



Investigation of decision to expel a high school student with Aspergers

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| Legislation: | Ombudsmen Act 1975, ss 13, 22, Education Act 1989, ss 13, 14, 17 and 66, Education (Stand Down, Suspension, Exclusion and Expulsion) Rules 1999 (see appendix 1 for full text) |
| Agency: | Board of Trustees of a College |
| Ombudsman: | Professor Ron Paterson |
| Reference number(s): | 178591 (W60658) |
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Summary

In August 2009, following an incident where a year 11 student with Aspergers threatened to assault a teacher in the staff room, the Board of Trustees of the College concerned expelled the student for “*gross misconduct*” that was “*a harmful or dangerous example to other students*” (Education Act 1989, s 14(1)(a)). The student’s father complained to the Ombudsman about the expulsion.

In my opinion, the Board acted unreasonably in the following respects:

- it did not keep adequate records of the decision making process;
- staff at the College failed to take opportunities for earlier intervention and to adopt alternative handling strategies before the incident in the staff room; and
- the decision-makers did not give adequate consideration to relevant factors, specifically:
 - the manner in which the sequence of triggering events was handled;
 - the alternatives to expulsion;
 - the Memorandum of Understanding signed in 2009; and
 - the effects of Aspergers on the student’s behaviour.

My overall assessment is that the Disciplinary Subcommittee of the Board found itself in an invidious situation but that, in moving immediately to impose the harshest penalty – in the face of unanswered questions and a complex background, and under time pressure – the Subcommittee acted unreasonably.

Ombudsman's role

1. Under section 13(1) of the Ombudsmen Act 1975 (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations made by Boards of Trustees constituted under Part 9 of the Education Act 1989. This includes the Board of Trustees of the College concerned.
2. My role is to consider the administrative conduct of the Board, and to form an independent opinion on whether that conduct was fair and reasonable (OA, ss 22(1) and (2)).
3. The relevant provisions in the Education Act and the Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules 1999 are set out in Appendix 1.
4. My investigation is not an appeal process. An Ombudsman is required to review the fairness and reasonableness of an agency's processes and decisions and to form an opinion on whether the agency followed a fair process and reached a decision that was reasonably open to it.
5. Although I am undertaking an investigation under the Ombudsmen Act, there are obvious parallels with judicial review proceedings. I note the following comments of the High Court in a recent case involving an expulsion at Green Bay High School:¹

"[66] The Principal's decision to suspend and the Board's decision to exclude are both exercise of statutory powers of decision. They are susceptible to review by this court as to whether they are lawful, and as to whether they were reached by a fair process, and as to whether they were reasonable.

...

[74] ... One must always ask the question whether when objectively considered, this incident justified the most serious response the legislation provides for by the Principal."

¹ *A v Hutchinson and the Board of Trustees of Green Bay High School* [2014] NZHC 253.

6. In examining the College and the Board's actions in the present case, I am also guided by the overarching aim of the student disciplinary provisions set out in section 13 of the Education Act, which provides:

"The purpose of the provisions of this Act concerning the standing-down, suspension, exclusion, or expulsion of a student from a State school is to—

- a. provide a range of responses for cases of varying degrees of seriousness; and*
- b. minimise the disruption to a student's attendance at school and facilitate the return of the student to school when that is appropriate; and*
- c. ensure that individual cases are dealt with in accordance with the principles of natural justice."*

Factual situation

7. The complex background to this investigation is set out below.

The student

8. At the age of nine, the student was diagnosed with Aspergers Syndrome, an Autistic Spectrum Disorder. The student's father says that his son's condition manifests itself in:
- inhibited social interaction and communication skills especially in relation to expressing his feelings;
 - slower processing of information leading to lower awareness of what is happening around him;
 - an inflated sense of equity and justice and consequential reduced tolerance of authority;
 - quickly increasing anxiety levels (often not well expressed) when stressed; and
 - obsessive behaviours, especially in terms of difficulties with food and cleanliness and in a passion for computers and gaming.

Time at the College

9. The student began at the College in 2007 as a year 9 student. During his time at the College, a number of strategies were put in place to support him. They included:
- a detailed Student Profile, prepared and updated by the Learning Support Department at the College, which was circulated to staff;

- training staff to recognise the signals and triggers for the student’s behavioural outbursts;
 - the development of an Individual Education Plan (IEP);
 - the involvement of, and consultation with, other health and education professionals and service providers, such as the Child, Adolescent and Family Service, the Child and Adolescent Mental Health Services, the Ministry of Education’s Group Special Education and its Early Childhood and Regional Education group, and Tautoko Services;
 - the assistance of a teacher aide;
 - special arrangements for food and drink, including the use of a ‘grab-box’ in the Learning Support office and the availability of a teacher aide to take the student out of school during lunch time to purchase food; and
 - a five point strategy designed to assist the student to self-manage his behaviour, and a “swearing strategy”, which encouraged the student to go to the Principal’s office to vent anger.
10. In 2009, as part of his year 11 curriculum, the student was initially enrolled in a six subject programme. This programme was designed with the intention of ensuring that the student could achieve a level 1 National Certificate in Educational Achievement (NCEA) qualification, which in turn would enable him to progress to level 2 and 3 NCEA qualifications and to gain University Entrance. However, over the course of the year, concern arose about the student’s ability to cope with the requirements of this programme, especially in English and Drama.
11. Additional measures were adopted to enable the student to achieve the necessary NCEA credits, including:
- allowing him extra time to complete assessments;
 - a one-on-one session with a teacher aide to catch up and complete his homework;
 - the use of an internet based computing course (Moodle); and
 - a weekly mentoring session.

Previous incidents leading to the Memorandum of Understanding

12. Prior to August 2009, the student had been stood down and suspended for a number of incidents, which involved alleged physical assaults on and threats to staff, inappropriate language, and failure to obey instructions. The student’s father considers the previous disciplinary actions to be illegal and unjustified.
13. Following a decision in April 2009 to suspend the student, the Board resolved to lift the suspension with the condition that a new IEP be developed. The Board also approved a

suggestion from the Ministry of Education that a Memorandum of Understanding (MOU) be drawn up.

14. The MOU was facilitated by the Human Rights Commission and the Ministry of Education, and was signed on 14 May 2009. It set out the shared understanding of the parties (the College and the student's parents) to assist the student in achieving his educational goals. In particular, the parties agreed on a number of undertakings, including that:
- there was common understanding of what the student's Aspergers condition meant;
 - the student needed support to access and engage in the curriculum adequately;
 - there would be an independent review of the educational programme to ensure that the student had the opportunity to gain University Entrance by the end of year 13;
 - the student's parents would actively try to avoid making any critical comments about the College, its management and teachers in front of him;
 - the student's parents would actively help him understand that in most cases there would be negative consequences for behaviour which breaks the rules and creates risk for other people, and they would support the College in applying appropriate consequences;
 - the student's parents accepted and acknowledged that the school would do its best to balance the student's right to education with the rights of other students and staff to a safe and peaceful working environment, and that this might require the student to receive some tuition or study periods outside mainstream classes but within the campus;
 - the student's parents would actively encourage the student to take his medication, in conjunction with medical advice, where it was likely to have positive benefits;
 - the student's parents would continue to work with health professionals (including an eating disorder service) in relation to his diet;
 - the College would consult with the family before any disciplinary decision was made which could lead to stand-down or suspension, having regard to the effect of the student's Aspergers condition on his behaviour and taking into account the rights of other students and staff to a safe environment; and
 - the College would not expect the student to complete a written apology in respect of any disciplinary procedure.

The paper dart/swearing incident

15. The first disciplinary action taken by the College, after the signing of the MOU in May 2009, was the result of an incident that occurred in spell 1 English on 6 August.

16. The teacher had asked the student to put away a paper dart he was playing with. The student, who was proud of his dart, did not want to damage it by putting it in his bag. According to the father, the student's teacher aide agreed that he could place the dart at the front of his desk. However, it appears that the teacher was not aware of the agreement with the teacher aide, as she continued to insist that the student put away the dart. When he refused to comply, she asked him to leave the room; when he failed to leave, the teacher seized the paper dart from his desk. The student, upset by her actions, grabbed her arm.
17. There are differing accounts of what happened next. According to the College, when the student grabbed her arm, the teacher handed the dart back to him but it had been crushed during their exchange. The father maintains that when the student grabbed the teacher's arm, she crushed the dart and threw it away.
18. What is undisputed is that the student, angered by the destruction of the paper dart, swore in abusive and foul terms at the teacher. She then left the class to seek assistance. In retaliation for what he saw as the disrespectful treatment of his property, the student went to the teacher's desk and swept the items on it to the ground.
19. Later that day the Acting Principal met with the student's parents to discuss the incident. The Acting Principal decided to stand the student down because he considered that the student's conduct amounted to gross misconduct and was a harmful example to other students. The stand-down period was for one day, Friday 7 August.
20. It was at this meeting on 6 August that the Acting Principal suggested a "swearing strategy". The idea was that when the student became angry, he could go and vent in the Acting Principal's office. There is no evidence that the strategy was formally documented or implemented.
21. The Acting Principal also decided that the student would be allowed to attend two classes on 7 August in order to complete practical group-based tasks. Aside from attending these two classes, the student did not return to the College until the following Monday, 10 August, when he was due to resubmit a speech in the teacher's class.

The student's speech and plans for resubmission

22. In June 2009, the student delivered a speech in the teacher's English class for the purpose of attaining 3 credits for level 1 NCEA English. During the delivery of his speech, the student encountered some difficulties with the equipment he was using. He stopped his speech to resolve the issue. The teacher's (undated) assessment notes record that the audience waited for over 10 minutes while the student attempted to fix the problem. She then interrupted the student, advised him that he could resubmit his speech on another day and proceeded to release the class. Her notes indicate that the student had not reached the required standard because the speech lacked structure and the student was not able to maintain eye contact.

23. The father claims that the teacher's actions in releasing the class were unfair and contrary to the normal practice that a class would not be released until the assessment was completed. He also says that although the student was told that the speech needed to be at least three minutes long, he was not told of any maximum time limit.
24. The student was given the opportunity to resubmit the speech the following day. However, he felt unable to do so since he required further time to resolve the issues he had encountered.
25. The issue of the resubmission of this speech was revisited during a review of the student's year 11 programme towards the end of July. At the review, the father, the Acting Principal and the Head of the Learning Support Department discussed how the student would progress to years 12 and 13. The Head of the Learning Support indicated his belief that the student would easily achieve three of the eight credits required for level 1 NCEA English by resubmitting his speech. However, the father submits that when he later met the teacher at parent-teacher interviews on 30 July, she was reluctant to give the student an opportunity to resubmit his speech. As a result an email exchange took place the following day, 31 July, and a resubmission was arranged for spell 2 English on 10 August.
26. During the discussions between the father and the Acting Principal on 6 August, about the paper dart/swearing incident, they noted that the student was returning to the teacher's class on 10 August to resubmit his speech. The Acting Principal indicated that he planned to be present during this class to deal with any issues that might arise. However, the records for the stand-down decision of 6 August do not specifically refer to this undertaking.

The incident in the staff room

27. The student returned to the College on Monday 10 August, following the stand-down imposed for 7 August, prepared to resubmit his speech in the teacher's English class as planned. However, the teacher aide was away sick that day. Before the student arrived at the classroom, the teacher sought the attendance of the Acting Principal (who had intended to be present) as the teacher was concerned about having the student unaccompanied in her class during spell 2. It is not clear whether she did in fact speak to the Acting Principal, as he had left the school for a short time during spell 1.
28. It appears that the Head of the Learning Support Department and the teacher spoke about the matter but he too was not available to be present during the class. When the Head of the Learning Support Department encountered the student on his way to the teacher's class, he told the student to go to the library for the duration of spell 2. The exact nature of this conversation with the student is disputed by the parties.
29. The Acting Principal returned to school about this time and observed the student heading towards the library. It is not clear whether the Acting Principal spoke to the student, but he later advised the Board in his report that the student was comfortable with going to the library and delaying his speech.

30. The student spent the duration of spell 2 in the library. At the interval, he discovered that other students had been allowed to resubmit their speeches while he was in the library. He concluded that he had been misled by the teacher and became distressed about having missed the opportunity to resubmit his speech. His agitation was noted by a teacher in spell 3 Science.
31. The father claims that after spell 3 the student approached another teacher about the use of a projector to enable him to complete his speech. Whatever the nature of this interaction, it seems clear that the student's level of anxiety about the resubmission of his speech increased to the point that he decided to confront the teacher.
32. During lunch time, the student entered the staff room, uninvited, shouting for the teacher. The entrance to the staff room, which is in a separate annex to the main school block, is adjacent to the College's quadrangle. On his way to the staff room, the student passed other students. When he entered the staff room, the student spotted the teacher sitting at the far end. He walked towards her and, in his own words, was "*yelling about his speech*". Other staff members present managed to steer the student, without touching him, out of the staff room. As he was leaving, the student threatened to "*club*" the teacher.
33. Almost immediately after being ejected, the student re-entered the staff room and started shouting again. Once again, the other staff members ushered him out. The student became calmer and more cooperative at this point.

Discussions after the staff room incident

34. Both the Acting Principal and one of the Deputy Principals spoke to the student shortly after the incident in the staff room. The matters discussed formed the basis of the incident report prepared by the Deputy Principal. The student's father disputes the content of this report, primarily on the basis that the student denies having "*confirmed*" the comments that were attributed to him in the report. The Board maintains that the student was willing to speak to the Deputy Principal.
35. In any event, it appears that there was a brief discussion between the student and the Deputy Principal about half an hour after the incident in the staff room. Following this, the Deputy Principal contacted the student's mother to arrange to pick him up from school. The Acting Principal also spoke to the mother and said that he would need to meet with both parents to discuss matters.
36. The Acting Principal received an email from the teacher later on 10 August outlining her version of the events in the staff room. She advised that she felt frightened and unsafe and did not want the student back in her class. In addition, shortly after the incident, the Acting Principal also sought and received an account from one of the staff members who had helped to guide the student out of the staff room.
37. Later that evening, at a Board meeting, the Acting Principal informed the Chairperson that the student had been involved in an incident and that he was considering whether

suspension was warranted. The Board has advised that the Acting Principal did not provide any details of the incident, nor were questions asked about what had occurred. Instead, according to the Board, the Chairperson made some general observations regarding the seriousness of the suspension step and the processes set out in the MOU but noted that it was the Acting Principal's decision to make. No contemporaneous records were kept of the Acting Principal's discussion with the Board.

38. The Acting Principal met with the student's father on the morning of 11 August, as had been arranged the previous day. While there is no record of this discussion, the father believes that during it the Acting Principal gave every indication that the student was not to be suspended, and that he was considering alternatives to the statutory disciplinary options. However, both the Acting Principal and the Board maintain that the option of a suspension had not been ruled out at this stage. What appears undisputed is that both the father and the Acting Principal agreed that the student would remain at home for the day in order to allow the Acting Principal to determine what steps to take.
39. The Acting Principal also discussed the incident with the Head of the Learning Support Department and the three Deputy Principals at their weekly meeting on the morning of 11 August. There is no record of what transpired during this discussion.

The decision to suspend the student

40. At some stage on 11 August, the Deputy Principal completed incident and context reports for the Acting Principal, which he relied upon for his own report to the Board. The incident and context reports were not included in the material presented to the student's parents and the Board prior to the decision to expel the student.
41. The preparation of the incident and context reports appears to be in accordance with guidance published by the College, which is designed to assist staff in determining whether a student should be stood down or suspended. This material provides that, following an incident of student misbehaviour (which is clearly defined as gross misconduct or continual disobedience, harmful or likely to harm, or creating a dangerous example), the Deputy Principal will put the case to the Principal for either a stand-down or suspension. This is followed by initial advice to the parents of the student with either an offer of a meeting or an accompanied interview. The Deputy Principal is also required to prepare incident and context reports for the Principal who then determines whether to take any statutory action.
42. The Acting Principal contacted the father by email on the afternoon of 11 August to advise that he was going to have to take formal disciplinary action on the basis that "*[the student's] actions in going to the staff room and making threatening comments against [the teacher] were inexcusable in any context from any student*". He requested that the father attend a further meeting later that day to discuss the matter.
43. At this meeting, the Acting Principal said that he had decided to suspend the student. The father considers that, during the discussion, the Acting Principal indicated that the reason for this decision was that the student presented a health and safety risk to others

at the College. The Acting Principal disputes this, and claims that the father had been told that suspension was for gross misconduct, as set out in the Acting Principal's subsequent letter of 12 August. There are no contemporaneous records of this discussion.

44. On 12 August the Acting Principal received email comments from two other staff members who were present in the staff room when the student entered it on 10 August. By this time the Acting Principal had already made his decision to suspend the student. Nevertheless, these emails were later put before the Board.

Communications following the decision to suspend

45. In his letter of 12 August to the student's parents, the Acting Principal stated that the student had been suspended from that day pending a Disciplinary Subcommittee hearing within seven days, pursuant to section 14(1)(a) of the Education Act. The Acting Principal explained that he had reached this decision because the student's actions during lunchtime on 10 August – in verbally abusing and intimidating a staff member in the staff room – were gross misconduct and a harmful example to other students.
46. The Acting Principal also advised that the Board would meet on 19 August 2009 to consider the matter and that before this meeting the student and his parents would be provided with a copy of the report to the Board and other relevant material.
47. The Acting Principal contacted the Special Education Facilitator at the Ministry of Education, to advise her of his decision. In addition, he completed, and provided to the Ministry, a 'SDS1b – Advice of Suspension' form.
48. On 12 August, the father sent the Acting Principal an email expressing disappointment at the decision to suspend the student. He claimed that it had appeared that the Acting Principal was initially prepared to deal with the incident innovatively but that his intentions changed later in the day. This suggested that the Acting Principal had bowed to pressure from staff. The father also claimed that staff failed to recognise the student's cry for help, in that no one present in the staff room followed him out to address his concerns. He went on to query the lack of consequences for staff whose actions he claimed had precipitated the student's outburst in the staff room.
49. The father requested that a copy of his email be forwarded to the Chairperson of the Board. He also requested copies of the Board's letters of delegation to the Disciplinary Subcommittee and the Acting Principal.
50. Prior to the meeting on 19 August, both the student's parents and the Disciplinary Subcommittee were provided with the Acting Principal's report, which he had prepared on 11 August 2009, as well as the following documents:
 - the student's disciplinary record for 2009;

- the emails of 10 August from the teacher and the other staff member, and the emails of 12 August from the two other staff members who had also witnessed the events in the staff room;
 - the MOU signed on 14 May 2009;
 - the student's Student Profile; and
 - the student's 2009 school reports for NCEA level 1 in English, Mathematics, Science, Drama and Nutrition and Food Technology.
51. The father sent the Acting Principal another email on 18 August attaching a letter dated 14 August in which he further outlined his disappointment with the decision to suspend. In summary, his concerns were:
- it was unclear what had occurred between their meeting on the morning of 11 August and the meeting later that day which led to the Acting Principal embarking on the suspension route;
 - the Acting Principal's actions constituted a breach of the trust that the parties were committed to developing;
 - the student's behaviour did not reach the threshold of gross misconduct as his actions were attributable to the actions of the College;
 - the student's outburst in the staff room could not be said to have set a harmful example to other students, who had not witnessed it;
 - the Acting Principal had chosen to attend to a personal matter that morning notwithstanding his undertaking to be present during spell 2;
 - the student was excluded from spell 2 through no fault of his own, was not given an explanation for this, and no attempt had been made to reschedule the resubmission of his speech;
 - the student had been misled in that he was told that all the resubmissions were postponed, when in fact other students were given the opportunity to complete their speeches;
 - no effort was made by the staff present to attend to the student when he went to the staff room as a cry for help;
 - the long-term consequences of the decision were detrimental for the student's future; and
 - the grounds for suspension had changed from section 14(1)(b) of the Education Act (serious harm to others) as indicated at the second meeting of 11 August, to section 14(1)(a) (gross misconduct) in the letter advising of the suspension.
52. The father's email of 18 August, along with his letter dated 14 August and a document from the student entitled "My thoughts about Monday 10th August 2009" (which the

father assisted him in preparing some time after the incident in the staff room), were provided to the Disciplinary Subcommittee before its meeting. In addition, the Disciplinary Subcommittee was provided with a submission from the student's mother.

53. On the evening of 19 August, the student's parents received an email from the Head of the Learning Support Department. It seems that he had intended to send the email earlier. Due to its late arrival, this information was not presented to the Board. The email set out the Head of the Learning Support Department's views of the student's progress. In particular, he noted that the student performed well when he was settled. He also observed that at times the student had needed considerable support to complete his assessments. The Head of the Learning Support Department concluded that *"on the whole over the last two terms [the student had] remained focussed on his studies and achieved a number of level 1 credits"*.

The Board hearing and the decision to expel

54. The Disciplinary Subcommittee, which comprised three members of the Board, met on 19 August to consider the matter. Also in attendance were the Acting Principal, the student's family (his parents and brother), and their support person.
55. The Disciplinary Subcommittee heard from the Acting Principal and the student's family for just over an hour. The subcommittee members then withdrew and deliberated for a further two hours. At some point during these deliberations, the Chair of the Disciplinary Subcommittee telephoned the student's father to request additional time to consider the matter. According to the Board, the father insisted that a decision be taken that evening. Later, the Chair rang the father to advise that the Disciplinary Subcommittee had resolved to expel the student on the basis of gross misconduct that was a harmful or dangerous example to other students.
56. There are no records of the Disciplinary Subcommittee's deliberations, apart from the Resolution Summary dated 19 August 2009, which states:

"This Committee has reviewed the suspension of [the student] who has been suspended for gross misconduct which is a harmful or dangerous example to other students at the school.

The Committee has received written information from:

the Principal and teachers ... and [the student and his parents]

And has heard testimony from: the [Acting] Principal, [the student's parents and brother]. The family was supported by

The Committee is satisfied that gross misconduct which is a harmful or dangerous example to other students at the school has occurred in this case and accordingly it has resolved that [the student] be expelled from [the] College.

The Principal is requested to advise the family of this decision in writing and to remind the family that assistance is available from the Ministry of Education.

The Committee considered the following options in respect of this suspension:

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| <i>a)</i> | <i>suspension lifted – without conditions</i> | <i>yes</i> |
| <i>b)</i> | <i>suspension lifted – with reasonable conditions</i> | <i>yes</i> |
| <i>c)</i> | <i>suspension extended – with reasonable conditions</i> | <i>yes</i> |
| | <i>– for a reasonable period</i> | <i>yes</i> |
| <i>d)</i> | <i>expel the student (if aged 16 years or more)</i> | <i>yes</i> |

Reasons for the decision:

[The student] has Aspergers syndrome and requires significant learning and behavioural support to attend college. The family, college staff and outside providers have worked closely together to understand the effect of Aspergers on [the student's] behaviour and to provide both [the student] and his teachers with strategies to avoid serious behavioural incidents. Even with this assistance, there have been a number of serious behavioural outbursts, some of which have resulted in suspension for gross misconduct that was a harmful or dangerous example to other students.

In the week prior to the suspension, [the student] was stood down following a serious incident in English which occurred in a class where the teacher was familiar with [the student's] needs and where [the student] was supported by a teacher aide.

The incident in the staff room occurred after [the student] mistakenly concluded he had been lied to by his English teacher and he chose to confront her in a public way. On August 10 [the student] entered the staffroom uninvited and threatened to assault that teacher. We find this to be a striking and reprehensible act.

The volatility of [the student's] behaviour is of concern. There have been intensive efforts by his family, school staff and outside professionals to teach [the student] strategies to deal with his frustrations in more appropriate ways and to inform staff about avoiding certain behaviours and to recognise signals. However there has been limited success on these fronts, and we have no confidence that there will be no serious flare-ups, despite best efforts and intentions.

The committee does not consider it can be sufficiently assured that the school can provide a safe environment for staff and students if [the student] returns to the college.”

57. The Acting Principal wrote to the student's parents advising them of this decision in a letter dated 20 August 2009 and enclosed a copy of the Disciplinary Subcommittee's Resolution Summary. The Acting Principal also completed and provided the Ministry with the 'SDS2 – Advice of Outcome of Board of Trustees meeting' form.

Complaint to Ombudsman

58. On 24 August 2009, the father made a formal complaint to the Ombudsman about the decisions to suspend and expel the student from the College. This followed an earlier approach by the father to the Ombudsman in December 2008, to raise concerns about three previous disciplinary actions by the College. Since the earlier events had been overtaken by the expulsion in August 2009, a decision was made to focus the Ombudsman's investigation on that issue.
59. On 31 August 2009, the Board was notified of the Ombudsman's intention to investigate the complaint. The Board was asked to provide a report on the following allegations raised by the father:
- neither the Acting Principal, nor the Disciplinary Subcommittee had the delegated authority to determine disciplinary matters;
 - the Acting Principal had initially indicated that he would not take any disciplinary action but later succumbed to pressure from staff, and thereby fettered his discretion;
 - both the Acting Principal and the Disciplinary Subcommittee failed to properly consider relevant factors, such as the student's Aspergers condition and the prevailing circumstances behind the behaviour;
 - consideration was given to irrelevant factors, such as the previous disciplinary actions; and
 - the residual discretion available to the Board was not properly exercised.
60. The Board provided its first report to the Ombudsman about the complaint, and relevant files, on 8 September 2009.
61. During the next 14 months, there was extensive correspondence and submissions. A provisional opinion was issued in November 2010 by the former Ombudsman dealing with the case, indicating his view that the Board had acted reasonably. The father responded at length with submissions arguing that opinion was wrong. There was little progress by this Office on the file over the next three years – clearly an unsatisfactory situation for all parties involved.
62. The position of Ombudsman is a personal Office. Upon assuming responsibility for this matter (in June 2013), and first being briefed about it (in November 2013), I reviewed the multiple files and decided to meet with the parties in an attempt to resolve the issues.

Attempted resolution

63. I met with the current Chairperson of the Board and current Principal of the College on 18 December 2013. The following day, I met with the student's parents and their support person. In both meetings, I signalled my initial thinking that in some respects the Board's actions appeared to have been unreasonable; that the investigation had become bogged down in a welter of correspondence; and that I wished to explore the possibility of mediation of the issues.
64. Both parties indicated a willingness to attend a mediation meeting. I facilitated a mediation on 21 February 2014. In attendance were the student's parents, the Chairperson of the Board, the Principal of the College and the Head of the Learning Support Department (the only participant who had been at the College in 2009 and remains on staff), together with investigative staff from my Office. The parties expressed their willingness to consider a proposed way forward to resolve this long-standing case. The proposal involved a three-pronged approach:
- a. addressing the student's individual needs;
 - b. providing a response about the disciplinary process followed by the College and the Board, and in relation to the student's expulsion record; and
 - c. advocating at national level for improved support for the special education sector, and fair and consistent student disciplinary processes.
65. I wrote to the student's parents and the Board about my proposal on 7 March 2014, and invited their comments. The father and the Board responded by letters dated 1 May and 7 May 2014 respectively. It became clear that the parties were unable to accept a mediated solution and that this investigation could only be concluded by my formal opinion as Ombudsman.

Responses to provisional opinion

66. I issued a provisional opinion on 16 July 2014 and gave the parties an opportunity to comment. Both the student's father and the Board disagreed with my analysis, for different reasons.
67. The Board submitted that the Disciplinary Subcommittee was well aware of the student's condition and the triggers for an outburst, and deliberated long and hard before reaching the decision to expel the student. It stated:

"...[I]n this case the college did all it reasonably could to work cooperatively with [the student] and his family. ... [A] student with high needs such as [this student] would never have remained in the college environment for nearly three years without comprehensive and sympathetic help. Nonetheless, the sad reality was that notwithstanding these efforts and the strenuous advocacy ... by his family, the school did not feel that it could continue to meet

[the student's] needs whilst at the same time providing a safe learning environment for the remainder of the students and the staff."

68. The father argued strongly that the decisions to suspend and expel the student were not only unreasonable but also unlawful. He noted the significant adverse impact on the student and the family from the unacceptable delays in this investigation (notably the lack of action from 2011 to 2013). He submitted that it would be "a final kick in the guts" for the student if the outcome of this investigation was not a formal recommendation that:

"the Board expunges the record of [the student's] suspension on 11th August 2009, and of his expulsion on 19th August 2009."

69. The father stated:

"I feel obliged to point out the enormity of the disparity between the outcome for [our son] had the matter been resolved properly and quickly (where he would have in all likelihood been back to school, gone on to further academic studies, and the school having amended its practices) and the current position of a highly intelligent young man so traumatised by [the] College's mistreatment of him as to being so frequently unwell, both mentally and physically, as to struggle with many of the most basic fundamentals of daily independent living, let alone virtually all hope of future academic achievement having been extinguished."

Overview

70. This is a complex case, but at the heart of it is a young man with an Autistic Spectrum Disorder (ASD) who was unable to complete his education in a mainstream school.
71. The difficulties faced by children with ASD at school, and their vulnerability to exclusion, are well summarised in the following statement from the National Autistic Society: School Exclusions Service (England):²

"Children with autism are particularly vulnerable to being excluded from school. Sometimes behaviour associated with this hidden disability can be confused with disobedience because of a lack of awareness of the condition by both pupils and adults in school. Sometimes a pupil with autism, trying to cope with the unstructured social aspects of school life, can feel overwhelmed and become anxious, stressed and aggressive, resulting in a meltdown. Headteachers may feel that exclusion is the only solution in order to maintain the safety and well-being of other pupils. Indeed it may be the case that a

² Available at <http://www.autism.org.uk/our-services/advice-and-information-services/school-exclusions-service.aspx> (accessed 8 December 2014)

mainstream school is not the best setting for a particular child. However, disruptive behaviour can be an indication of unmet needs and schools have a duty to make reasonable adjustments to policies and practices to ensure that pupils with ASD also feel safe, confident and able to experience success.”

72. The Education Review Office’s 2010 Report *Success for All – Every School, Every Child* highlights the importance of making schools more accountable for supporting students with disabilities, and of strengthening Boards’ awareness of such students’ needs. The extent of support and awareness shown by teachers, management and the Board is an important consideration in assessing the reasonableness of a school’s response when things ‘go off the rails’ for a student with a disability.
73. I recognise that school boards must strike a difficult balance, within available resources, between the rights of a student with a disability to an education,³ and their obligations to staff and other students. The Board has highlighted resourcing as an abiding problem, and noted the inadequacy of the statutory disciplinary process for managing a student with high needs:

“7. Resourcing is an abiding problem. As is evident from the incident that led to [the student’s] expulsion, the absence of one or two key individuals at a particular time can make all the difference. This is an illustration of the wider issue. For mainstreaming to function as it should, it is critical that schools are resourced appropriately. In my view this has not been the case for a very considerable period of time. The decile funding systems aggravates the problem for [this College]. As a decile 10 College we receive far less per student than lower decile schools. At the same time, because of the strength of our learning support department and the genuinely inclusive nature of the college, there is great demand for the department’s services.

...

11. In many ways this case highlights the inadequacy of the disciplinary process as a method to manage students with high needs. We agree with [the student’s parents] that more needs to be done to equip schools and Boards with resources and knowledge.”

74. The Board recognises the huge impact of its expulsion decision on the student and his family:

“4. The college acknowledges at the outset that the decision to expel [the student] has had long term adverse consequences for him, and has also caused much distress to his immediate family. We are sorry that this has happened and we very much regret that matters progressed to the point

³ United Nations Convention on the Rights of Persons with Disabilities (2006), art 24 and International Covenant on Economic, Social and Cultural Rights (1966), art 13.

where the Board's disciplinary committee felt it had no option but to expel [the student]."

75. In justifying the decision to expel the student, the College and the Board have maintained a strong focus on the safety of other students and staff in the aftermath of the student's actions in the staff room on 10 August 2009. I accept this was a legitimate concern for the College and Board.
76. I acknowledge the father's determined advocacy for his son, at considerable personal cost to him and the student's mother. As a result of what he perceived as 'stone-walling', he made numerous information requests to the College, to the point where the College felt besieged.
77. The breakdown in the relationship between the College and the complainant has been exacerbated by the unacceptable delay in concluding this investigation. I have apologised to the student and his parents, and to the Board, for the delay.

New Zealand's international Convention obligations

78. The Board and the father agree on the need for changes at a national level. I intend to use the lessons from this case in my work as the Ombudsman member of the tripartite New Zealand Independent Monitoring Mechanism (IMM) under the United Nations Convention on the Rights of Persons with Disabilities (CRPD).
79. In its recent *Concluding Observations on New Zealand's initial report*,⁴ the UNCRPD Committee commented on Article 24 as follows:

"Education (art. 24)

49. The Committee notes the steps being taken to increase inclusive primary and secondary education, and the ongoing challenges to make the education system fully inclusive, such as lack of reasonable accommodation

50. The Committee recommends that further work be undertaken to increase the provision of reasonable accommodation in primary and secondary education, and to increase the levels of entry into tertiary education for persons with disabilities. ..."

⁴ UN Committee on the Rights of Persons with Disabilities *Concluding Observations: New Zealand*, 3 October 2014, CRPD/C/NZL/CO/1. The UN Committee report builds on the recommendations of the IMM in its report *Making disability rights real* (August 2014) in relation to article 24 (see recommendations 23-25).

Analysis

80. The focus of my investigation has been on the reasonableness of the College's processes and of the decision to expel the student. I consider that the legal issue of whether the statutory grounds for suspension and expulsion were met to be very finely balanced. Given my opinion on the reasonableness issue, it is not necessary for me to form a separate opinion on legality.
81. The critical issues for analysis are:
- A. the adequacy of the records of the decision making process;
 - B. the College's handling of the sequence of events and whether it failed to take opportunities for earlier intervention and to adopt alternative handling strategies before the incident in the staff room;
 - C. the Acting Principal's decision to suspend and his report to the Board;
 - D. the Disciplinary Subcommittee's decision to expel and its Resolution Summary; and
 - E. the effects of Aspergers, when weighing up the student's reaction on the day.
82. I am satisfied that there is no merit in the concern expressed by the complainant about the Acting Principal's and the Disciplinary Subcommittee's delegations. The Board has relied on a resolution adopted at its meeting of 2 February 2009 as evidence that the appropriate delegations were in place. In light of sections 66(1)(e), 66(5) and 66(12) of the Education Act (set out in Appendix 1), and given the nature of my views about the substantive complaint, it is unnecessary to address this issue further.

A. Records of decision making process

83. Inadequate records were kept of the decision making process followed in the student's suspension and expulsion in August 2009.
84. The Acting Principal failed to keep records of a number of important discussions, in particular:
- his discussion with the student and his parents on 6 August 2009 as a result of the paper dart incident;
 - his and the Deputy Principal's informal and unaccompanied discussions with the student shortly after the incident in the staff room;
 - his discussion with the Board at its meeting on the evening of 10 August 2009;
 - his first meeting with the student's father on the morning of 11 August 2009;
 - his meeting with the Head of the Learning Support Department and the other Deputy Principals on 11 August 2009; and
 - his second meeting with the student's parents on 11 August 2009.

85. The failure to record these discussions has made it more difficult to unravel the sequence of events and has compounded the family's feeling of being kept in the dark and thus contributed to their sense of grievance.
86. The Disciplinary Subcommittee's Resolution Summary is brief and does little more than record the decision taken. Keeping full records of such meetings and decisions is a counsel of perfection. However, I do not consider that the Resolution Summary sets out sufficient reasons for the conclusions reached, particularly in relation to the Disciplinary Subcommittee's reasons for rejecting options short of expulsion. The Board submits that its initial report to this Office in September 2009 was effectively a contemporaneous record of its decision. Although that report includes more detailed reasons, it was prepared after the event, in the context of an Ombudsman's investigation.
87. Significantly, the Disciplinary Subcommittee did not retain any minutes of its hearing on 19 August 2009. The Board's practice at the time was to destroy any notes taken of the deliberations. The High Court in *A v Hutchinson and the Board of Trustees of Green Bay High School* recognised that "*the process before the Board is not expected to be run along the lines and with the formalism of a court case*".⁵ However, the Court also referred to the requirements of Rule 17(4) of the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999.⁶ This Rule requires that a Board "*must record its decision, and the reasons for it, in writing*".
88. For the purposes of transparency and accountability, good administrative practice requires that proper records of a decision making process are created and retained. This is particularly important in cases involving decisions that limit a young person's right to education.
89. The Board accepts that "*the records from the disciplinary subcommittee were deficient in some respects*" and has taken steps to improve its record keeping practices. However, at the time of the decisions in the student's case, the Board failed to act in accordance with advice from the Ministry of Education in 2006 about the retention of school records and with the requirements of the Public Records Act 2005.
90. Given the overall context of the College's involvement with the student and his family, and the significance of the decision ultimately taken by the Disciplinary Subcommittee on 19 August 2009 to expel the student, the failure to properly record the reasons for its decision, and to retain full minutes of its deliberations, were notable omissions.

⁵ *A v Hutchinson and the Board of Trustees of Green Bay High School*, above n 1, at [43].

⁶ At [65].

B. The College's handling of the sequence of events: opportunities for intervention

91. The Board maintains that the College's actions leading up to the final incident were appropriate and that reasonable accommodation was made for the student's needs, before matters came to a head, resulting in the expulsion decision:

"10. Having spoken with [the Head of the Learning Support Department] and the Board members involved, I am convinced that in this case the college did all it reasonably could to work cooperatively with [the student] and his family. As I noted in earlier correspondence, a student with high needs such as [the student] would never have remained in the college environment for nearly three years without comprehensive and sympathetic help. Nonetheless, the sad reality was that notwithstanding these efforts and the strenuous advocacy on [the student's] behalf by his family, the school did not feel that it could continue to meet [the student's] needs whilst at the same time providing a safe learning environment for the remainder of the students and the staff."

92. Although I am sympathetic to the Board given the predicament it faced, I do not accept its submission. I consider that there was a failure to adequately manage the student's return to the College on 10 August 2009, the day after the paper dart/swearing incident (which was serious and warranted a one-day stand-down the previous Friday).
93. I appreciate that the teacher aide's absence on 10 August, due to sickness, could not have been foreseen. However, she was an important support person for the student and played a crucial role in the agreed strategy for accommodating his needs.
94. In March 2009 the Deputy Principal sought clarification about the procedure to be followed if the student was not accompanied by a teacher aide. Apart from advising this Office that this request "was overtaken by subsequent events" and that the student did not return to the Deputy Principal's class, this issue was never fully addressed by the College. If a procedure had been clarified for staff and the student's family in March 2009, it is possible that a back-up strategy could have been in place, thus minimising any anxiety (for the student and the relevant staff) caused by a teacher aide's absence.
95. In any event, the College was aware that the student was due to resubmit his speech in the teacher's class when he returned on 10 August. Relevant staff should have also been mindful, as a result of the review of the student's year 11 programme in July 2009, that the resubmission of the speech was a source of considerable anxiety for both the student and his parents. This anxiety is likely to have been compounded as a result of the student's interactions with the teacher during the paper dart/swearing incident on 6 August. At the discussion with the father about that incident, the Acting Principal agreed to attend the teacher's class on 10 August to deal with any issues that might arise. When he was called away from the College at a critical point that morning, another part of the agreed strategy fell through.

96. The Acting Principal determined that it was not necessary to hold a re-entry meeting with the student and his parents on 10 August “because of the extended discussions” on 6 August. Quite apart from the fact that no records were kept of the earlier discussions, the College’s Stand-Down/Suspension Checklist (as published in its guidance at the time) suggests that a re-entry meeting was the standard process.
97. Had this meeting occurred, the misunderstanding (and dispute) about the advice the Head of the Learning Support Department provided to the student that morning may well have been avoided. The student and his father claim that the Head of the Learning Support Department advised that all the speeches (which were scheduled to be resubmitted during spell 2) had been postponed. The Acting Principal and the Board, on the other hand, maintain that the Head of the Learning Support Department merely told the student that he could give his speech on another day.
98. Although the exact nature of this discussion is disputed by the parties, it is clear that the arrangements for resubmitting the student’s speech broke down through no fault of his. At the time when the teacher aide’s absence became apparent, no staff member in the College took overall responsibility for the matter by giving the student (and his parents) a clear explanation of what had occurred and a new timeframe for resubmitting. This was despite the College being aware of the concerns surrounding the teacher’s previous reluctance to allow a resubmission. The material disseminated to relevant staff stressed the student’s need for prior warning of changes and specific timeframes for tasks and assignments. I refer in particular to the information in his Student Profile and the Early Warning Signs and Relapse Prevention Plan.
99. The Board disputes that this incident was a result of a failure to properly advise the student of a change in circumstances. However, it is clear that the Acting Principal did not speak to the student or his parents that morning about the postponement of his speech, and that there was some misunderstanding (at least in the student’s mind) about whether all the students’ speeches had been postponed. It is also clear that the teacher was unwilling to have the student unattended in her class, and the Head of the Learning Support Department was not available to attend the class.
100. Not only were these early opportunities missed; nothing was done about the student’s increasing agitation, as observed by the Science teacher in spell 3. The student’s approach to another teacher about the use of a projector was a further indication of distress that appears to have been overlooked. Even though staff had been told to be alert to the early signs of the student’s discomfort and anxiety, there was a failure to refer him to the Learning Support Department, as suggested by his Student Profile and the Early Warning Signs and Relapse Prevention Plan.
101. For these reasons, I am satisfied that a number of opportunities for earlier intervention were not adequately addressed by staff on the morning of 10 August. It is not only important to accommodate the needs of a student with Aspergers as part of a school’s everyday business; it is equally critical that a school do so when the agreed strategies fail, particularly against a backdrop of the MOU signed in May 2009, just three months prior to the incident in the staff room.

102. I appreciate that it is easier to make these observations in hindsight and that individual staff were doubtless preoccupied on a busy school day. However, I consider that the sequence of prior, triggering events could and should have been handled differently by the College. The College was well aware of the need for extra care and sensitivity in responding to situations where the student's Aspergers made him likely to "go off the rails" at school. Had agreed strategies been followed, the incident (which had such a drastic impact on the student's education) may well have been avoided.

C. The Acting Principal's decision and his report

103. I have considered whether the Acting Principal's decision, as recorded in his report to the Board, addressed the following relevant issues:

- i. the alternatives to suspension;
- ii. the Memorandum of Understanding (MOU);
- iii. the student's anxiety about the speech and the failure of staff to detect early warning signs;
- iv. the dispute about the advice provided to the student by the Head of the Learning Support Department; and
- v. the informal and unaccompanied interview of the student.

i. The alternatives to suspension

104. I am satisfied that the Acting Principal *did* turn his mind to alternatives short of suspension. It is clear that when he first met the student's father on 11 August, he had not made any decision. He subsequently received the incident and context reports, and discussed the incident with the Deputy Principals and the Head of the Learning Support Department. It seems reasonable to infer that, as a result of those discussions and reports, he concluded that options short of suspension were not appropriate.

105. In his report, the Acting Principal commented that the incident in the staff room formed a pattern of behaviour and that:

"[i]t also emphasises our inability to guarantee that despite our best intentions and endeavours that there will be nothing which occurs which [the student] will misinterpret and respond in this manner again. Should this happen in a different environment, the safety of staff and students would be at severe risk.

As result I believe that I have been left with no option but to suspend [the student]."

106. The student's father argues that this demonstrates a predetermination on the part of the Acting Principal. I do not accept that submission.

107. I recognise that the Acting Principal made his decision shortly after the incident in the staff room. Although there is no set time limit in the Education Act or the relevant Rules for making a decision about whether to suspend, there are obvious benefits in a Principal taking swift action. However, it is important for a Principal (or delegate), having fully established the facts, to make a decision and prepare a report for the Board that clearly sets out all the relevant matters.

ii. The Memorandum of Understanding (MOU)

108. The MOU signed on 14 May 2009 set out a series of undertakings intended to promote the student's health and well-being, and to manage his behaviour. Many of the undertakings were directed at the parents' behaviour. The key undertaking for the College, and most relevant to this investigation, was:

"6. The school will consult with the family before a disciplinary decision is made which could lead to a stand down or suspension. This is to provide the opportunity to explore reasons for, and the best way of managing the behaviour concerned having regard to [the student's] Asperger's condition and the rights of other students and staff to a safe working environment."

109. I am not satisfied that the Acting Principal undertook the type of consultations envisaged by the MOU, in the spirit of that agreement, before reaching his decision.

110. The Acting Principal met with the student's family twice on 11 August. The discussion at the first meeting with the father earlier that day was recorded in the Acting Principal's report to the Board as follows:

"At this meeting I discussed a number of options with [the student's father]. This included the fact that [the student] would not be able to return to [the teacher's] English class. I also told [the father] I had informed the Board of what had happened and that like me they were uncertain about the suspension option but had said that it was my decision. I told [the father] that at that point in time I had not decided how I would deal with [the student's] actions in the staffroom. I did not rule out any actions. I confirmed with [the father] that we would need [the student] to sit in [the Deputy Principal's] office for the day to give us the opportunity to follow up on his actions. We had arranged a lap top for him to work with. [The father] suggested that it would be better if [the student] remained at home for the day and that we classify him as 'sick'. I agreed to this suggestion."

111. There does not appear to have been any exploration, at this meeting, of the reasons for the student's behaviour. The MOU expressly states that the purpose of the consultation, apart from finding the best way of managing the student's behaviour, was to provide an opportunity to explore the reasons for the behaviour.

112. If there was an exploration of the reasons for the behaviour at the first meeting, the Acting Principal did not document this separately or record it appropriately in his report to the Board. Although his report does refer to the student's explanation of the events,

this was in reliance on the information gathered by the Deputy Principal during her informal and unaccompanied discussion with the student on the day.

113. By the time of the second meeting with the student's parents on 11 August, the Acting Principal had obviously decided to suspend the student, without consulting in the spirit of the MOU.
114. The MOU was entered into in the full expectation there would be further incidents involving the student. It was intended to provide a way of working through such incidents without prejudicing the student's education or the safety of staff and students. In his report to the Board, the Acting Principal refers to the MOU:

"I have tried to work within the terms of the Memorandum of Understanding but have had to act to address the 'rights of other students and staff to a safe working environment' as stated in the Memorandum. I have also taken into account the understanding reached at the Human Rights Commission mediation that in the event of having to consider any disciplinary action I would consult with [the parents] but at the end of the day I would have to make a decision that I considered appropriate."

115. In my view, the MOU was not given a chance to succeed. I do not consider that the paper dart/swearing incident on 6 August was so separate from the incident in the staff room on 10 August that it was reasonable to conclude that the approach of the MOU had been thoroughly tested and failed, and would fail again.

iii. The student's anxiety about the speech and failure to detect early warning signs

116. Although the Acting Principal's report refers to the paper dart incident, there is no reference to the student's anxiety about the speech and specifically about returning to the teacher's class following the stand-down.
117. The report also fails to note that the student's increasing levels of agitation had been observed by other teachers that morning prior to the incident in the staff room, but that no-one had referred him to the Learning Support Department. Therefore, the impression given by the report is that the student was initially *"comfortable with going to the library and delaying his speech"* and later, unexpectedly, had an outburst at the teacher.
118. There was no explicit acknowledgment in the Acting Principal's report that a number of earlier opportunities for intervention had been overlooked by the College.

iv. The dispute about the advice given to the student

119. Significantly, in determining what action to take about the incident, the Acting Principal did not take steps to address the dispute over the exact advice given by the Head of the Learning Support Department to the student. The Acting Principal's report to the Board stated:

*"[The Head of the Learning Support Department] had a meeting with a number of outside agencies at that time. **So he told [the student] that he should go to the library for the spell and he could do his speech another day. I returned to school as [the student] was heading to the library. I saw him and he seemed comfortable with going to the library and delaying his speech.***

*At interval [the student] heard that another student had been able to present his resubmission. **He decided that he had been told that there would be no speeches that day and therefore concluded that he had been lied to.** He brooded on this through Spell 3 and at lunchtime took the action described above and that he would have 'clubbed' [the teacher] if he could have reached her. He says that he was angry he didn't get to do his assessment and that she lied to him about it (although she didn't speak to him) not being on ... The student was clear in discussion with [the Deputy Principal] and the [Acting] Principal that he had been lied to and that in his mind validated his later actions."*

(emphasis added)

120. I note that the Acting Principal relied upon certain comments recorded in the incident and context reports prepared by the Deputy Principal. However, neither of these documents was presented to the student's parents or the Board prior to the Disciplinary Subcommittee hearing.⁷ The father only received these reports in February 2011 after making a specific request for this information to the Board. He challenges the contents of the reports.
121. I have reviewed the incident and context reports. In response to the question in the incident report form about whether there were any significant disagreements over facts, the Deputy Principal ticked both 'yes' and 'no'. Under the question about which version was preferred, she recorded:

"[The student] is adamant in his understanding of what has happened to him, however [the teacher] did not lie to h[i]m because she didn't talk to him before the incident at lunchtime. What comes through is [the student's] sense that he has been dealt with unjustly which validates his actions later."

⁷ This was confirmed by the Board in a separate letter to the father in April 2011 in response to his information requests.

122. While the Board has argued that this does not demonstrate a disagreement over the facts, it is clear that the circumstances in which the misunderstanding occurred were not fully investigated by the Acting Principal. Although it would have been evident to him that the teacher had not spoken to the student, he was aware that the Head of the Learning Support Department had done so. The Acting Principal should have been alert to a possible misunderstanding and dispute about the advice the Head of the Learning Support Department gave the student. Yet none of the records demonstrate how the Acting Principal resolved this issue.

v. Informal and unaccompanied interview with the student

123. A further concern with the Acting Principal's report is the failure to note the informal and unaccompanied interview with the student immediately after the staff room incident. This is particularly relevant when considering the comments in that report attributed to the student, explaining the reasons for his actions and derived from that interview.

124. I observe that in response to the question in the incident report form, on whether facts were put to the student, the Deputy Principal answered 'yes'. She went on to state:

"[The student] confirms the details above, and that he would have 'clubbed' [the teacher] if he could have reached her ..."

125. The student's father strongly objects to this statement, which was later repeated by the Acting Principal in his report. The father states that he learnt of the informal discussion with the student only during the course of the investigation by this Office. He is particularly concerned that even though the Deputy Principal acknowledged the impact or risk associated with interviewing the student, she went ahead regardless. The father suggests that her actions demonstrate the school's lack of regard for its own guidance and past experience in handling the student.

126. The reliance placed on the student's statements made during the unaccompanied interview is all the more surprising, given the Incident Report stated:

"[the student] has not been formally interviewed about the incident, as his Asperger S[y]ndrome makes it very difficult for him to reflect on his own behaviour. An interview would be very distressing for [the student] and very likely to be unproductive".

127. When the Acting Principal made his decision to suspend the student, he was aware that a formal accompanied interview had not been undertaken, as this was recorded in the incident report. Although his report to the Board reproduces the comments from the incident report, it would not have been obvious to the Disciplinary Subcommittee that any comments made by the student were in the course of an informal and unaccompanied interview. This was a deficiency. In my view, the circumstances in which the student gave his statement should have been spelt out to the Disciplinary Subcommittee.

128. If a formal accompanied interview, at which the student had support, had been undertaken some of the disagreement over the student's statements could have been avoided.
129. Overall, I consider that the Acting Principal's suspension decision and report to the Board are tarnished by several process flaws, identified above.

D. The Disciplinary Subcommittee's decision and the Resolution Summary

130. One of the key elements of a Board review is the opportunity to remedy any identified deficiencies in a Principal's decision.
131. The Disciplinary Subcommittee's records do not reveal whether, and if so how, it considered any deficiencies in the Acting Principal's investigation and decision – matters that had been squarely raised by the student and his parents in their submissions to the Board.
132. The Resolution Summary noted:

“The volatility of [the student's] behaviour is of concern. There have been intensive efforts by his family, school staff and outside professionals to teach [the student] strategies to deal with his frustrations in more appropriate ways and to inform staff about avoiding certain behaviours and to recognise signals. However there has been limited success on these fronts, and we have no confidence that there will be no serious flare-ups, despite best efforts and intentions.

The committee does not consider it can be sufficiently assured that the school can provide a safe environment for staff and students if [the student] returns to the college.”

133. There is no direct comment on any of the triggering events, again despite receiving submissions from the student's parents on these points.
134. Nor is it clear why the Disciplinary Subcommittee rejected the alternatives to expulsion. Apart from noting 'yes' to each of the four disciplinary options identified, the Resolution Summary does not provide any details about the reasons for (or against) rejecting each of the options. It does not adequately record how the Disciplinary Subcommittee weighed and balanced competing considerations. Although more detail was given to this Office shortly after the incident, the Disciplinary Subcommittee's decision must stand or fall on the matters set out in the Resolution Summary.

135. Having heard directly from the Disciplinary Subcommittee, I accept their oral assurances that they grappled long and hard with the matter. In responding to my provisional opinion, the chair of the Board noted:

“6. I have sat on a number of Board disciplinary hearings. They are all difficult. Typically, where the incident is serious enough that exclusion or expulsion is a real possibility, the Board must very carefully try and weigh the educational needs of the student against the rights of the staff and other students to teach and learn in a safe and positive environment. These issues are compounded in a case such as [the student’s], where his right to education in a mainstream environment calls for particular consideration and extra support.

...

12. ... The committee found the decision a very difficult one. They deliberated for several hours and were considering adjourning to seek more feedback from the teachers involved, particularly around their perceptions of safety. However, when [the Chair] rang and asked [the father] for additional time [the father] refused the request and insisted the family be given an answer that evening.”

136. The evidence suggests that the Disciplinary Subcommittee felt pressured to make an immediate decision on the evening it convened, without the benefit of more time to weigh all the alternatives and consider all the factors that contributed to the incident.
137. My overall assessment is that the Disciplinary Subcommittee found itself in an invidious situation but that, in moving immediately to impose the harshest penalty – in the face of unanswered questions and a complex background, and under time pressure – the Subcommittee acted unreasonably.

E. The effects of Aspergers

138. I accept that the College staff and the Board had made extensive efforts to understand the effects of Aspergers on the student’s behaviour. In its response to my provisional opinion, the Board noted:

“5. This case is all the more concerning because [the] College has a well deserved reputation for the strength of its learning support programme and its inclusive approach. Having spoken with [the Head of the Learning Support Department] I am aware that a great deal of care was taken to ensure that [the student’s] transition from intermediate to college went well. Very significant levels of support tailored to [the student’s] needs were provided throughout his time at [the College]. Nonetheless, and despite all these efforts and successfully managing several previous incidents, the [B]oard ultimately concluded in this particular instance that it had no option but to expel [the student]. ...”

139. Both the Acting Principal's report to the Board and the Disciplinary Subcommittee's Resolution Summary refer to the student's Aspergers condition. In particular, the Acting Principal noted that "[the student] does not cope well with changes to his routine and needs help with managing his own behaviour and feelings". The Disciplinary Subcommittee observed:

"[The student] has Aspergers syndrome and requires significant learning and behavioural support to attend college. The family, college staff and outside providers have worked closely together to understand the effect of Aspergers on [the student's] behaviour and to provide both [the student] and his teachers with strategies to avoid serious behavioural incidents."

140. What is missing from both documents is any reference to the fact that, for a teenager with Aspergers Syndrome, the combination of a highly anticipated, stressful event, a late, unexpected change in arrangements for that event, and the discovery of being singled out for different treatment (as the sole student not able to deliver his speech that day) were predictable triggers for an outburst.
141. I find it surprising that no direct comment was made about how the student's condition may have led him to misconstrue matters. The Board should have been aware that his Student Profile indicated that the student had a strong sense of justice and would challenge what he considered to be unfair treatment.
142. Instead, both the report and the Resolution Summary refer to the efforts by the College and other professionals to provide the student with strategies to manage his frustrations. In particular the Acting Principal, in his report to the Board, refers to the student's failure to use the "swearing strategy" on the morning of 10 August. Questions about the effectiveness of this strategy were previously put to the Board and in response it has referred to the concluding comments in the student's statement presented to the Disciplinary Subcommittee ("My thoughts about Monday 10th August 2009"):

"The principal had suggested to me that I can go and yell in his office when I'm angry with someone, but I wouldn't have felt good about doing that when I wasn't mad with him, and also the reason for going to the staff room was that I just didn't want this to go unnoticed because although often with problems I don't want anyone to know about them, I felt that I had been treated so unfairly over my speech that I wanted to make sure as many people as possible knew about it so that people could see what sort of person [the teacher] is so that something could be done about it."

143. The Board submits that this shows the student understood the strategy but chose to disregard it on the day. I do not agree. The student's comments suggest that the swearing strategy was flawed. The student could not see the point of venting at the Acting Principal when he was not the cause of the student's anger. Further, the College was aware that, due to the effects of Aspergers, in times of high stress the student was unable to make clear and appropriate choices. In light of this, it is difficult to see how the student could reasonably have been expected to identify, without any assistance from

staff, the need to use the swearing strategy (or with whom, in the Acting Principal's absence).

144. While the College staff and the Board clearly had an awareness of the effects of Aspergers, when confronted by a specific instance of the student's challenging behaviour, the decision makers appear to have had insufficient regard to the triggers that led to the student's outburst on 10 August. This was a critical flaw in the process surrounding the decisions to suspend and expel the student.
145. Given the requirement for a Board to consider a range of responses and to minimise the disruption to a student's education, I am not persuaded that the expulsion in this case was a proportionate and reasonable response.

Ombudsman's opinion

146. I conclude that the Board acted unreasonably in the following respects:

- it did not keep adequate records of the decision making process;
- staff at the College failed to take opportunities for earlier intervention and to adopt alternative handling strategies before the incident in the staff room; and
- the decision-makers did not give adequate consideration to relevant factors, specifically:
 - › the manner in which the sequence of triggering events was handled;
 - › the alternatives to expulsion;
 - › the Memorandum of Understanding signed in 2009; and
 - › the effects of Aspergers on the student's behaviour.

Recommendations

147. Pursuant to section 22(3) of the Ombudsmen Act 1975, I recommend that the Board:

- a. write to the student and his parents with a formal apology;
- b. attach a copy of my opinion to the student's expulsion record; and
- c. continue to review its practices – in the areas of support for students with disabilities, disciplinary processes and documentation – in light of the lessons from this case.

148. In terms of recommendation (b), the father has strenuously argued that the expulsion record should be expunged. However, I have followed the practice set out in Information Privacy Principle 7 under section 6 of the Privacy Act 1993, of attaching a statement of

correction to the relevant record. I consider this, along with the apology and the publication of my opinion, to be sufficient acknowledgment of the deficiencies identified.

Postscript

149. The Board of Trustees accepted the Ombudsman's recommendations.
150. It wrote separately to the student and his parents, with a formal apology for the expulsion and the resulting distress. The Board agreed to attach a copy of the Ombudsman's opinion to the student's expulsion record, and to support the parents' efforts to have that record formally expunged.
151. The Board also undertook to continue to review its practices in the areas of support for students with disabilities, disciplinary processes and documentation.

Appendix 1: Relevant statutory provisions

Ombudsmen Act 1975

13 Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.
- (2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.
- (3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission...

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
 - (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
 - (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that,

in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

- (3) If in any case to which this section applies an Ombudsman is of opinion—
- (a) that the matter should be referred to the appropriate authority for further consideration; or
 - (b) that the omission should be rectified; or
 - (c) that the decision should be cancelled or varied; or
 - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
 - (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
 - (f) that reasons should have been given for the decision; or
 - (g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefor, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned...

Education Act 1989

13 Purpose

The purpose of the provisions of this Act concerning the standing-down, suspension, exclusion, or expulsion of a student from a State school is to—

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

14 Principal may stand-down or suspend students

- (1) The principal of a State school may stand-down or suspend a student if satisfied on reasonable grounds that—

- (a) the student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school; or
- (b) because of the student's behaviour, it is likely that the student, or other students at the school, will be seriously harmed if the student is not stood-down or suspended.

17 Board's powers when suspended student 16 or older

- (1) If a student who is 16 or older has been suspended from a State school, the board may—
 - (a) lift the suspension at any time before it expires, either unconditionally or subject to any reasonable conditions it wants to make; or
 - (b) extend the suspension conditionally for a reasonable period determined by the board when extending the suspension, in which case subsection (2) applies; or
 - (c) expel the student.

66 Delegations

- (1) The governing board of a board may delegate any of the functions or powers of the board or the governing board, either generally or specifically, to any of the following persons by resolution and written notice to the person or persons:
 - (a) a trustee or trustees:
 - (b) the principal or any other employee or employees, or office holder or holders, of the board:
 - (c) a committee consisting of at least 2 persons, at least 1 of whom is a trustee:
 - (d) any other person or persons approved by the board's responsible Minister:
 - (e) any class of persons comprised of any of the persons listed in paragraphs (a) to (d).
- (5) A delegate who purports to perform a function or exercise a power under a delegation—
 - (a) is, in the absence of proof to the contrary, presumed to do so in accordance with the terms of that delegation; and
 - (b) must produce evidence of his or her authority to do so, if reasonably requested to do so.
- (12) Until revoked, a delegation to a committee continues in force, even if the membership of the board or committee changes.

Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999

9 Information about stand-downs or suspensions

A principal who has stood-down or suspended a student must ensure that the student and a parent of the student are, as soon as practicable, given the information on stand-downs or suspensions provided by the Ministry for the purpose.

10 Information for Ministry

A principal telling the Secretary about a stand-down or suspension must ensure that the Secretary is given the information about the stand-down or suspension, under section 18(1) or (2) of the Act, in the form that the Secretary requests.

14 Report for board

A principal who has suspended a student must ensure that a report that contains all information relevant to the suspension is written for the board.

15 Information about suspension meeting

- (1) The board must ensure that a student who has been suspended, and the student's parents are given the following as soon as practicable after the suspension:
 - (a) written notice of the time and place of the suspension meeting; and
 - (b) written information about the statutory options available to the board to deal with the suspension at the suspension meeting.
- (2) The board must ensure that the following material is given, in writing, to the student and the student's parents within the time described in subclause (3):
 - (a) information on the procedures the board follows at suspension meetings; and
 - (b) advice that the student and the student's parents may attend the meeting and speak at it about the suspension; and
 - (c) those parts of the following that, in the board's opinion, it would have no ground to withhold if the student made a request for the following under the Privacy Act 1993:
 - (i) the principal's report to the board on the suspension; and
 - (ii) any other material about the suspension to be presented by the principal or the board at the meeting.
- (3) The material must be given to the student and the student's parents at a time that enables it to reach them at least 48 hours before the meeting (or within a shorter time agreed by all the parties).

16 Adjournments to consider new information

- (1) The board must allow an adjournment in a suspension meeting if the student, a parent of the student, or any member of the board asks the board to do so because the person making the request needs time to consider new information.
- (2) In subclause (1), new information means information—
 - (a) that is referred to at the suspension meeting; and
 - (b) that is either—
 - (i) information that was not given, under rule 15, to the person making the request; or
 - (ii) information that is new to the person making the request for some other reason.
- (3) In deciding on the period of the adjournment, the board must have regard to the amount of time that the person making the request needs, in his or her particular circumstances, to consider the information.

17 Board's decision

- (1) Before deciding at a suspension meeting whether to lift or extend the suspension or exclude or expel the student, the board must—
 - (a) have due regard for each circumstance relevant to the suspension; and
 - (b) consider each statutory option available to it.
- (2) The board may—
 - (a) require the principal, the student, the student's parents, any representative of the student, and any representative of the parents to withdraw from the meeting while the board makes its decision; or
 - (b) ask the principal, the student, the student's parents, and any representatives of the student and the parents to stay at the meeting while the board makes its decision.
- (3) Before making its decision, the board may try to get all the parties at the meeting to agree on what the decision should be.
- (4) The board must record its decision, and the reasons for it, in writing.