The applicant put forward a series of arguments in support of his case. First he noted that although Ms Cave had asserted that suspension was not punitive in intention (at least in the present case) and should not be viewed in that light, in practice in his own family and in the wider community it was widely regarded as a form of punishment or discipline. From that perspective, there were interesting parallels and comparisons with the criminal law. For example, the length of a suspension varied with the severity of the relevant conduct, just as a criminal sentence varies with the severity of the offence. Ms Cave had consulted with one of the little girls affected by the incidents on 3 July, in a way that recalls taking a victim impact statement, even though she did not reach out in a similar way to the applicant and family. But it is clear, the applicant argues, that the evidentiary requirement for suspension of a student falls well short of that needed to obtain a criminal conviction.

78. A second argument relates to how a school or its principal decides that a particular matter engages the criteria of "urgency and seriousness" set out in subsection 36(6). Noting that the two terms are not defined in the Act, the applicant submits that, following *NSW v Tyszyk*[29] only exceptional circumstances allow a principal to take action under subsection 36(6) and avoid the prescriptive procedural fairness elements set out in subsection 36(5). The applicant questioned whether the circumstances in the present matter triggered the "urgency" criterion, noting the distinction between the urgency of preventing further violence after an incident and the separate question of urgency attaching to the administrative response a school might make to an incident. The applicant contended that, in this instance, once it was clear that his son was unlikely to commit any further violent acts, there was no real urgency attached to the school's decision about a response. The applicant made a similar analysis of the "seriousness" criterion, relying on *R v Way*[30] in which Spigelman CJ, Wood CJ at CL and Simpson J analysed the offence there considered in terms of its "objective seriousness". The applicant compared his son's behaviour and the suspension consequently imposed with other acts in ACT schools and in Western Australia, concluding that the events were not sufficiently serious to trigger the choice of subsections 36(6) and (7) rather than subsections 36(3) and (5).

79. The applicant pointed out that Ms Cave said in evidence that she made perhaps four suspension decisions in the course of 2019, all of them "urgent or serious" matters under the provisions of subsection 36(6). No other suspensions occurred at the school, and indeed the delegation to Ms Cave only extended to urgent and serious cases under subsection 36(6) of the Act. This implies that the procedural fairness provisions of subsection 36(5) have had no application. It is, the applicant submitted, a perverse outcome if those provisions are effectively empty, when so much emphasis is given to them in the legislation, the Policy and its supporting procedures.

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[29] [2008] NSWCA 107 (Campbell J)
[30] [2004] NSWCCA 131

80. Finally, the applicant argued that the suspension was an inappropriate and unduly severe response to the events of 3 July 2019, taking into account his son's age, disabilities and medication, lack of intention, the apparent minor degree of injury to the other children affected and the school's failure to provide proper psychological support to his son during the 2019 school year. It was evident that the school was giving priority to his son's elder sibling. The applicant pointed out that there was a series of events in 2019 illustrating that his son was not coping, especially in the playground, and that these events were not addressed until the meeting of 30 May. Although the exact facts of the event of 8 May involving another boy choking a child were unclear, it was accepted that some event had occurred. There had been no follow up and it remained possible that his son had simply modelled his behaviour on what he had seen (despite the elapsed time of about seven weeks). There was also a potential contributing factor in the side effects of his son's medication, the dose of which had been increased only a day before the events leading to the suspension had occurred. Whatever the explanation for his son's behaviour, it was clear that the school had not come properly to grips with the extent of his son's disabilities, as evidenced by Ms Westerman's lack of awareness of them.

81. The applicant pointed out that the assessment of his son's disabilities includes a recognition of the difficulty he has in emotional regulation. After a traumatic event it should be expected that he might have difficulty in calming himself. If that difficulty is simply a reflection of his disability, it should not be a basis for a suspension. He noted also that the playground support that had been provided for his son had been absent at the time of the incident on 3 July involving the two girls. While he recognised that it could never be perfect, that gap in the playground support – the school's major strategy in support of his son – had coincided with the events leading to the suspension. Further, as his son's physical capacities were limited because of his fine motor and gross motor deficits, an element of clumsiness might have contributed to the physical violence on 3 July.

82. The applicant accepted that the evidence of the witnesses suggested that the events of 3 July involving his son occurred more or less as described, and that on that basis the discretion to suspend in section 36 was enlivened. By implication, the applicant's arguments are focused entirely on whether or not that discretion should be exercised.

The respondent's arguments

83. The respondent contended that this matter is one in which a temporal element requires that a departure be made from the principle established in *Shi*, that reviews be decided on the circumstances at the time of the tribunal's decision rather than at the time of the decision at first instance. The High Court recognised in that case that a temporal element in the particular legislation governing a decision might require that the case be decided by the tribunal at the time of the relevant events or the initial decision rather than at the time of the tribunal's review.[31] With regard to the requirement in subsection 36(6) that the decision-maker form an opinion that the matter is sufficiently serious or urgent to require the student's suspension, Dr Jarvis referred us to *Prior v Mole*[32] *George v Rocket*,[33] *Minister for Immigration and Multicultural Affairs v Eshetu*[34] and *R v Connell*[35] as authority for the position that such an opinion (or its equivalent in other similar formulations) must be founded on reasonable grounds, both in respect of the facts and of the law. Acceptance of these points also means that any events that occurred after the suspension occurred can have no influence on the Tribunal's decision.

84. Dr Jarvis noted that, as would be entirely normal in cases such as the present, the principal did not witness the events in question. But she heard eye-witness evidence about all of the events except the initial contact between the applicant's son and the first girl that he is reported to have "strangled". After the events, the applicant's son was unable to calm down, despite the best efforts of

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31 At [44] (Kirby J), [143]-[145] (Kiefel J)
32 [2017] HCA 10
33 [1990] HCA 26
34 [1999] HCA 21
35 [1944] HCA 42

Ms Short, Ms Bissell and Mr Muir. He remained non-compliant. Taken together, this was sufficient for her to form a well-founded view as to the urgency and seriousness of the matter and of the appropriate response. The applicant has quite properly accepted the established facts of the matter.

85. Dr Jarvis contended that, given those established facts, it was clear on the afternoon of 3 July 2019 that some formal and enforceable separation of the applicant's son from the school and its students would be needed. That was the conclusion of Ms Cave. The question then arises as to how that separation might be achieved and for how long it should continue. Ms Cave's evidence was that she wished to ensure that the child would be absent from school on 4 July and was concerned that he would arrive at school as usual unless a suspension was imposed. So, an exercise of the power conferred by section 36 was necessary. As for the length of the suspension, the delegation to Ms Cave only allowed up to five days. At the time, with two days remaining in the term, a two-day suspension might have seemed in order, but a more compassionate one-day suspension was preferred, as it allowed for the child to "re-enter" the school on the last day of term and so end the term on a successful note.

86. The applicant had called up earlier facts in support of the argument that they contributed to the behaviour shown by his son on 3 July. Such facts cannot contribute, in Dr Jarvis' submission, to a decision based on immediacy, which would always be driven by the events of the present moment. In any case, we know from the evidence of the school staff that the child's behaviour was not unprecedented. Ms Westerman described him as having previously engaged in "aggressive" behaviour (i.e. hitting other children). The child's mother complained by email on 5 May that her son was being bullied but in fact the evidence for bullying is very slight. The applicant also argued that the school failed to provide proper psychological support for her son, but the exchange of emails between school and parents does not support that conclusion, and account has to be taken of delays resulting from the two-week break between the first and second terms. The applicant's son spent time outside the classroom not because his presence at the school was not properly managed, but just the

opposite: he was outside by design, on the basis that he was better off happy and outside than unhappy and inside.

Consideration

Some preliminary issues

87. As noted earlier, in setting out the issues to be decided in this matter, the provisions of the ACAT Act, and the case law relating to the operation of legislation governing Australian tribunals, establish that the role of the tribunal in administrative review is to do again what the earlier decision-maker did in coming to the decision under review. In this case, that requires us to decide, once again, whether the applicant's son should be suspended. There is plainly an element of unreality in our taking such a decision: the suspension has been well and truly completed, and little change will be visible objectively were we to come to a conclusion different from that of earlier decision-makers, beyond a change to the records of the child in a school system that he is no longer a part of (although it may also deliver reputational and self-esteem benefits to the child and his family). It may have been this unreality that prompted the approach adopted by the tribunal in *XY and Director-General, Education Directorate*,[36] the only reported case dealing with this provision of the Act. In that case the tribunal focused on assessing whether the decision-maker at first instance had taken the decision under review correctly, deciding that the decision was correct and confirming it. But the precedents, by which we are bound as a matter of law, are clear: our role is to take a fresh decision on the evidence now available to us. It is perhaps worth emphasising that the aim is to arrive at the correct or preferable decision based on all the information now available, but that does not carry with it the implication that if our decision is different from that of the primary decision-maker the latter must have erred or taken a poor decision. It may often be the case that the tribunal arrives at a particular decision on the basis of more complete evidence and because it has had the time to arrive at a more considered and careful conclusion.

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[36] [2018] ACAT 68

88. The question also arises as to the nature of the fresh decision taken by the tribunal. The High Court's judgment in *Shi* decided that in general tribunals should draw on relevant information about developments occurring after the initial decision, up to the tribunal's hearing of the matter. The exception to that rule is where there is a "temporal element" in the decision. Is there such a temporal element in the present matter? We agree with Dr Jarvis that there is. The decision to suspend the applicant's son relied on the incidents that occurred on, and in the lead up to, the day the suspension decision was made. The suspension having been imposed and served, it would be absurd to consider, fourteen months later, whether a different decision should be arrived at on the basis of how the applicant's son might have behaved or what he might have done since the suspension was imposed and completed. The decision stands to be reviewed on its merits on the basis of the evidence about the period leading up to it. Evidence from after 3 July 2019 can only be relevant if it sheds light on the circumstances leading up to and on that date, or on the kind of decision that should be taken in response to those events.

89. The respondent argues that we should in a fresh decision follow a similar decision-making path to that adopted at first instance; in particular, we should treat the decision as one that requires application of the "urgent or serious" provision at subsection 36(6) of the Act rather than the more considered path under subsections 36(3) and (5). That argument flies in the face of both statute and case law. Subsection 68(2) of the ACAT Act assigns to us all the powers and functions available to the Director-General in making the decision. That is, we stand in the shoes of the Director-General, with all the powers and functions available to the Director-General in respect of the decision we are reviewing. That plainly includes the powers and functions set out in subsections 36(3) and (5), as well as those in subsection 36(6). Further, there is ample authority for the proposition that we are not limited to the powers actually exercised by the

decision-maker, but may call upon other powers available in the context of the decision.[37]

90. When Ms Cave came to make the decision, she saw the circumstances as falling within the "urgent or serious" criterion in subsection 36(6). In our position, fourteen months later, with the one-day suspension having been completed on 4 July 2019, we cannot accept that any element of urgency remains; and after such a lapse of time, there are no concerns that are serious in the sense of needing to be addressed quickly. It seems to us preferable, therefore, to follow the more considered pathway established by subsections 36(3) and (5). That provides a more complete way of providing procedural fairness to the applicant and the child (although once ample time is available subsection 36(7) would have nearly the same effect). Further, consultation with the applicant and his son is not only a way of arriving at a fairer decision, but a way of promoting better decision-making by ensuring that more complete information is before us.[38]

91. There are four paragraphs in subsection 36(5) setting out the special procedural requirements in regard to suspension or transfer of a student. Paragraph (a) requires that the parents of the child "be given an opportunity to be consulted and told in writing" of the proposed suspension and the reasons for it. That requirement is met in our review by the participation of the father as applicant. Paragraph (d) calls for arrangements to be made so that the education of the student whose suspension is proposed can be continued during the suspension. Strictly speaking, the suspension having been already served, the paragraph falls away; but its spirit could be met if the applicant's son were to appear at the hearing outside school hours.

92. That leaves paragraphs (b) and (c), each of which requires the Director-General – or, on review, the Tribunal – to involve the student in the decision. The

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[37] See for example *Secretary, Department of Social Security v Hodgson* [1992] FCA 338 at [25]-[27] (Hill J); *Re Fletcher & Ors v Commissioner of Taxation of the Commonwealth of Australia*[1988] FCA 362 at [29]-[41] (Lockhart, Wilcox and Burchett JJ)

[38] See for example *Cooper v Board of Works for the Wandsworth District* (1863) 143 ER 414 at 417 (Erle CJ); *John v Rees* [1969] 2 All ER 274 at 309 (Megarry J)

obvious way to go about that would be for the child to appear briefly at the hearing, not to give evidence, but to say what response he thought the school should make (or should have made) to the events that led to his suspension. We explored this issue with the parties early in the hearing, emphasising that if the child were to appear it would be very briefly and without questioning or cross-examination by the parties. The applicant stated that his son had not mentioned the events of 3 July 2019 even once in the more than fourteen months that had elapsed since that date, and that he himself was unwilling to raise it with his son or make his son available to participate in the hearing. Indeed, he was adamant that the experience would be unduly traumatic for his son and he would not permit him to appear.

93. The requirement for consultation with the child in subsection 36(5) is in mandatory terms, with qualifiers that make the requirement less than absolute in certain circumstances. The qualifier in paragraph (b) relates to the student's maturity and capacity for understanding; that in paragraph (c) relates to the provision of information in language and in a way the student can understand. Although the applicant's son may have been unable in practice to participate usefully in a consultation with the Tribunal, that has not been tested; and the evidence we have available to us suggests that if he cannot participate it is for reasons to do with sensitivity and emotional regulation, as much as with capacity, maturity and understanding. It is not clear, then, that the qualifiers offer us a satisfactory way to avoid the mandatory consultation. But the relevant provision requires that a suspension proceed only if the consultation process is followed; as our decision, as noted earlier, is not to suspend the child, the requirement to undertake the consultation falls away.

94. The decision under review is the internal review decision. The applicant pointed out in written submissions, but did not press at the hearing, that the Directorate's review decision was not made within the timeline set in section 144 of the Act. That section requires the internal reviewer to make a review decision within 28 days of receiving the application for review. If the internal reviewer does not issue a new decision within that timeline, the decision at first

instance is taken to have been confirmed.[39] As the applicant showed, the Directorate's review decision fell outside that timeline (he applied for review on 18 July and the review decision was made on 26 August). We would note, however, that section 152 of the *Legislation Act 2001* provides that a legislated obligation to take an action persists after a deadline to take that action has passed without the action being taken; and therefore the taking of the internal review decision by the Directorate, after the deadline for taking that decision had passed, suggests that the Directorate's **actual** internal review decision, once taken, took the place of the **deemed** internal review decision. Nothing rests on this, as the content of the two decisions – the deemed internal review decision and the delayed actual decision by the Directorate – was identical; each confirmed the decision at first instance, that is, it had the effect of leaving the decision at first instance in place and unchanged.

Decision-making under section 36 of the Act

95. As noted earlier, section 36 of the Act provides for a two-step decision-making process, where a recommendation by the principal (**the directory step**) is followed by a decision by the Director-General (**the deliberative step**). It is clear here that the Director-General's deliberative decision is anything but a rubber stamp, simply accepting a recommendation from a school principal. Rather, the drafting of the section, and of subsection 36(3) in particular, requires that the Director-General make an independent decision, considering the evidence about what has occurred, arriving at certainty that the discretion to take action has indeed been enlivened – that what has occurred is of the kind specified in paragraph 36(1)(a) – and undertaking appropriate consultations as required by subsection 36(5) with those most directly affected (the student and the student's parents), before coming to a conclusion that the discretion is or is not to be exercised, and if so, to what degree. The normal two-step process can change in two ways: by use in appropriate circumstances of the "urgent or serious" process established in subsection 36(6); or by delegation of the

[39] The Act section 144(3)

Director-General's decision-making power to the principal under subsection 36(10); or both.

96. Where the Director-General delegates the deliberative power in the section to the principal, it has the effect of conflating the two steps envisaged by the section into a single process in which no distinction is retained between what we have referred to above as the directory and deliberative steps. It is easy to see the rationale for such a delegation: when urgent action is required it can more readily be taken if the responsibility rests with the principal to respond to circumstances in the school, rather than to send the matter off to the Directorate and hope for a speedy response (sending the matter to the Directorate is likely to slow the decision-making process because of the need for the Director-General to consult the parents and child before arriving at a decision, regardless of any other more bureaucratic delays).

97. At the time of the present decision the Director-General had delegated the power to suspend a student for up to five days under subsection 36(6) to school principals in the ACT;[40] that is, principals could take decisions under the "urgent or serious" process. A further delegation appears in the papers but its validity is called into question by an apparent administrative error. Item 42 in Exhibit R5 purports to delegate power under subsection 36(10) (described as power to "suspend a student for not longer than 15 days") to the principal of the school affected. But the power in subsection 36(10) is the Director-General's power to delegate, not the decision-making power to suspend under the section, which is found in subsection 36(3). The power to delegate is a power that itself may not be delegated: that is a well-established legal principle which is given statutory force in the ACT by section 236 of the *Legislation Act 2001*. It appears that the intention was to delegate the power in subsection 36(3), but the delegation has listed the wrong power. We do not need to make a determination for the purposes of this decision, but it appears that the delegations made at the relevant time were effective in delegating the power to suspend for "urgent or serious" reasons for up to five days to school principals but there may be no

[40] Exhibit R5 item 40

effective delegation of the power (beyond senior staff of the Directorate) to take decisions under the default decision-making process in subsection 36(3).

98. Generally speaking, a tribunal coming to review a decision under section 36 would regard a recommendation made by the principal under subsection 36(2) as a "jurisdictional fact". In the High Court decision *M70/2011 v Minister for Immigration and Citizenship*[41] French CJ explained the concept of jurisdictional fact as follows (at [57]): "The term 'jurisdictional fact' applied to the exercise of a statutory power is often used to designate a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion." In present circumstances, the existence of such a recommendation under subsection 36(2) is necessary to found the tribunal's jurisdiction to review a decision taken under subsection 36(3) or 36(6), but where the decision-making power has been delegated to the principal, the separate decision-making steps have been collapsed into each other. It would be plainly absurd to expect a principal, in such circumstances, to make a recommendation to herself or himself under subsection 36(2), and it is equally and similarly absurd to imagine that a principal would have a different view under subsection 36(2) from the view he or she held under subsection 36(6). In these circumstances, the recommendation under subsection 36(2) is implied; the content of the implied recommendation is identical to the decision that the principal makes under subsection 36(6).

99. It is apparent that the power to suspend, transfer or exclude a child is not conferred lightly. It is one of the few powers in respect of an individual child (rather than the child's parents) prescribed under the Act. Its prescription is detailed and its application demanding; and decisions under the section are reviewable, internally and by this tribunal. The statute is in turn supported by the Policy, procedures and guidelines that elaborate on the application of section 36 and provide guidance on decision-making.

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[41] [2011] HCA 32

100. It follows that in taking a lawful decision to suspend a student the decision-maker must:

(a) determine the relevant facts;

(b) document the facts of the matter and determine that they fall within paragraph 36(1)(a);

(c) obtain and take into account the views of the parents and the child, taking into account the child's age and capacities;

(d) consider how a suspension might impact on the educational needs of the affected student, and of any other students, where relevant;

(e) taking all of the above into account, reach a state of satisfaction that action is warranted;

(f) determine the dimensions of that action; and

(g) provide for the child to continue his or her education during any suspension.

The decisions

101. As explained above, neither the decision at first instance nor the internal review decision is the focus of this review. But it is perhaps worth noting that each of those decisions fell short of the requirements specified above.

102. Ms Cave's decision fell short in that it was clearly practicable and appropriate to consult the applicant on his arrival at the school on 3 July; he was there to collect his son and it would have been straightforward to have had a conversation with him before coming to a final decision. No doubt Ms Cave was faced by the need to come to a decision in circumstances of considerable urgency, but the evidence is clear that she arrived at a decision as soon as she heard an account of events from Ms Bissell. In evidence Ms Cave suggested that 'consulting' the applicant meant simply informing him of her decision; that is not what the usual understanding of 'consult' is, and Ms Cave's understanding is plainly inconsistent with paragraph 36(5)(a) of the Act, which speaks of consultation regarding a 'proposed' decision and requires that the

proposed decision and the reasons for it be provided to the parent in written form. The consultation must therefore precede the taking of the decision; and there was nothing in the events of the afternoon of 3 July that would have made such a step other than practicable and appropriate. It is also the case that when Ms Bissell repeated the account of events to the applicant's son and obtained his confirmation, she did not go on to ask him how he thought the school should respond. It is entirely possible, even likely, that the child would not have provided a coherent or useful answer, but at least if the question had been asked, the school would be able to say that an attempt had been made to meet paragraphs 36(5)(b) and (c). Other fault might be found (for example the applicant has questioned whether, once his son was no longer likely to attack any other students, the matter remained "urgent and serious" enough to make it appropriate to apply subsection 36(6)), but the above is sufficient to illustrate that Ms Cave arrived at her decision without proper regard to the detail of the Act.

103. The internal review decision also fell short of what was required. The school provided detail on the events of 3 July leading to the suspension,[42] and the applicant was able to put his view to the Directorate, but it appears that the school's version of events was not put to the applicant (thus failing to afford him procedural fairness) and no attempt was made to contact the child for the purposes of subsection 36(5). In any case, the internal review decision is, like our decision, intended to be a fresh decision taken after the evidence has been reviewed. In this instance the internal reviewer merely examined whether Ms Cave's decision was in error or not.

104. It is also plain that Ms Cave did not follow the guidelines that accompany the policy. They called on her to document the matter thoroughly at the time, to provide a more complete written account of events to the parents when informing them of the suspension, and to consider alternatives to suspension, to which she does not seem to have turned her mind.

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[42] T Documents pages 143-5

105. Both Ms Cave and Ms Bissell spoke in positive terms about how their views on education are aligned. Such alignment can simplify administration and decision-making, but it carries some risk: in this case, where the statute sets out a two-step process that collapses into a single step because of the delegation by the Director-General, Ms Cave may have benefited from having a deputy who would contest her views rather than simply acquiesce in them.

What were the events leading to the suspension?

106. Our knowledge of the events of 3 July 2019 relies heavily on the evidence of the school staff. Six staff gave evidence, and all of them gave every appearance of being dedicated and skilled educationalists. The evidence of Mr Muir, Ms Short and Ms Bissell was central. Ms Dee was a good witness, but her evidence does little more than relay what she was told by the two little girls. Mr Muir saw more than any other staff member, and he proved to be a reliable and careful witness. Ms Short was also a good witness, who gave a good account of the child's achievements in engagement at school and the techniques she and the LSA had used to encourage that engagement, but her involvement with the events of 3 July 2019 was quite brief.

107. Ms Bissell was closely involved with the events; she spoke to the two girls and obtained an account of events from them which is broadly similar to that reported by Ms Dee, if different in some details (there are also differences between her account of what the two girls said to her and what she described to the applicant's son,[43] although nothing perhaps turns on those differences). It was Ms Bissell who attempted to engage with the child in the upstairs area, described to him what was reported to her as having happened in the playground, and obtained his confirmation of those events. She also saw him push another child over as he ran from the room. It was she who reported the events to Ms Cave, and she was a witness to the applicant's arrival at the school that afternoon and his exchange with Ms Cave on hearing of the suspension. Hers is the evidence that shows most clearly that the decision to suspend the

[43] Exhibit R1 paragraphs 8 and 12

child was made by Ms Cave almost immediately on hearing of the events.[44] Her evidence was well given and coherent, but her account made us wonder about her objectivity and independence; and the last few paragraphs of her witness statement are very much in the nature of submissions justifying the suspension decision.

108. Ms Westerman gave evidence mainly about the events in April, when the applicant arrived to find his son locked inside a classroom, dishevelled and with leaves and soil on his clothes. Ms Westerman was supervising the child from an adjoining room. In evidence she said she did not recall any issues with the child's appearance, and further commented, in response to questions asked of her, that the applicant's son was occasionally aggressive to other children, and that she was unaware of or could not recall the child's disabilities. With regard to the child's appearance on the day he was locked in the classroom, we prefer the record of the applicant: it was contemporaneous and made well before there was any issue relating to suspension. We also note that Ms Westerman's apparent pattern of recalling what might be seen as factors supporting the decision to suspend the child (aggression) while forgetting or overlooking factors that might have excused him (disabilities) might reflect a wish to speak up for the school and its decision.

109. That inclination appeared most noticeably in Ms Cave's evidence, perhaps not surprisingly, as she was the decision-maker, and no doubt concerned to defend or justify her decision. But her unwillingness to make reasonable concessions, and her readiness to respond to questions with advocacy rather than fact means that her evidence must be viewed with some caution. On that point, it is notable that she was not an eye-witness of events herself; she saw the applicant's son only at the end of the sequence of events, and her evidence goes mainly to matters such as her interaction with the applicant on his arrival at the school on 3 July, the alternatives that were available to her at the time of her decision, the decision-making process and how she conveyed the written decision to the applicant and his wife. Her evidence and that of Ms Bissell might suggest that

[44] Exhibit R1 paragraph 14

the two were perhaps unduly ready to take each other's assessments hastily and without question.

110. The events of 3 July are plainly those that drove Ms Cave's decision to suspend the applicant's son, and as Dr Jarvis noted, in a decision based on immediacy, they will be accorded the most weight. But on review the Tribunal can take into account earlier events to the extent they are relevant. The applicant has argued that earlier events may have contributed causally or else may have provided a model on which his son based some of his actions. It is also possible that earlier events may throw explanatory light on the child's behaviour, and so influence an assessment of what might be the appropriate response. The evidence has therefore been summarised in these reasons, in order to consider and assess those lines of reasoning.

111. We know about many of these earlier actions because one or other parent has reported that they were told about them by their son; for the reasons advanced earlier, we are loath to rely on hearsay relayed by a seven-year old child. But clearly the first half of 2019 was of concern to both school and parents: so much so that on 30 May a meeting was held, involving staff from the Directorate, and the applicant's son was moved back to Ms Short's class. Among the incidents in the first half of 2019 that appear clearly from the evidence are: the child's late start to the school year because of illness; the child spending much time apart from the class; the incident in which the child was found dishevelled and locked in a classroom; the incident when an older boy is reported to have put his hands around another child's neck (the detail is not clear but it is not at issue that some event occurred); the decision to place him once again in Ms Short's class; and the child's foray onto the roof of the school (or onto the fire escape – nothing appears to turn on that distinction). There is enough confirmation in the evidence to be sure that this was a disturbed period for the applicant's son; that he was less settled in his class than he had been at the end of the previous year; and that his parents had an elevated level of concern about him. For our purposes we see no need to make findings regarding whether the psychological support offered to the child was adequate, or whether the school was too slow in

taking remedial action, or whether the action it did take was sufficient; all we need conclude – and the evidence is clear on this point – is that the school year up to 3 July 2019 had been disturbed and unhappy for the child and unsatisfactory to his parents.

112. The incident on the day before the suspension, 2 July, is less than clear in its outline. It was important enough that the school reported it to the Directorate, but it was not mentioned to the parents until it was relayed to the applicant when he arrived to collect his son the next day, and then only in the context of that day's events. The incident on 2 July apparently involved a skipping rope striking a girl's face[45] but Ms Bissell said in oral evidence that nothing came of the event because it was inadvertent, and the children involved were able to reconcile. The internal review decision referred to the event, but it appears that the reviewer was reliant on the school's incident report, which was brief and based on information that may or may not have come from adult eye-witnesses. On the evidence available, it is plain that some incident occurred on that day, but we are unable to arrive at a finding of fact as to what occurred, or to reach a conclusion that the events of 2 July have any bearing on or connection to the events of the following day.

113. With regard to the events of 3 July, the relevant sequence appears to start at the end of the lunch break, shortly before 2pm, as the children were about to move back into the school for their afternoon classes. The triggering event, based on Ms Dee's evidence, appears to be that the applicant's son was drinking water that was dripping from some guttering where there was a break or an imperfect join. The first girl told him he should not. He apparently made some move in the nature of choking her, grabbing her by the neck and pushing her against the wall. He then dragged his hand across the face of the second girl and also pushed her against the wall.

114. After the interaction with the two girls the applicant's son ran upstairs to the area outside the Year 1 classrooms and began putting tape across some of the

[45] Exhibit R1 paragraph 20; Exhibit R6 paragraph 9; evidence of Ms Bissell, Transcript of proceedings 9 September 2020 pages 79-80, 86

doors, muttering, perhaps not entirely coherently, about "stupid little girls" and making threats about killing them or wanting to kill them. He also kicked another boy as the latter was on the way into class, and apparently attempted to kick one or more others but did not connect. Ms Bissell spoke to him, recounting what she had heard from Ms Dee, and obtained from him confirmation of what had occurred. The child then ran from the area, pushing over another boy in the process. He made his way to Ms Bissell's office on the floor below and remained there until his father arrived. He was unresponsive to engagement with staff (Mr Muir, Ms Bissell) during this period, and similarly with his father, on the latter's arrival.

115. Not all of the above has a satisfactory evidentiary basis. What might have been occurring at the start of the events (the applicant's son drinking from dripping water) is known only through what the two girls told Ms Dee, and the same is true of the "choking" or "strangling" of the first little girl. Ms Bissell obtained a slightly different account. Most of the witnesses offered an account of events, but those accounts frequently included details they had heard from others but had not witnessed themselves. We have preferred to rely only on what the witnesses saw and reported at first hand. Mr Muir saw the part of the incident involving the second girl. He described the applicant's son as having "swiped" his hand against the face of the second girl, and from his oral evidence this appears to mean something stronger than wiping his hand but not as strong as striking or hitting the girl's face. Mr Muir also saw the applicant's son push the second girl into the wall, and a little later, in the upstairs area, kick at least one other student. Ms Bissell, Ms Short and Mr Muir all saw the applicant's son when he was in the upstairs area taping the classroom doors shut, and all three heard his muttered comments and threats; Mr Muir and Ms Bissell saw him push another student to the ground when he ran downstairs.

116. The cause of the events is clearly of importance, as it may help identify an appropriate response to them; but none of the witnesses, nor the applicant, has been able to offer any persuasive explanation why what appears to be a natural suggestion by the two girls not to drink water likely to be dirty triggered such a

strong response. The applicant suggested that his son was affected by an increase in his medication dosage and says that Dr Rosier, his son's doctor, made that suggestion. We are not inclined to accept that explanation: it is offered as a possibility only, Dr Rosier's comment is not in evidence, and, even if it were, at best it is not much more than speculation. We similarly reject the applicant's suggestion that his son was modelling his behaviour on something he saw in the playground some seven weeks earlier. While that is possible, it has no corroboration from elsewhere and comes nowhere near meeting the balance of probabilities standard of proof. We note that none of the adults involved at the time (or subsequently, for that matter) appears to have asked the child why he had behaved as he did – or if they did so, none reported on what they heard.

117. In the absence of any explanation, and given the origin of the material in hearsay from young children, we cannot see that a finding regarding the trigger of the events (apparently the drinking of the water and/or the comments by the first girl) is one we need to make. For the reasons already advanced, we also decline to make a finding that the applicant's son attempted to choke or strangle the first girl. But from that point on, there is eye-witness evidence from adults that the applicant's son dragged his hand across the second girl's face, pushed her into the wall, kicked at least one other child and pushed another boy to the ground, meanwhile uttering threats about the girls; and we so find.

118. It is also clear that the applicant's son taped the doors in the upstairs area, that his behaviour remained "heightened", and that at the time of his father's arrival, although calmer he was still in a heightened state and largely unresponsive.

119. In the above findings we have completely disregarded the confirmation of what happened by the applicant's son, for three main reasons. First, it is another example of hearsay from a seven-year old child; second, if the child was so heightened and unresponsive, as all the witnesses have told us, it is doubtful that much weight can be put on the child's response, given that we have so little idea of how well he might have understood what was put to him and how coherently

he might have confirmed it; and third, factors such as the power imbalance between teacher and student, and possible confirmation bias by the teacher in the circumstances, would even under good conditions have called the evidence into question.

Do the events enliven the power to suspend?

120. Paragraph 36(1)(a) sets out the criteria that might, under normal circumstances, prompt a principal to suspend a student. Paragraph 36(1)(b) requires that the principal arrive at a state of satisfaction that action under the section is warranted, and the same test must be met by the decision-maker in giving effect to subsection 36(3). Dr Jarvis put forward authorities in relation to the formation by the principal, acting under delegation, of a state of satisfaction that the matter at hand is sufficiently "urgent and serious" to allow action under subsection 36(6). We do not need to address that point, as it goes to Ms Cave's decision, and not to the decision we are now taking on review, which for reasons explained earlier is under subsection 36(3). But those authorities apply equally to the state of satisfaction required under paragraph 36(1)(b),

121. The four criteria in paragraph 36(1)(a) might be summarised as: persistent and wilful non-compliance; violence or its threat; other threats to order or safety; and disruption to the student's own education or that of other students. These are the criteria that must be met in order to enliven the power to suspend.

122. We are not persuaded that the applicant's son could sensibly be described as "persistently and wilfully non-compliant". On the evidence we have, it appears to us that, even if there might have been an element of wilfulness in his behaviour, he would more accurately be described as a seven year old child with known disabilities who at the time was incapable of compliance, because of some combination of emotions – anger, frustration, low levels of trust and, by the time he left the school, possibly fear. We do not see him as wilfully non-compliant – that is, deliberately choosing to be non-compliant – despite Ms Cave's identification of an element of wilfulness in him, and, since the events had by 2:30pm lasted for no more than perhaps 40-45 minutes, we are not

persuaded that he could be described accurately as "persistently" non-compliant. He does not meet subparagraph 36(1)(a)(i).

123. That he was violent to other students, however, seems beyond dispute. The violence does not seem to have been extreme. There was some questioning at the hearing regarding whether either of the two little girls needed first aid, but it was not clearly established whether that was so or not; certainly no evidence was led suggesting a significant level of injury or any lasting physical trauma. It appears perhaps that the children involved were more shaken and alarmed than hurt in any more serious way. Some level of physicality among children is to be expected as part of normal interaction, but none of the evidence – evidence taken from trained and experienced teachers of young children – points to that having occurred on this occasion. It seems plain that the applicant's son pushed and kicked other children in an excess of anger and frustration, or other emotion of a similar kind. The applicant makes the point that his son was poorly coordinated physically, but the evidence clearly points to a significant element of intention rather than simply clumsiness. The muttered threats regarding the little girls would also fall under this subparagraph, although it is not clear the degree to which the witnesses regarded them as genuine threats of violence. Taking the events as a whole, in our view there was sufficient violence to bring those events within the meaning of subparagraph 36(1)(a)(ii).

124. Subparagraph 36(1)(a)(iii) refers to behaviour that 'otherwise' threatens good order and safety. The drafting suggests that the subparagraph is intended to refer to behaviour that is non-violent but nevertheless a threat to the order and safety of the school. The applicant's son's attempts to tape and glue the doors to the classroom might fall into this category, but we cannot see that these attempts could be sensibly described as a threat to the order and safety of the school. None of the witnesses who described this behaviour expressed any concern about order or safety arising from it, and Ms Bissell said that this was behaviour

he had engaged in on previous occasions, thinking it amusing.[46] In our view, the behaviour does not fall within this criterion.

125. The applicant's son clearly created an interruption to his own learning on 3 July. It is not clear to us that he interrupted the learning of other students in any significant way; none of the witnesses suggested that he did, including by the taping and gluing of the doors. But staff present were unable to bring him to undertake other tasks himself or move his attention to other activities. Our conclusion is that his behaviour satisfies subparagraph 36(1)(a)(iv).

126. The applicant's son met the criteria under paragraph 36(1)(a) and the discretion to suspend him is enlivened. We note too that the applicant conceded this point at the hearing.

Should the discretion to suspend be exercised?

127. Some of the arguments put by the parties can be readily dismissed. The applicant drew a parallel with the criminal law; the parallel, although interesting, does not help us find an answer in this case. Clearly every child, as he or she grows to maturity, passes through stages of autonomy and responsibility. As a baby, a child has no autonomy and will not be held responsible for her or his actions; over time both autonomy and responsibility increase; at some point, responsibility increases to a point where the child is at a stage of maturity and development where she or he is expected to account for his or her actions, and may even be charged with a criminal offence. That gradual transition from baby to adult (or at least the part thereof that occurs in school years) is recognised in section 36 of the Act by the requirement that the student's participation in the decision be sought "as far as the student's maturity and capacity for understanding allow"[47] and that the student be allowed to "take part in the process" through being given information "in a language and way that the student can understand"[48]. But in the end it is the statute that has the final word here: if the applicant believes the process to be unreasonable because

[46] Transcript of proceedings 9 September 2020 page 55
[47] The Act section 36(5)(b)
[48] The Act section 36(5)(c)

a person charged with a criminal offence would have to meet a higher standard of proof than his son did, his complaint is with the legislature. The criteria to be met to enliven the discretion and the procedural fairness provisions that apply to a student are set out in the statute and provided for in common law; it is the Tribunal's task to apply them.

128. The applicant also put an argument that his son's behaviour was not of a seriousness that warranted a one-day suspension, when viewed in the context of events occasioning suspension at other schools. Once again, the applicant has sought and found a parallel in the criminal law, where the sentencing process is carefully calibrated, and sentencing aims to produce broadly consistent outcomes among similar cases. That does not seem to apply in the present context: certainly, there is nothing in the statute to suggest it.

129. The object of the Act is to ensure a child has access to a high-quality education. A decision whether to suspend a student must be taken in that context, when a problem of the kind specified in paragraph 36(1)(a) of the Act has arisen, and with the aim of ensuring that the education of the affected student, and other students at the school, is advanced. This requires that all relevant circumstances are taken into account, but it does not call for a comparison with what might have been done elsewhere, which may well confuse the central issue rather than supply illumination. The particular circumstances, for example, might require a longer period in one case to prepare for re-entry than in another, and the guidelines accompanying the policy would encourage the planning for successful re-entry to determine how long the suspension ought to run for. While clearly some caution would need to be used with respect to suspensions running for long periods, comparison with other cases seems to us an unhelpful way of determining whether in a given case a suspension ought to be imposed or for how long.

130. The applicant described the suspension of a student as an action which is perceived by the outside world as punitive and submitted that the appropriateness of a suspension should be assessed from that perspective. The

witnesses, all of whom work in the education system, did not present it in that light. They depicted the act of suspending a child as a way of dealing with a situation where a circuit breaker or a change in the usual sequence of events is needed to manage a problem that has arisen. That perspective is supported by the guidelines accompanying the Policy, which suggest that the length of a suspension should be based on its purpose: "if it is determined by the principal that it will require four days to engage appropriate supports to ensure successful re-entry then the suspension should be for four days".[49] On the other hand, the purpose of suspension, as set out in the Policy, is threefold: to restore or maintain a safe and supportive learning environment; to allow support plans to be established for the student; and to communicate the seriousness of the behaviour and for the student to accept responsibility. The Policy is not a legal document, and care must be taken applying the analytical tools used to construe a piece of legal drafting, but it does appear that the intent is that every suspension serves all of the three identified purposes, as the use of the conjunctive "and" between them would suggest. In our view, the last of those three identified purposes is punitive, or at the very least, has a punitive dimension to it, and Ms Cave volunteered that in some quarters suspensions would be perceived as punitive.[50] We would be surprised if students, even at the age of seven, do not see a suspension as punitive, although we have no evidence on that point. We return to this issue below.

131. The applicant noted that the record of his son's school suggested that the more demanding procedural fairness requirements of the decision-making pathway through subsections 36(3) and (5) was rarely followed, and argued that that pathway, involving its mandatory procedural fairness steps, should not be "empty". This is a sound argument but irrelevant to the present matter for two reasons: first, it is an argument about the procedure followed at first instance, which, for the reasons explained earlier, is not the focus of this decision – process failures at first instance are cured by good procedure in the review process; second, even if the focus were to be on the decision at first instance, the

[49] T Documents page 216
[50] Transcript of proceedings 10 September 2020 pages 165, 166

applicant's argument is about procedure at the Directorate level, that is, about suspensions from all ACT schools over a period of time, and could have no bearing on any one individual decision, which must be decided on its own merits, in the circumstances that obtain in the particular instance.

132. Dr Jarvis contended that, once the discretion to suspend was enlivened, and it was clear that some way of creating a hiatus in the sequence of events was required, the only question was how long the suspension ought to run for. But there are other considerations that come to bear:

(a) This was a child with disabilities, including epilepsy (absence seizures), fine motor control, gross motor control and emotional dysregulation.[51]

(b) The child was known to be very sensitive, requiring frequent positive feedback and given to frustration and anger when unsuccessful in his endeavours.

(c) After a successful last term in 2018, the first half of 2019 had been disturbed and unsatisfactory.

(d) The level of frustration in the applicant's family had increased and levels of trust between the family and the school had decreased during 2019.

133. Dr Jarvis insisted that the school was not privy to the child's diagnosis of emotional dysfunction, and that may be true. Nevertheless, the teachers who engaged with the child must have been aware of his difficulties in that direction, and for us as decision makers it is entirely appropriate, indeed necessary, that we take into account the evidence dating from the time of the decision that we now have on the issue. Surely a decision-maker would hesitate to impose a suspension – an action with a punitive dimension, and often seen as punitive, as noted above – if it appears probable that the behaviour prompting the suspension is in part a manifestation of one of the child's underlying disabilities. Ms Bissell, in her evidence, acknowledged that the applicant's son may have

[51] Exhibit A5

been unable, rather than unwilling, to control his emotions on the afternoon of 3 July.[52]

134. Dr Jarvis did his best to contest the evidence regarding the provision of psychological support to the applicant's son, whether he was bullied or not, and his propensity to spend significant amounts of time outside the classroom. He suggested that the absence or low level of specific psychological support was as much the result of actions taken by the applicant and his wife as of inaction by the school or the Directorate. He stated that the evidence of bullying was thin, unconvincing and without corroboration. And the time the child spent outside the classroom was simply his preferred mode of education rather than evidence of any failing by the school or his teacher. Those arguments are not completely devoid of merit, but the period March-June 2020 is too replete with events, complaints by the applicant and his wife, tardy and incomplete responses, excuses and explanations by the school, and similar incidents, for us to accept that there was no underlying problem. Concrete evidence that even the school and the Directorate accepted that there was an issue needing resolution is provided by the decision at or after the meeting of 30 May to move the child into Ms Short's class.

135. It is also clear that courses of action other than suspension are – or were – available. From the time of the incidents in question on 3 July to the departure of the child and his father from the school was of the order of 45 minutes. The evidence of Mr Muir is that once the applicant's son had gone downstairs to Ms Bissell's office he was no longer as agitated as he had been earlier – he was calm, even if still unwilling or unable to engage (and we wonder if Ms Bissell's engagement had been less investigatory and more therapeutic further progress might have been made). It is by no means clear that if staff had continued their attempts at calming him he could not have eventually come to de-escalate that afternoon. Other options were also available: the in-school alternate program described in the guidelines accompanying the policy, in which the child attends school but does not join in with other students; or an informal request to the

[52] Transcript of proceedings 9 September 2020 pages 88-89

applicant to keep his son at home for a day, the effect of which would have been the same as suspension but without the formalities and the punitive appearance of those formalities. When Ms Cave was asked at the hearing about the alternatives that had been available to her,[53] she said her priority was to ensure that the applicant's son did not come to the school the following day. She did not mention the in-school alternate program option, nor was it clear why a call to the applicant or his wife on the morning of the following day could not have had the same effect as a formal suspension, in terms of ensuring the child's absence that day. It is recorded that Ms Cave made a call at around 8:30am on the morning of 4 July in order to leave some schoolwork for the child to undertake, in accordance with paragraph 36(5)(d) of the Act[54] (she was unable to complete the call because the child's mother brought it to an abrupt end). If an informal request had been made to the applicant to keep his son at home, a call at that hour could have been a way of guaranteeing that result.

136. The child has not returned to the public school system since that day. That precise reaction by his parents could not perhaps have been predicted, but a strong reaction to the suspension could not have come as a surprise to the school staff, and especially to Ms Cave and Ms Bissell. It is very apparent from the email exchanges over the previous few months that the level of concern and frustration on the part of the child's parents was high and mounting. An action such as a suspension would inevitably have a profound effect on the child, no matter how it was described; and it was also likely to prompt a reaction in the parents which would have an amplifying effect on the child. The likely reaction was therefore a relevant consideration in arriving at a decision whether or not to exercise the discretion to suspend. It may be that at the time there was some impatience on the part of school staff with the applicant and his wife, whose close involvement in the children's education and call on the school's limited resources went well beyond the usual. We have no evidence to suggest a

[53] Transcript of proceedings 11 September 2020 pages 210-212 (the transcript mistakenly assigns the question to Dr Jarvis; it was in fact put to Ms Cave by a tribunal member)

[54] T Documents page 200

problem in that area, but if there was, suspending a year 2 child with disabilities was surely not the way of addressing it.

137. The Act's overarching principle is the right of every child to a high-quality education. With that in mind, and taking all the circumstances of this matter into account, we have concluded that the correct or preferable decision was not to exercise the discretion to suspend the applicant's child, but rather to pursue one of the alternatives identified above. Accordingly, we set aside the decision under review and substitute our decision that no action is to be taken under section 36 of the Act.

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Senior Member M Hyman
Member L McGlynn

Date(s) of hearing	9 – 11 September 2020
Applicant:	In person
Solicitors for the Respondent:	Ms A Sydney, ACT Government Solicitor