



## Chief Ombudsman’s opinion under the Ombudsmen Act

<b>Legislation</b>	Ombudsmen Act 1975, ss 13, 22
<b>Agency</b>	Miramar Central School Board of Trustees, Ministry of Education, Education Review Office
<b>Complaint about</b>	Use of seclusion
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	439668
<b>Date</b>	18 December 2017

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## Introduction

1. In October 2016, I announced my intention to investigate the use of seclusion in schools. This followed complaints from the parents of a student who attended Ruru Specialist School (Ruru) in Invercargill, and from the mother ('Ms A') of a student ('B') who attended Miramar Central School (Miramar) in Wellington.
2. This report sets out my opinion in relation to Ms A's complaint.

## Summary

3. In October 2016, a complaint was received from Ms A about the use of a 'time-out room' at Miramar to seclude students, including her son, B.
4. I have investigated the use of the 'time-out room' at Miramar to manage B's behaviour, as well as related actions and omissions by the Ministry of Education (the Ministry) and the Education Review Office (ERO).
5. I have formed the opinion that:
  - a. Miramar acted unreasonably and oppressively in using its 'time-out room' to manage B's behaviour; and
  - b. the Ministry's failure to provide schools with clear and unambiguous up-to-date guidance in relation to the use of seclusion was an unreasonable omission.
6. I recommend that Miramar provides B and his parents with a written apology for its failings and an *ex gratia* payment of \$3000.

## Background

7. B started as a student at Miramar in 2010, age five.
8. B has Autism Spectrum Disorder and Global Developmental Delay, meaning he is severely delayed in all areas of neurotypical development. He received part-time teacher-aide support at Miramar through the Ongoing Resourcing Scheme (ORS), which is funded by the Ministry of Education (the Ministry). B's family supplemented this with additional teacher-aide and therapist support. It was the expectation of B's parents, Ms A and Mr A, that this would enable B to be included full-time in mainstream education.
9. Ms A and Mr A describe B's first few years at Miramar as largely successful. With a lot of input and support, he made considerably more progress than they understood would be possible.
10. Towards the end of 2015, Ms A and Mr A noticed changes in B's behaviour, including a deterioration in his sleep patterns, increased fearfulness, and an increase in difficult behaviours. They were concerned about what was happening at school, including that B

had been spending time in Miramar’s Special Education Centre (Kowhai Unit) without their knowledge and consent. The Kowhai Unit caters for students with high physical, social, and learning needs.

11. Ms A said that they had also heard rumours about students being locked in the Kowhai Unit, but when they asked staff about this at a meeting in December 2015 they were assured there was no such practice.
12. In March 2016, it was agreed that B would spend a limited amount of time in the Kowhai Unit each week, when teacher-aide support was not available (from 2.30 to 3pm Monday to Wednesday, and at break times).
13. On 21 June 2016, lead specialist teacher Ms C emailed Ms A with information that she proposed adding to B’s Behaviour Support Plan (BSP), about the use of ‘time-out’:

*There are times when B’s behaviour becomes physical to others. He can grab at them, their arms, face or around the throat. When this happens he has a reminder of good hands, hands to himself and try again. If he repeats any of these behaviours he is to go onto the timeout chair for 1 minute—use timer. Once this minute is finished he is to be asked ‘what did you do—to be in time out?’ It is important B gives a reason. If he cannot answer he is to be told, then asked again, so he is clear as to the reason for time out.*

*Should he not sit in the chair and run away is to go into the time out room for 1 Minute. Once this minute is finished he is to be asked ‘what did you do—to be in time out?’ It is important B gives a reason. If he cannot answer he is to be told, then asked again, so he is clear as to the reason for time out.*

*Following use of the time-out room there is a time-out room report to be filled out—this hangs next to the door. This is to ensure transparency when using the room. The policy surrounding using the time out room is alongside and must be read.*

14. Ms C also sent a copy of Miramar’s ‘Use of the Time-Out Room’ policy (‘time-out room’ policy) and noted in her email: ‘Once we reach an agreement as to how it’s written up, I will attach [the] behaviour plan and print it for you’.
15. Ms A was concerned about what was proposed. She telephoned B’s Ministry key worker, Ms D, who was on leave at the time. In the meantime, Ms A did not reply to Ms C.
16. There is conflicting evidence regarding a discussion between Ms C and Ms A prior to this email:
  - a. Ms C said that she spoke to Ms A on 20 June 2016 about the fact that the time-out strategy they had been using with B, with him sitting on a chair, was not always working, and they may need to use the ‘time-out room’. Ms C recalled Ms A saying time-out was used at home and she ‘was OK with time out’. Ms C also said that she showed Ms A the room.

- b. Ms A recalled a casual conversation with Ms C about time-out on a stool if diversion techniques were not helping B to manage himself, but said there was no discussion about trialling the *'time-out room'*. She said that prior to the email of 21 June 2016 she did not know the room existed, and she would never consent to locking B in a small dark empty room, alone.
- 17. On 7 July 2016, B's Applied Behaviour Analysis (ABA) therapist Ms E informed Ms A that on returning from her lunch-break that day, she had found B unattended and locked in a small dark room in the Kowhai Unit. Ms E said she heard B crying loudly, pleading to be let out. She did not immediately see the lock at the top of the door, and sought the assistance of a teacher-aide to let B out. He was in a distressed state.
- 18. Ms A spoke to staff at the school and was told that B had been locked in the room for ten minutes or possibly longer, that it was the Principal who had locked him in, and that B had been locked in the room previously.
- 19. On 8 July 2016, Ms A and Mr A withdrew their son from Miramar.

### **Complaints to the Board of Trustees and the Ministry of Education**

- 20. On 22 July 2016, Ms A complained to Miramar's Board of Trustees (the Board) and the Ministry.
- 21. On 25 or 26 July 2016, the Ministry contacted the Principal, Mr F, and it was agreed that an independent investigation would be carried out.
- 22. On 27 July 2016, the Ministry appointed a human resources consultant, Ms G, to investigate Ms A's complaint.
- 23. On 4 August 2016, Ms A met with the Board Chair, Ms H. In a follow-up letter, Ms H confirmed that the Ministry would be reviewing the Kowhai Unit's processes and procedures, and Miramar would work with the Ministry to ensure that the investigation was independent and timely.

### **Ms G's investigation**

- 24. Ms G carried out her investigation in August 2016 and issued her final report on 13 September 2016. The investigation included a review of relevant policies and records, and interviews with a number of Miramar's teachers and teacher-aides, Mr F, Ms A, and Ms E. Ministry staff were also consulted.
- 25. It should be noted that Ms G had, in early 2015, investigated a complaint to the Ministry about the use of seclusion at Ruru. One of her recommendations at the conclusion of that investigation was that the Ministry convene a national working party to consider the use of seclusion and restraint in schools and investigate best practice models. An Advisory Group, which included Ms G, met for the first time in June 2015. At the time of the investigation into Ms A's complaint, new guidelines regarding seclusion and restraint

in schools had been drafted and were in the process of being finalised. The draft guidelines for seclusion were, at this time, transitional guidelines to assist schools work toward the elimination of seclusion.

26. Ms G's report on Miramar included the following information and findings:

- a. There was no reference to the *'time-out room'* in Miramar's information booklets and policies on discipline, misbehaviour, and *'Difficult to manage individual children'*.
- b. The *'time-out room'* policy was general to all students, with no reference to use of the room for students with special needs.
- c. The room itself was 1.45m x 2.3m, with a height of 2.3m. It had a window along one side, a working light, and the walls and floor were carpeted. There was no sprinkler. There were no soft furnishings but the room presented as a *'well-maintained, clean environment'*. There were handles at the top of the door, on both sides. There was a lock at the top of the door on the outside. There was a viewing window in the door, which could be closed off with a sliding cover.
- d. There was opportunity in the documentation for greater emphasis to be put on de-escalation. There was no reference to this in the *'time-out room'* policy, and no requirement to list antecedent behaviours in the reports that staff were required to complete whenever the room was used.
- e. Information from the *'time-out room'* reports was entered into a log. For the period between November 2014 and August 2016, there were one hundred entries in the log, relating to eight students. Three of those students were taught in the Kowhai Unit and five in mainstream classes. Interviews with staff indicated a further four students had been placed in the room with no record made. Three of those four students had since left the school.
- f. Review of the documentation had been challenging, due to inconsistencies in the structure and designation of documents. There were also inconsistencies in the information recorded about particular students and incidents.
- g. None of the Individual Education Plans (IEPs) and BSPs reviewed were signed off by parents/caregivers, or by staff.<sup>1</sup> For many of the students who were put in the *'time-out room'*, there was no reference to use of the room in their BSP.
- h. Interviews with staff indicated inconsistent practice in the use of the *'time-out room'*. Some staff viewed the room as an opportunity for students to self-regulate but most saw it as *'a consequence for undesirable action'*.

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<sup>1</sup> IEPs and BSPs are commonly used for students with special needs. An IEP is a targeted plan for the education of a student, while a BSP (or Behaviour Management Plan) outlines particular behaviours a student may exhibit and strategies for managing those behaviours.

- i. It would be unfair to judge Miramar against the guidelines that had been drafted by the Advisory Group but not yet finalised and issued. However, it was evident that in several respects Miramar's policies and practice would not meet the expectations set out in the draft guidelines.
  - j. An overwhelming theme from interviews with staff was that they were operating with the *'best intentions in relation to student wellbeing and the development of appropriate social skills'*. However, staff acknowledged inconsistencies in approach and practice.
  - k. There had been changes within the Kowhai Unit with an increased focus on building partnerships between mainstream classroom teachers and specialist teachers. These changes may have been unsettling for some staff.
  - l. The quantitative data indicated significant room for improvement. The interviews *'allowed for balancing and contextualising of the quantitative data with the ethos of the unit'*. There was honesty from the staff, who all appeared to have the students' best interests at heart. The Principal was *'transparent and helpful, welcoming the review as an opportunity to improve practice at Miramar'*.
27. With regard to B, Ms G noted the following:
- a. There had been an escalation in inappropriate behaviours in 2016. Staff considered this may have been due to hormonal changes, an increased learning gap between B and his peers, and the number of staff working with B each week.
  - b. Ms E was concerned that staff did not understand that B's behaviours were signs of autism brought on by stress and anxiety, rather than a consequence of aggression. Staff agreed with Ms E's explanation but were nevertheless sometimes intimidated by, and fearful of, his behaviour.
  - c. There was no disputing that B had been placed in the *'time-out room'*. Records showed that this happened 13 times between 20 June and 7 July 2016. Staff interviews suggested that he was placed in the room on other occasions.
  - d. Records indicated that B was placed in the room for longer than one-minute intervals. The record for 7 July 2016 shows he was in the room with the lights off, for at least ten minutes, without the door being opened at one-minute intervals.
  - e. The *'time-out room'* was not mentioned in B's *'Team Communication Book'*, which went home to Ms A and Mr A.
  - f. *'The use of a time-out room is a last resort intervention, and should only be used on very rare occasions as part of an evidence based programme. This intervention should involve a multi-disciplinary team, and full consent from a parent.'*
  - g. There is evidence that communication failed in a number of areas. There were also discrepancies between parties as to what had occurred.

28. Ms G concluded that Miramar's systems and documentation needed to be '*significantly overhauled and improved upon*'. Irrespective of intentions, '*some of the school's practices are outmoded and do not embrace inclusive and effective pedagogy*'. There was an unsatisfactory assumption that school policies catering for mainstream students were also suitable for students with challenging behaviours. There was a lack of transparency in both written and verbal communication between the school and parents.
29. Ms G recommended that:
- a. Miramar adopts the new Ministry guidelines once promulgated;
  - b. Miramar reviews its overarching policies in relation to behavioural management, with links to associated guidelines;
  - c. the Kowhai Unit is resourced with time and expertise to put systems and processes in place;
  - d. documentation pertaining to individual students is updated, reformatted, and signed off by all parties;
  - e. Miramar's complaint process is made easily accessible on the school's website;
  - f. staff undertake training relevant to their area of expertise and the new guidelines, with an emphasis on de-escalating behaviours and finding alternatives to the use of the '*time-out room*'; and
  - g. B's family is offered a facilitated meeting with a view to resolution and closure.

## Subsequent developments

30. On 19 September 2016, Ms A complained to the Human Rights Commissioner (HRC), alleging unlawful discrimination on the grounds of disability. Following consultation between the HRC, the Children's Commissioner, and myself, and with Ms A's consent, her complaint was referred to my Office (received 12 October 2016).
31. On 22 September 2016, Ministry staff met with Miramar to discuss Ms G's report.
32. On 1 October 2016, Ms A received a further letter from Ms H, advising that Miramar was working on Ms G's recommendations. Ms H said that the school was working to remove the '*time-out room*' and implement positive behaviour strategies, with support from specialist Ministry staff. She noted that they were keen for B to return to school and for Ms A to be part of the school's '*journey of change*', and that the Ministry had offered to facilitate a meeting to discuss this. Ms H thanked Ms A for bringing the matter to the Board's attention and apologised for the distress caused to her and her family.
33. Although Ms A was pleased with these actions, she was concerned that the '*time-out room*' was still being used, and that nothing had been done in respect of her requests for transparency with the families of other children who had been put in the room, and with the wider school community. In these circumstances, Ms A engaged with the media.

34. On 8 October 2016, Miramar stopped using its *'time-out room'* and removed the door.

### **Chief Ombudsman commences investigations**

35. On 14 October 2016, I confirmed my intention to investigate the use of seclusion in schools. I advised that my investigations would include the actions of Miramar and Ruru, the extent of the practice, and any related actions or omissions of government agencies.
36. I asked the Ministry to issue an advisory to schools requiring that the use of seclusion in schools be discontinued pending the outcome of the investigations.
37. This investigation in respect of Ms A's complaint is in accordance with section 13(1) of the Ombudsmen Act 1975, which makes it a function of Ombudsmen to investigate the administrative conduct of agencies, such as school boards of trustees, the Ministry, and ERO, which affect anyone in their personal capacity.

### **Apologies from Ministry and Miramar**

38. On 21 October 2016, the Acting Secretary of Education issued a statement apologising for its handling of Ms A's complaint. The Acting Secretary commented that the Ministry hadn't acted with the urgency it should have to stop the use of seclusion, and that it should have acted much more decisively when it first received the complaint about Miramar.
39. On 3 November 2016, Ms H wrote a further letter to Ms A, confirming that the Board was in the process of implementing Ms G's recommendations, reiterating the offer of a facilitated meeting, and again apologising for the distress caused.

### **Use of seclusion prohibited**

40. On 3 November 2016, the Ministry advised schools that the use of seclusion in schools was no longer acceptable. It issued *'Guidance for New Zealand Schools on Behaviour Management to Minimise Physical Restraint'* (2016 Guidance), effective immediately.
41. The Ministry also advised that a legislative change was being proposed to reinforce the prohibition on the use of seclusion in schools (and to provide schools with further certainty regarding acceptable practice in relation to the use of restraint).
42. On 15 May 2017, the Education (Update) Amendment Act 2017 was enacted. This provided for the insertion of a new section in the Education Act 1989 relating to seclusion. Under section 139AB, the use of seclusion at or on behalf of a registered school or early childhood service is prohibited.
43. The 2016 Guidance was reviewed to align with the new legislation and, in August 2017, the Ministry finalised *'Guidelines for Registered Schools in New Zealand on the Use of Physical Restraint'* (2017 Guidelines). These guidelines, issued in September 2017, refer

to the legislative ban on the use of seclusion in schools and early childhood services, and the availability of further information about seclusion on the Ministry's website.

## Defining seclusion

44. Prior to the Ministry's 2016 Guidance, there was no agreed definition of seclusion in the context of a school. There was a lack of clarity as to what constituted seclusion, how it differed from time-out, and acceptable practice for the management of challenging student behaviour, including that which posed a risk to students and staff.

45. The 2016 Guidance defines seclusion as:

*When a student is involuntarily placed alone in a room, at any time and for any duration, from which they cannot freely exit. The door may be locked, blocked or held shut.*

*This may occur in any room that is lockable or, even if not locked, where a level of authority or coercion leads to a student believing that they must not or cannot exit the room in which they are confined.*

46. Consistent with this, the Education Act 1989 was amended to include at section 139AB:

(1) *A person to whom this section applies must not seclude any student or child who is enrolled at or attending a registered school or an early childhood service.*

*To seclude, in relation to a student or child, means to place the student or child involuntarily alone in a room from which he or she cannot freely exit or from which the student or child believes that he or she cannot freely exit.*

47. Although this is the definition I have adopted for the purposes of this investigation, I take into account the fact that, at the time of the events leading to this complaint, that definition had not been articulated as it has now.

48. The 2016 Guidance also states:

*Seclusion is not the use of timeout such as:*

*When a student is asked to leave an activity or area because of their behaviour and go to another specified area where they must stay until told they can return.*

*When a student voluntarily takes themselves to an agreed space or unlocked room (part of a planned intervention to de-stimulate or calm down).*

*When they take themselves, or are asked, to go to a quiet place in the classroom to calm down.*

49. The room at issue in the case of Miramar was called the *'time-out room'* and I will continue to refer to it as such in this report. However, this should not be interpreted as an indication of how the room was used at Miramar. Where schools have or had dedicated rooms used for managing students exhibiting difficult behaviour, they have variously used names such as time-out rooms, safe rooms or safe areas, quiet rooms, calm rooms, low stimulation rooms, and low sensory rooms. My focus is on the nature of the room and the way in which it was used, not its name.

## Complaint

50. The specific concerns that Ms A outlined in her initial complaint included the following:
- a. At a meeting in December 2015 to discuss B's IEP, Ms A and Mr A had reiterated their wish for their son to be taught in mainstream education with support, rather than in the Kowhai Unit. B had been taken to the Kowhai Unit without their knowledge and consent. When they raised their concerns at this meeting about students in the Kowhai Unit being locked in, staff denied that this happened.
  - b. B was locked in the *'time-out room'* on multiple occasions. The school's records are unclear and inconsistent, but show that between 20 June and 8 July 2016, he was locked in the room thirty-two times over eight days. B is *'petrified of the dark and so this would have been a truly frightening experience for him'*.
  - c. The *'time-out room'* was used for punitive purposes, not as the sensory calming room it was intended to be. To use the room in this way, for a child with a severe intellectual disability, is *'cruel and immoral'*.
  - d. There was a complete lack of transparency regarding B's education and the *'time-out room'*. Use of the room was deliberately kept secret from Ms A and Mr A, and from other parents. The fact that they and other parents were unaware that their children had been locked in a small dark room is *'unacceptable and morally wrong'*.
  - e. The *'time-out room'* had no alternative exit so there were also health and safety risks.
51. In terms of outcomes, Ms A wanted Miramar to: cease immediately its exclusionary use of the *'time-out room'*; tell the parents of students directly affected about the particular circumstances relating to their children; and tell the entire school community about the room and its use.
52. Following Ms G's investigation, the issuing of the 2016 Guidance, and the proposed legislative change to reinforce the prohibition on seclusion, Ms A was asked about her outstanding concerns. She noted the following:
- a. She considered the overall tone of Ms G's report suggested an attempt to try to protect the school and the Ministry.

- b. The extent to which seclusion was being used at Miramar was not captured in Ms G's report, because its use was often undocumented. There were a number of ex-staff who could have been interviewed and who may have shed light on what took place at the school.
- c. Miramar had failed to recognise the effect of what had happened on B. He had developed an overwhelming fear of the dark and become much more anxious. Much of the progress he had made socially seemed to have been undone.
- d. Although the Board had apologised, she was not satisfied that it or the Principal had really taken responsibility for what occurred.
- e. She remained concerned that not all of the families of children who were secluded had been contacted by the Board or received apologies.

## Investigation process

53. In December 2016, I advised Ms A that the issues arising from her complaint that I intended to investigate were:
- a. whether Miramar acted unlawfully, unreasonably, unjustly, oppressively, or improperly discriminatorily by using its 'time-out room' to manage B's behaviour;
  - b. whether, by act or omission, the Ministry unreasonably or unlawfully caused or contributed to the seclusion of B;
  - c. whether, by act or omission, the Ministry unreasonably or unlawfully caused or contributed to the use of seclusion generally; and
  - d. whether the Education Review Office had appropriate systems in place for the oversight and monitoring of seclusion in schools.
54. Under the Ombudsmen Act 1975, I have the authority to hear or obtain information from such persons as I see fit, make such enquiries as I see fit, and regulate my procedure as I see fit.<sup>2</sup>
55. After reviewing a range of information from Miramar, the Ministry, and ERO, I met with Ms A and Mr A, and briefly with B and Ms E, in May 2017. I also met with Ms H and Mr F.

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<sup>2</sup> Section 18 provides that:

(3) *An Ombudsman may hear or obtain information from such persons as he thinks fit, and may make such inquiries as he thinks fit. It shall not be necessary for an Ombudsman to hold any hearing, and no person shall be entitled as of right to be heard by an Ombudsman [...]*

(7) *Subject to the provisions of this Act and of any rules made for the guidance of Ombudsmen by the House of Representatives and for the time being in force, an Ombudsman may regulate his procedure in such manner as he thinks fit.*

56. It was evident from my meeting with Ms A and Mr A that they had some outstanding questions, including when B was first put in the 'time-out room' and how often he was put in the room. There were also areas of disagreement or conflicting evidence, such as the extent to which the room was discussed with Ms A before B was put in the room on 20 June 2016.
57. However, on the question of whether B was secluded at Miramar, there appeared to be no dispute. It was understood that Miramar had accepted Ms G's key findings, and it had apologised.
58. In these circumstances and bearing in mind the changes since made at a national level, I determined that in this case, the most appropriate way forward was for my Office to arrange for a facilitated meeting between Ms A and Mr A and representatives from the school. The intention was to enable the parties to address outstanding questions and concerns and consider any appropriate remedies. A meeting was scheduled for mid-August 2017.
59. The parties gathered on the agreed date but the meeting did not proceed, as they were unable to agree the terms on which the meeting would take place.
60. In the meantime I had, in July 2017, met with ERO and the Ministry to discuss matters relating to both this complaint and the complaint about Ruru.
61. In October 2017, I provided Miramar, the Ministry, and ERO with my provisional findings (first provisional opinion) and invited their comment. After considering submissions from Miramar (including relevant staff) and the Ministry, I issued a second provisional opinion, in November 2017. All parties, including Ms A, were invited to comment. This final opinion takes into account comments from all parties.

## Relevant information

### Agency roles

#### School boards

62. The way in which schools in New Zealand operate changed considerably following the enactment of the Education Act 1989, which gave effect to the *Tomorrow's Schools* system of education. This introduced the self management of schools through individual boards of trustees.
63. Boards of trustees are responsible for the governance of a school and control of the management of the school. The board is responsible for ensuring its school provides its students with a safe environment and quality education. The Education Amendment Act 2013 provides that, except to the extent that any enactment or the general law of New Zealand provides otherwise, 'a school's board has complete discretion to control the management of the school as it sees fit' (s 16).

64. A school's principal is the board's chief executive in relation to the school's control and management. Under section 76(2) of the Education Act 1989, except to the extent that any enactment or the general law of New Zealand provides otherwise, the principal is required to comply with the board's general policy directions but otherwise *'has complete discretion to manage as the principal thinks fit the school's day to day administration'*.
65. Section 78 of the Education Act 1989 provides for the government to make regulations providing for the control, management, organisation, conduct, and administration of schools. National Administration Guidelines (NAGs) relate to school administration. Under NAG 5, a board of trustees is required to:
  - a) *provide a safe physical and emotional environment for students;*
  - [...]
  - c) *comply in full with any legislation currently in force or that may be developed to ensure the safety of students and employees.*

## Ministry of Education

66. The Ministry is the government's lead advisor on the education system, with responsibility for strategic matters including property expenditure, the curriculum, and major policy matters. This includes administering a range of legislative and regulatory controls, and providing services that support the governance, management, and operation of education providers.

## Education Review Office (ERO)

67. ERO provides independent external evaluation of schools (and early childhood services). The evaluation of a school has two purposes: accountability and educational improvement. Evaluation for accountability purposes involves reporting on goals and standards, including checking on compliance matters.
68. An ERO review considers a range of matters, including student health and safety. ERO evaluates a school's provision of a safe and healthy learning and working environment and a board's compliance with statutory legislation and legal requirements.

## Miramar Central School

69. Miramar has a roll of approximately 240 students. The Kowhai Unit caters for a small number of students in years one to eight.
70. Miramar advised that the *'time-out room'* was constructed during a remodelling of the Kowhai Unit in 2002–2003. The Principal recalled that plans for the remodel were prepared in conjunction with the Ministry's property division and the Group Special Education (GSE), a Ministry department focused on children with special education needs.

71. Miramar was asked whether it had any information to indicate that B may have been placed in the 'time-out room' before the first documented incident on 20 June 2016. It responded:

*While [Ms G's report] notes that he could have been, no further information has been presented to the Board. From our records the first time was 20/06/16.*

72. Miramar confirmed that it had contacted the parents of all nine children who were enrolled at the school in 2016 and who had been placed in the 'time-out room'.

### 'Time-out room' policy

73. The rationale for the 'time-out room' was described in the policy as follows:

*The Time-Out Room is used when a child is deemed to be out of control and for extremely aggressive behaviours. It is only used where the safety of the child, staff or property is at risk. The child is placed there and watched until they have calmed-down and then asked to cooperate. The room is designed so that it is difficult for the child to do harm to themselves or others.*

74. The 'time-out room' policy set out in further detail the circumstances in which the room should be used and how it should be used, including:

*Students should only be placed in the Time-Out Room when:*

*They are out of control and violent representing a real risk to themselves, the safety of fellow students and staff.*

*[School] property (especially expensive items) is at risk of being destroyed.*

*Students should first be given a warning that if their behaviour continues they will be put in the time-out room.*

...

*The student must be monitored at all times while in the time-out room. But for safety, no adult must stay with the student in the time-out room. If a teacher is needed in their classroom they should appoint an aide to monitor the student.*

...

*As soon as the student is calm let them out. Keep time-out as short as possible—rule of thumb is no more than a minute for each year of their age...*

*The decision whether to leave the light on/off should be made with knowledge of the individual student and what works best for them.*

75. Miramar advised that GSE specialists were involved in the development of the *'time-out room'* policy. It explained also that its policies and procedures are reviewed as required and at least once every three years, with the last review having been completed in 2014.

### Response to Ms G's recommendations

76. Miramar advised my Office that following Ms G's recommendations:
- a. it stopped using the *'time-out room'* and removed the door on 8 October 2016;
  - b. it is fully involved with two Ministry programmes: *'Understanding Behaviour, Responding Safely'* (UBRS) and *'Positive Behaviour for Learning'* (P4BL);
  - c. overarching procedures in relation to behaviour management were reviewed to reflect best practice;
  - d. a substantive intervention and support plan was put in place in association with the Ministry, which included:
    - i. measures to address and manage staff and parent concerns and issues in relation to the Kowhai Unit;
    - ii. the development of new guidelines for managing extreme behaviour;
    - iii. an increase in on-site resourcing to assist with the implementation of new behaviour management strategies;
    - iv. a review of BMPs for all students at risk of extreme behaviour, and all IEPs;
    - v. the complaints policy was made accessible from the school's website; and
    - vi. concerted efforts were made by the Board Chair to facilitate a meeting with B's family, but Ms A had not responded.

## Information from the Ministry

### The 2016 Guidance

77. As noted previously, the Ministry responded to Ms G's final recommendation from her investigation into Ruru by setting up an Advisory Group, which convened for the first time in June 2015. The group included representatives from the New Zealand School Trustees Association, education unions, principals' groups, the Ministry of Health, the Ministry of Education (including Ms G), and Child Youth and Family's High and Complex Needs Unit. The Advisory Group met once or twice a month between June and October 2016 and considered a range of information, including a series of background papers prepared by Ms G, and legal advice.
78. By October 2015, two sets of guidelines had been formulated: *'Physical Restraint'* and *'Transitional Guidelines as we move towards the Elimination of the Use of Seclusion in New Zealand Schools'*. The draft guidelines were submitted to the Ministry to be finalised

and socialised. This involved seeking further legal advice and having a working group formulate a training package to support schools with the proposed guidelines. That group convened for the first time in February 2016. Further stakeholder consultation was undertaken and, from late July 2016, the Ministry began trialling the training package. By August 2016, a final draft of the training package had been prepared. At that stage, the Ministry's intention was still to support schools to work towards the elimination of seclusion.

79. In October 2016, the Minister for Education directed the Ministry to work on ending the use of seclusion in schools as soon as possible. The two sets of draft guidelines were combined into one document and amended to reflect the change in approach. On 3 November 2016, the Acting Secretary for Education wrote to all schools advising that the use of seclusion was no longer acceptable and the 2016 Guidance was issued.
80. The Ministry identified that the guidance would likely encourage schools to stop using seclusion but may not end the practice entirely. Legislative change was proposed accordingly.
81. The Ministry acknowledged that the process of developing the new guidance took longer than anticipated, attributing this in part to it being developed by a cross-sector led group. In addition, there were areas of disagreement that took time to work through and consult on.
82. The Ministry acknowledged that it could have acted sooner and perhaps provided schools with interim guidance on the areas where there was agreement, such as the use of preventative and de-escalation techniques for managing behaviour.<sup>3</sup>

### Previous guidelines

83. As outlined above, the 2016 Guidance included a definition of seclusion, and advice that its use is no longer acceptable. The use of seclusion in schools is now prohibited by law.
84. Prior to this, the Ministry had developed guidelines in 1998 on *'Managing Extreme Behaviour in Schools'* (1998 Guidelines). These were described as primarily a resource for classroom teachers. They were revised in 1999 and 2005, and effective until the 2016 Guidance was issued. The 1998 Guidelines did not refer to seclusion, but they referred to time-out rooms as follows:

*Timeout is when a student is removed from other students for a specified period of time. Sometimes special timeout rooms are used. Timeout is often misused and misunderstood.*

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<sup>3</sup> As noted in paragraph 43, the 2016 Guidance was updated in August 2017 to align with the new legislation— see: <https://www.education.govt.nz/assets/Documents/School/Managing-and-supporting-students/Guidance-for-New-Zealand-Schools-on-Behaviour-Mgmt-to-Minimise-Physical-....pdf>

*Timeout rooms should not be used. They are not necessary and can result in teachers and schools being accused of using inhumane and cruel punishments.*

*A major disadvantage of timeout is that it does not teach the student alternative appropriate behaviours. Use Mini-timeout or Easy Change.<sup>4</sup>*

85. In October 2007, the Ministry issued 'Time-out and Physical Intervention Practice Guidelines' (2007 Guidelines). These were developed for internal use by Ministry Special Education staff working with children and young people who presented with challenging behaviour in an early childhood or school setting. The 2007 Guidelines stated:

***Isolation (Seclusion)***

*Sometimes when teachers refer to time-out, they are referring to a procedure, which involves removing the child/young person to a 'time-out room'. This is one type of time-out and is discussed in these guidelines under the heading of isolation. Isolation involves placing the child/young person in an environment such as a room, by him or herself, for a specified period. [...]*

*The Ministry of Education, Special Education does not recommend any form of time-out procedure in an Early Childhood/School setting, which involves a child/young person being shut in a room, or screened area, by him or herself without any way of getting out unless someone comes to release them. This is a form of isolation (seclusion) and is not an appropriate practice in an Early Childhood/School setting.*

## 2016 survey of schools

86. In October and November 2016, the Ministry undertook a survey of all 2529 state, state integrated, partnership, and private schools in New Zealand, to identify which schools were using seclusion and to work with those schools to eliminate its use. Stage 1 of the survey involved schools self-identifying as using or potentially using seclusion. Stage 2 involved Ministry staff visiting the schools that had self-identified using seclusion in 2016 and discussing current practice.
87. Of the 36 schools that self-identified as potentially using seclusion:
- five had not used seclusion in 2016;
  - 14 were considered to have used appropriate time-out behaviour management practices that did not constitute seclusion; and
  - 17 were considered to have used seclusion in 2016.

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<sup>4</sup> Mini-timeout is described as 'a planned procedure where a student removes him or herself to a specified space nearby for a brief period of time, usually less than a minute. Students choose to use Mini-timeout.' Easy Change is 'a planned alternative activity in which students can be motivated to walk unassisted (but accompanied) ... to engage in an alternative previously practised activity which has a calming effect...'

88. Of the 17 schools that were considered to have used seclusion, five were special schools (ie, schools for students with high needs).
89. The Ministry acknowledged that in relying on schools to self-report, there was a risk that some schools may not have reported the use of seclusion. It noted this could have occurred for a variety of reasons, including the lack of clarity that had existed in the terminology used.
90. By the end of November 2016, the Ministry confirmed that all of the schools that had self-reported using seclusion in 2016 had ceased the practice and were using appropriate behaviour management techniques.

### Update on changes at Miramar

91. The Ministry advised it is confident that Ms G's recommendations in respect of Miramar have been implemented. The support plan put in place following her investigation was signed off on 22 February 2017.
92. The Ministry confirmed or advised further that:
  - a. it has continued to support Miramar with additional teacher-aide and teacher release funding, and the provision of specialist support;
  - b. it is supporting Miramar with its *'Inclusion Project'*, which is a three-year plan to include all students from the Kowhai Unit in regular classes and transform the unit into an inclusive learning space or hub;
  - c. it had delivered the UBRS programme and is continuing to support Miramar with the P4BL framework and by providing a lead worker for students who qualify for the ORS; and
  - d. in response to a recent request from Miramar, it will arrange for the delivery of *'Management of Actual or Potential Aggression'* training.

### New process in place for complaints about seclusion

93. The Ministry has further advised that while the standard process for resolving complaints about schools involves first raising any concerns with the principal or board of trustees, in the case of reports of or complaints about seclusion:
  - a. staff have been instructed to immediately escalate the matter to the relevant Director of Education for action;
  - b. the Director of Education would then initiate an investigation, which would include following up with the school and the complainant; and
  - c. an investigation could lead to a range of interventions, including providing advice to the school to ensure it is complying with the law, and working with the school to

ensure appropriate processes and supports for the management of challenging behaviour are in place.

94. In its response to my second provisional opinion, the Ministry also confirmed that its website would be updated, to ensure that anyone with concerns about seclusion knows to report these directly to the Ministry.

## Information from ERO

### Responsibilities and review process

95. ERO advised that the reviews carried out by or on behalf of the Chief Review Officer are formal assessments of the education service provided by schools and that:
- a. it does not have powers of investigation and enforcement in relation to health and safety issues;
  - b. the focus of an ERO school review is to look at the school's performance in learning, teaching, leadership, and governance;
  - c. before a review, ERO requires schools to complete a Board Assurance Statement and Self-Audit Checklists (BAS);
  - d. the BAS is a tool devised by ERO for school boards, as a self-audit checklist on compliance matters; and
  - e. the use of the BAS by ERO is *'very much based on a "trust" approach to statutory (and best practice) compliance by school boards'*.
96. It also maintained that the Education Act 1989 *'does not contemplate ERO investigating or monitoring issues such as seclusion in schools'*, although I note that ERO does report on health and safety issues arising from a review, which would include any risks to health and safety of students associated with the use of seclusion. ERO advised further that its reviews consider best practice, guidelines, policy and advice and that there were no established best practice guidelines for the use of seclusion prior to November 2016.

### ERO's 2014 review of Miramar

97. The most recent ERO review of Miramar prior to Ms A's complaint was conducted in April 2014. ERO advised that it had received no complaints about Miramar prior to, during, or immediately after that review.
98. In June 2014, ERO issued its review report. It was noted that the school was well placed to sustain and improve its performance, and that factors influencing this included: a *'strong focus on student wellbeing'*; *'regular, responsive consultation with parents, whānau, fono and students'*; *'positive, respectful relationships at all levels'*; and *'established reflective culture in the school with a growing evaluative aspect'*.

99. It was noted that before the review, the Board and the Principal had completed the BAS and attested that they had taken all reasonable steps to meet their legislative obligations, including those relating to the management of health, safety, and welfare. It was also noted that ERO had checked a number of items during the review, because they have a potentially high impact on student achievement. These included *‘the emotional safety of students (including prevention of bullying and sexual harassment)’* and *‘the physical safety of students’*.
100. The report indicated that the next review would likely take place in three years.

### Changes made

101. ERO advised that in light of the issues raised by the complaint and investigation in respect of Ruru, it had made a number of changes. Insofar as these relate to the information that ERO obtains about the way in schools manage challenging behaviour, those changes are relevant to this investigation also.
102. The changes ERO outlined relevant to this investigation were as follows:
- a. the Compliance Checklist has been updated to ensure review teams check and record how schools manage students with challenging behaviour;
  - b. the BAS has been revised to ensure consistency with the 2016 Guidance;<sup>5</sup> and
  - c. ERO has formalised its schedule of regional liaison meetings with the Ministry and agreed to the timely exchange of information.
103. Following my meeting with ERO in July 2017, it also agreed to amend its Compliance Checklist to ensure schools are asked directly about significant complaints and investigations.

### Further information from Ms A and Mr A

104. Ms A and Mr A advised that B has needed a significant amount of additional support and input as a result of what happened at Miramar. This included regular input from an Educational Psychologist. Ms A recently advised that B is doing very well at his new school but is not yet able to attend full-time, which has impacted on her ability to return to paid employment as intended.

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<sup>5</sup> The BAS has been further updated to align with the 2017 Guidelines. Section 3 of the Self-Audit Checklist relates to *‘Health, Safety and Welfare’*. Within this section, question 3 refers broadly to behaviour management, while question 30 asks specifically whether the school board has *‘developed policies, procedures and practices on good behaviour management practice, including elimination of seclusion and the need to minimise physical restraint for students and staff wellbeing that follow the Ministry of Education’s Guide’*. Question 31 requires the school board to answer 14 specific questions about the use of physical restraint. Question 20 refers specifically to the welfare and safety of students at off-site locations, where premises outside the school are being used to provide education to students on a long-term or full-time basis.

105. In her response to my second provisional opinion, Ms A noted that between July and September 2016 she alerted the Ministry, through B's key worker, of her intention to contact the media if Miramar did not stop using the *'time-out room'*.

## Further information in response to first provisional opinion

### Miramar

106. On the basis of information provided to me by the Ministry, it was noted in my first provisional opinion that the Ministry had advised Miramar on two occasions following receipt of Ms A's complaint to stop using the *'time out room'*.

107. Miramar has disputed this, advising that at no time during the review process was the school advised to stop using the *'time-out room'*. Miramar provided the following additional information about its communication with the Ministry following Ms A's complaint.

- a. When the Ministry contacted the Principal on 25 July 2016, it advised that new guidelines were coming out. Mr F confirmed that the *'time-out room'* would not be used for B and an alternative management strategy would be worked through.
- b. The Board Chair contacted the New Zealand School Trustees Association on 4 August 2016, and the Ministry on 5 August 2015, to seek clarification on the process, but *'[at] no time was the Chair advised to stop using the room'*.
- c. At a meeting on 22 September 2016, the Ministry provided Miramar with the transitional guidelines.<sup>6</sup> The focus of the meeting was on those guidelines and Ms G's recommendations. The Ministry and the school discussed closing the *'time-out room'* and how the Ministry would support the school to implement positive behaviour management strategies. An email exchange between Mr F and Ms I, Regional Manager Special Education, following this meeting confirmed the agreed outcomes.
- d. On 8 October 2016, the Board decided to close the *'time-out room'* and the door was removed. Miramar stated that even in its contact with the Ministry that day, Ministry staff *'were still using the language of phasing out'*.
- e. There was a further meeting between the Ministry and Miramar on 1 November 2016, during which Miramar expressed concerns about the Ministry's media statement of 21 October 2016, including concerns about the substance and timing of the Ministry's advice regarding continued use of the room. Miramar confirmed those concerns in a follow-up letter, dated 19 December 2016.
- f. On at least three occasions in 2017, Miramar contacted the Ministry seeking a response to its letter of 19 December 2016. On 30 October 2017, Ms J, Manager

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<sup>6</sup> See paragraphs 25 and 78.

Learning Support (Wellington region) responded. Ms J apologised for the delay and responded to Miramar's specific concerns about the Ministry's media statement. She noted that a review of the documentation indicated there were several discussions around use of the room and how this might be phased out. Ms J stated:

*I can see that the Ministry was not clear and direct enough about what its expectations were during discussions. While our intent was to stop the use of the room this was not articulated well and on both 26 July and 22 September agreements were made that Ministry staff agreed with that made that intent less clear.*

*It is worth noting that on 21 October Katrina Casey, Deputy Secretary, Sector Enablement and Support issued a formal apology where she stated that it was clear that the [Ministry] didn't act with the urgency it should have to stop the use of seclusion.*

## Ms C

108. In response to the relevant sections of my first provisional opinion, Ms C commented as follows:

- a. She and Ms A had many informal and unrecorded discussions in which Ms A verbally agreed to suggestions for managing B's behaviour. That is what occurred on 20 June 2016, and that is why her email the following day referred only to how the use of the 'time-out room' would be written up in B's BMP, rather than to the actual use of the room.
- b. Ms C discussed issues relating to B's behaviour and work with Ms A virtually daily, sometime twice daily. Ms C consulted with Ms A and staff about strategies for managing B's behaviour, and took steps to ensure everyone was aware of any changes.
- c. Ms C made her own record regarding the use of the 'time-out room' for B on 20 June 2016. This was in the context of 'professional issues' between her and her manager. Ms C said that her manager spoke to her that day, indicating she was unhappy that Ms C had put B in the room without consulting Ms A first. Ms C said she advised her manager that she had consulted with Ms A that morning, and would be sending a follow-up email to update the BMP.
- d. Ms C stated that she would not have gone against Ms A's wishes or assumed consent, because they had established 'a relationship of professionalism, collaboration, openness and honesty around [B's] learning and behaviour' early in the year.
- e. Ms C disputes that Ms A did not know of the 'high probability of the time out room being used', given the escalation of B's unsafe behaviours and their discussion on the morning of 20 June 2016.

## The Ministry

109. In its response, the Ministry accepted my finding in respect of its actions (see below) and noted the changes that have been implemented since November 2016. The Ministry also clarified the timeframes regarding the advice it provided to Miramar between July and October 2016.

## Discussion and findings

### Miramar

110. The purpose of this investigation is not to conduct a wholesale re-investigation of matters considered by Ms G on behalf of the Ministry.
111. I have noted Ms A's concerns about that investigation, including that it did not capture the extent to which Miramar's *'time-out room'* was used. While further investigation by my Office may have elicited some additional evidence about the use of the room, this report does not purport to be a definitive account of exactly when, how, and why the room was used, or who was involved.
112. Ms A also expressed concern that the overall tone of Ms G's report suggested an attempt to protect the school and the Ministry. I am satisfied that, drawing on information gathered by Ms G, as well as information provided to me directly by Miramar, the Ministry and ERO, I have independently assessed the relevant issues.
113. The focus of this investigation in respect of Miramar is whether it acted unlawfully, unreasonably, unjustly, oppressively, or improperly discriminatorily by using its *'time-out room'* to manage B's behaviour.<sup>7</sup> The following matters are relevant to that question.

### B was put in the *'time-out room'* on multiple occasions

114. There is no question that B was put in the *'time-out room'*. Ms G referred to records showing that he was put in the room 13 times, while Ms A understood the records as indicating he was put in the room 32 times. This discrepancy results from the way in which staff recorded use of the room. There were 13 separate entries in the *'time-out room'* log relating to B. However, on some occasions separate entries were made for consecutive one-minute periods spent in the room, while at other times consecutive minutes were combined in one entry. In addition, it is not always clear whether a number in the log refers to the duration or the number of times B was placed in the room. (For example, *'Time-out room x3'* could mean B was put in the room once for three minutes, or three times for one minute each time.)
115. It is evident, however, that in terms of recorded use, B was put in the *'time-out room'* on eight of the fourteen school days between 20 June and 7 July 2016. The total time spent

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<sup>7</sup> See paragraph 53.

in the room on each of these days was between one and fifteen minutes. The total time for the eight days was not less than fifty-seven minutes.

116. Information provided to Ms G during staff interviews indicates that B may have been placed in the room on other occasions, for which no record was made. While I have seen no evidence that points conclusively to B being put in the room on other occasions and before 20 June 2016, I do not rule out that possibility.

### Miramar's use of its 'time-out room' constituted seclusion

117. B was put in the 'time-out room' alone, with the door shut and locked. On at least one occasion—7 July 2016—he was left unsupervised.
118. As outlined earlier, seclusion in the context of a school was not clearly defined until the 2016 Guidance (see para 45). On the basis of that definition, it is evident that B was secluded.
119. However, this is not a case that turns on matters of definition. If seclusion practices were to be considered on a continuum, Miramar's practice on some occasions at least, appears to have been at the extreme end. By *any* definition that I have seen, Miramar's use of its 'time-out room' for students including B constituted seclusion.

### The adequacy of Miramar's 'time-out room' policy

120. It should not be inferred from my comments in this section that a robust, comprehensive policy would have rendered the use of seclusion acceptable, and I will outline my concerns in this regard shortly. However, in addition to my concerns about the practice *per se*, I consider that Miramar's 'time-out room' policy was inadequate in several respects. For example:
- a. There was nothing in the policy to prompt staff to consider whether a student exhibiting difficult behaviour had particular needs or vulnerabilities—disability-related or otherwise—to be taken into account when deciding whether or how to use the 'time-out room'.
  - b. Although the policy stated that students should be warned that they would be put in the room if their behaviour continued, it made no reference to the room being used only when efforts to de-escalate a situation and manage it with less restrictive measures had failed.
  - c. The policy was silent on communication with parents/caregivers. It did not cover the need for consultation with parents/caregivers when use of the room was proposed for the management of extreme behaviour, or the need to inform them after their child had been put in the room.
  - d. It is evident that in some situations, some form of physical restraint was deemed necessary in order to move a student who was out of control to the 'time-out

*room*'. The policy did not include or refer to guidance on acceptable methods or techniques for moving a student to the room.

### *'Time-out room'* not used in accordance with Miramar's policy

121. Again, putting to one side my fundamental concerns about Miramar's *'time-out room'* practice, as well as the adequacy of its policy, I note that the room was not always used in accordance with key aspects of the policy that was in place.
122. Of particular concern is evidence indicating that the room was not used only when a child was *'out of control and violent representing a real risk'*, but also for lesser incidents that were more about a lack of co-operation or disobedience. When B was put in the room on 20 June 2016, for example, the precipitating incident was recorded as: *'Throwing bean bags. Didn't stop when requested.'* Most of the other entries relating to B refer to him grabbing or trying to grab a staff member. While this may have presented a significant risk to staff safety, the records provide little detail to confirm that was the case. In some cases, it was noted that time-out on a chair had been tried first, but otherwise there is minimal information about efforts to calm B using less restrictive interventions.
123. In its response to my second provisional opinion, Miramar stated that it was certain that B was *'only ever put in the time-out room when several formative options (with specialist guidance) had been attempted, without any change in his aggressive behaviours towards others'*.
124. There are also several entries in the *'time-out room'* log relating to other students, which similarly indicate the room was used to deal with behaviour that did not, on the face of it, appear to pose a risk to safety. These include: a student refusing to come out from under a table and stand with other children; a student ignoring instructions and rolling on the floor; a student who would not do as asked and refused to apologise; and a student who would not get out of the swimming pool and was put in the *'time-out room'* on their return to school.
125. The policy also required students in the *'time-out room'* to be monitored at all times. That did not occur when B was put in the room on 7 July 2016. Information provided to Ms B indicated a failure to monitor on other occasions. I regard this as unacceptable in and of itself, as well as contrary to Miramar's policy.

### Use of *'time-out room'* contrary to best practice and Ministry advice

126. As I stated in my report into the complaint about Ruru<sup>8</sup>, acceptable practice for the management of students exhibiting behaviour that poses a risk to themselves or others is not static. Over time, society develops better understandings of the ways in which the rights of children and young people should be met—including in and by schools. We

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<sup>8</sup> Available at: [http://www.ombudsman.parliament.nz/ckeditor\\_assets/attachments/556/Ruru\\_School\\_seclusion\\_complaint\\_final\\_opinion.pdf](http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/556/Ruru_School_seclusion_complaint_final_opinion.pdf)

learn more about what is therapeutically effective. We recognise the consequent need for changes in practice.

127. I acknowledge that when Miramar's *'time-out room'* was constructed in 2002-2003 and the *'time-out room'* policy was developed, the level of knowledge and understanding regarding the use of such rooms did not exist as it does now.
128. However, it is concerning that Miramar continued to use the room in the way that it did, and primarily for students with special needs, until late 2016. This was despite the policy being reviewed at least once every three years, including in 2014.
129. As a school with a specialised unit for students with high and complex needs, it might reasonably have been expected that Miramar would be aware of changing practices and the growing body of evidence indicating that the use of seclusion is both ineffective and harmful. That is to say, I would have expected Miramar to have identified sooner that the way in which it used its *'time-out room'*, especially for students such as B, was inconsistent with best practice.
130. It was stated at the end of Miramar's *'time-out room'* policy that students sometimes choose to use the room as *'a sanctuary'* and, with the door left open, this was to be encouraged *'as an excellent use of this facility'*. This was, in fact, the only basis on which students should have spent time alone in the room.
131. In its response to my first provisional opinion, Miramar noted that GSE specialists liaise with Kowhai Unit staff on a regular basis, and would have known about the existence and use of the *'time-out room'*. Miramar stated that *'at no stage was [this] flagged as an issue'*.
132. As outlined earlier, the Ministry had developed guidelines in 1998 that advised against using a time-out room to remove a student for a specified period of time. The 1998 Guidelines were reviewed in 1999 and 2005, and remained effective until the new guidance was issued in November 2016. In these circumstances, it appears that Miramar was using its *'time-out room'* contrary to the Ministry advice effective at the time.
133. However, there is no evidence that Miramar was provided with or had access to the 1998 Guidelines. I will comment on this further below.
134. The absence of national guidance does not, however, absolve Miramar of responsibility for having appropriate policies and procedures in place.

## The law and international conventions

135. When B was put in the *'time-out room'* at Miramar in June and July 2016, there was no legislative authority for the use of seclusion in schools. It could be argued that if Parliament had intended for schools to have that option, it would have provided that

authority as it did in respect of mental health and intellectual disability, for example.<sup>9</sup> However, in order to provide greater clarity, the Education Act 1989 was amended in April 2017 to include an explicit prohibition on the use of seclusion in schools. There can be no doubt that Miramar's use of the 'time-out room' in 2016 for B was contrary to the law as it now stands. The question arises as to whether it was contrary to the law as it existed in 2016.

136. It could be argued that without express legislative authority, the use of seclusion in a school setting was potentially an act of unlawful detention or false imprisonment. This gives rise to a number of issues, such as how that fits with a school's obligations, including under the Health and Safety at Work Act 2015, to protect the health and safety of its students and staff.
137. As outlined above, I have concerns that B (and other students) was placed in the room not because his behaviour was '*out of control and violent representing a real risk*' to his safety or the safety of others, but for less extreme behaviour, including potentially for punitive reasons. I have also noted that on one occasion at least, B was locked in the room and not monitored. In these circumstances, the grounds for concluding that B was unlawfully detained are in my view, stronger than if it could be shown that his behaviour met the criteria set out in the '*time-out room*' policy and the procedure for use of the room was fully complied with.
138. The use of the '*time-out room*' to manage B's behaviour also raises the possibility that B's rights under the Bill of Rights Act 1990 were contravened, and that Miramar's actions were not in accordance with New Zealand's international obligations under the United Nations Convention on the Rights of People with Disabilities (UNCRPD), the United Nations Convention on the Rights of the Child (UNCROC), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Several provisions are potentially relevant including, in particular, those relating to the right not to be unlawfully or arbitrarily detained, and the right not to be subjected to disproportionately severe treatment or punishment.<sup>10</sup>

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<sup>9</sup> Mental Health (Compulsory Treatment and Assessment) Act 1992, section 71; and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, section 60.

<sup>10</sup> For example:

The Bill of Rights Act 1990 includes rights to freedom of movement (section 18), not to be arbitrarily detained (section 22), and not to be subjected to torture or to '*cruel, degrading, or disproportionately severe treatment or punishment*' (section 9);

The UNCRPD provides that '*the existence of a disability shall in no case justify a deprivation of liberty*' (Article 14) and for '*freedom from cruel, inhuman or degrading treatment or punishment*' (Article 15);

Article 37(b) of UNCROC provides that '*no child shall be deprived of his or her liberty unlawfully or arbitrarily*'; and

Article 16 of the Convention Against Torture provides for the prevention of '*cruel, inhuman or degrading treatment or punishment*'.

### B's parents did not consent to use of the *'time-out room'*

139. Records indicate that B was first put in the *'time-out room'* on 20 June 2016. There was nothing in writing at this time to indicate that use of the room had been discussed with, and agreed to, by his parents.
140. The question of whether Ms A had verbally consented to use of the *'time-out room'* on 20 June 2016 prior to B being put in the room later that same day, is disputed. I acknowledge Ms C's comments in response to my first provisional opinion. However, in all the circumstances, I find it unlikely that Ms A was shown the room and verbally consented to its use.
141. Whatever discussion had taken place between Ms C and Ms A, Ms C followed up by email on 21 June 2016, seeking Ms A's agreement to the revised BSP. In my first provisional opinion, I stated that the fact that Ms A did not reply signalled a need to follow up, not to assume agreement. Ms C responded that it was not a question of assuming agreement; she believed that Ms A had agreed to the use of the room and her email was simply to confirm how this would be recorded in B's BSP.
142. I remain of the view that B was put in the *'time-out room'* before either of his parents had clearly confirmed that they were aware of what was intended and comfortable with this. Aside from the issue of whether B should have been put in the *'time-out room'* at all, he should certainly not have been put in there without his parents' knowledge and consent.

### B's parents not informed after B was put in the *'time-out room'*

143. There is no evidence that Ms A and Mr A were informed after any of the occasions on which B was put in the *'time-out room'*.
144. At Ms E's suggestion, a communication book was used to facilitate communication between his parents and those teaching and supporting B at school. As well as recording the activities he was engaged in, there was a separate section for behavioural concerns and successes. An entry on 20 June 2016 refers to B being taken for *'1 minute time-out'* but aside from Ms E's entry of 7 July 2016, there are no entries that refer to B being put in the *'time-out room'*.
145. Miramar's *'time-out room'* policy provided that a student should be placed in the room only if they were deemed to be *'out of control and violent representing a real risk'* to themselves or others, or to school property. I have already noted my concern that in practice, the room was used for less extreme behaviour. However, again leaving aside the question of whether students should have been put in the room at all, the parents/caregivers of children who were put in the room should certainly have been informed.
146. While I would expect this to occur in respect of *any* child, it is particularly important for children who may themselves be unable to clearly or fully communicate their experience and any associated thoughts and feelings.

147. Staff at Miramar were aware that Ms A and Mr A were concerned about a deterioration in B's behaviour. If his behaviour at school on any given day was such that staff deemed it necessary to use the 'time-out room', there can be little doubt that his parents should have been told.

### The adequacy of Miramar's record-keeping

148. As Ms G outlined, Miramar's records were problematic in several respects. The systems in place did not provide for relevant information to be recorded in a coherent and consistent way. The records that were made were too often insufficient, incomplete, ambiguous, or contradictory. Records that should have been signed off by staff and parents/caregivers were not.

149. The importance of good record-keeping should not be underestimated. Clear and accurate records assist those involved in the care and education of a student to monitor, assess, and plan. Schools are subject to the Public Records Act 2005, which requires agencies to create and maintain full and accurate records of their affairs, in accordance with normal, prudent business practice. Records are also essential in the event of a complaint or investigation.

### Conclusion

150. In light of the factors outlined above, it is my provisional opinion that Miramar acted unreasonably in using its 'time-out room' to manage B's behaviour. In particular:
- a. it appears that B was put in the room for behaviour that did not necessarily pose a real risk to safety and which could have been managed with less restrictive interventions;
  - b. insufficient regard was had for B's disabilities and the potential impact on him of being locked in the 'time-out room';
  - c. on at least one occasion, B was put in the room and left unsupervised; and
  - d. the room was used in a way that was contrary to best practice and Miramar's own policy;
  - e. B was put in the room without the knowledge and consent of Ms A and Mr A; and
  - f. staff did not inform Ms A and Mr A about any of the occasions on which B was put in the room.

On the basis of points a. to c., in particular, I also consider that the use of the 'time-out room' was oppressive.

151. In addition, I consider that Miramar's use of its 'time-out room' to manage B's behaviour:
- a. amounted to 'disproportionately severe treatment or punishment' for the purposes of section 9 of the Bill of Rights Act 1990; and

- b. was inconsistent with New Zealand's obligations under the Convention on the Rights of People with Disabilities (Article 15) and the Convention Against Torture (Article 16).<sup>11</sup>

152. Further, in all the circumstances of this case and on the basis of the evidence I have reviewed, I consider that the way in which the 'time-out room' was used at Miramar in respect of B may have been without lawful justification.<sup>12</sup>

## The Ministry

153. When Ms A complained to the Ministry in July 2016 about the use of seclusion at Miramar, the Ministry was in the process of finalising new guidelines, the need for which had been identified in February 2015 following a Ministry-initiated investigation into a complaint about seclusion at Ruru.

154. As noted above, I have also investigated a complaint about Ruru. My findings in that investigation in respect of the Ministry are, in several respects, also relevant to this case and included here accordingly.

## Ministry advice and guidance prior to Ms A's complaint

155. I have two concerns about the advice and guidance that was provided to schools by the Ministry in respect of seclusion, prior to Ms A's complaint:

- a. the lack of advice provided prior to the issuing of the new guidance in November 2016; and
- b. the delay in providing clear and up-to-date guidance, after the need for this was identified in early 2015.

## Advice provided to schools prior to November 2016

156. The Ministry was involved in approving plans for the construction or conversion of rooms in schools that could be used for a student in a heightened state needing a space away from other students in which to calm. This included the approval of plans in 2002-2003 for the construction of a time-out room at Miramar. However, the Ministry considers that if schools were using those rooms for seclusion, that would have been contrary to its guidance.

157. The Ministry acknowledges that until the new guidance was issued in November 2016, there was a lack of clarity amongst schools about what was meant by seclusion, what was meant by time-out, and what did and did not constitute acceptable practice.

158. This was arguably evident from the Ministry's own guidance. The 1998 Guidelines, which remained effective until November 2016, did not refer to seclusion but did comment on

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<sup>11</sup> See footnote 10.

<sup>12</sup> See paragraphs 136–138.

the use of time-out rooms. They stated that in relation to the practice of removing a student from other students for a specified period of time, time-out rooms *'should not be used'*.

159. There is also a question as to schools' awareness of the 1998 Guidelines and their availability. Ms G noted in her report on Ruru that the New Zealand School Trustees Association (NZSTA) was unable to offer any guidelines, and that despite contacting the Ministry she had been unable to locate any guidelines about the use of time-out facilities or safe rooms. It would appear she was not provided with the 1998 Guidelines. If neither the Ministry nor the NZSTA was aware of these, the extent to which they were known to, and accessible by, individual schools would seem highly questionable. The Ministry has provided no evidence to indicate that the 1998 Guidelines were provided or made available to schools.
160. The 2007 Guidelines, developed for internal use by Ministry staff working in special education, stated that the Ministry did not recommend any form of time-out procedure that involved a child or young person being shut in a room or screened area, by him or herself, without any way of getting out unless someone came to release them.
161. As I have said, acceptable practice in relation to the management of students exhibiting difficult behaviour has evolved over time. However, it would seem that by 1998 if not before, the Ministry was of the view that seclusion should not be used. I consider that it should have done more, sooner, to provide schools with clear and unambiguous guidance, and its failure to do so was unreasonable.

### **Delay in issuing 2016 Guidance**

162. The need for better guidance was highlighted by the complaint about Ruru. The delay between the investigation of that complaint (February 2015) and the issuing of the new guidance (November 2016) is therefore a further concern.
163. In February 2015, Ms G recommended that the Ministry convene a working party to consider the use of seclusion and restraint in schools and to investigate best practice models. The Advisory Group convened for the first time in June 2015 and draft guidelines were submitted to the Ministry in October 2015. A further working group was set up to develop a training package, and the Ministry obtained further legal advice. It was not until November 2016—more than eighteen months after Ms G's recommendation—that the guidance was issued. But for the media attention from early October 2016, it may have taken still longer.
164. It is clear that the process of developing the new guidance was no easy undertaking. However, the fact that the guidance was not issued until November 2016 meant that in the meantime, most schools and staff continued to operate as they had been. It was during this period that the events giving rise to the complaint about Miramar arose, in addition to two further complaints that included concerns about the use of seclusion.

165. The Ministry attributes the delay at least in part to the fact that it was developed by a cross-sector led group, as well as the time needed to work through areas of disagreement. In addition, the Advisory Group recognised that schools that were going to need to change their practices would need training and support. While these are valid considerations, this was a matter of some urgency and I consider that the Ministry should have pushed to ensure the new guidance was available sooner, or provided interim guidance to the extent that this was possible.

### The Ministry's response to Ms A's complaint

166. As outlined above, on 22 July 2016 Ms A submitted her complaint to the Board and to the Ministry. The Ministry contacted Miramar early the following week, and it was agreed that an independent investigation would be carried out.

167. It is evident from the responses to my first provisional opinion that prior to Miramar itself deciding on 8 October 2016 to stop using the *'time-out room'*, the Ministry did not clearly advise it do so. The message from the Ministry during this period appears to have been that Miramar should work on phasing out its use of the room. This was consistent with the draft guidelines at the time, which were transition guidelines for the elimination of seclusion.

168. On 3 November 2016, the Ministry advised all schools that the use of seclusion was no longer acceptable.

169. The Ministry has acknowledged that did not act with the urgency it should have to stop the use of seclusion and that it should have acted more decisively in response to Ms A's complaint.

### The Ministry's awareness and oversight of the use of seclusion in schools

170. The Ministry had its own staff and teams working directly with schools who were dealing with students exhibiting challenging behaviour. While that did not involve all schools or students it meant that, to some extent, the Ministry had both the means and opportunity to observe the ways in which schools were using their time-out rooms and to ensure appropriate behaviour management and crisis management techniques were being used.

171. The Ministry's role in approving the construction of rooms such as Miramar's *'time-out room'* and in assisting schools with the development of related policies, is also relevant.

172. The Ministry has advised that complaints about seclusion or other restrictive practices were dealt with in regional offices, with no central repository for complaints. As such, the Ministry was unaware of the number and nature of complaints received.

173. In response to my enquiries, the Ministry advised that in addition to the complaints about Ruru and Miramar, six complaints about the use of seclusion had been received in the previous five years.

174. It is unfortunate that the Ministry was not more alert to the fact that some schools were using their facilities in ways that were contrary to its guidance and best practice.
175. It is appropriate that the Ministry has now recognised the need for complaints about seclusion to be escalated to National Office and centrally recorded.

## ERO

### ERO's systems for reviewing seclusion or time-out rooms and their use, in the context of its role and responsibilities

176. My investigation in relation to Ruru also considered the adequacy of ERO's systems for reviewing seclusion or time-out rooms and their use, in the context of its role and responsibilities. My comments in this regard are relevant also to Miramar.
177. ERO's most recent review of Miramar was in 2014. There was nothing in the review report to indicate that health and safety concerns were not being managed appropriately. Miramar was, at this time, using its '*time-out room*' to manage students exhibiting difficult behaviour.
178. ERO is responsible for evaluating a school's performance in the delivery of education, including whether a school board is complying with requirements to provide students with a safe physical and emotional environment.
179. ERO notes that its approach to statutory and best practice compliance by school boards is, with the use of the BAS, '*very much a "trust" approach*'. I consider this renders it all the more important for ERO to ensure its self-audit checklists and the questions asked in the course of a site visit capture all relevant matters in sufficient detail. This includes matters with the potential to impact directly on the physical and emotional safety of students, and that would certainly include a school's policies, procedures, and practices for the management of students whose behaviour poses a serious risk of harm to themselves or others. I would expect that to include an inspection of any rooms or spaces used for managing students at such times.
180. It does not appear that, at the time of its 2014 review of Miramar, the arrangements ERO had in place necessarily provided for relevant information to be captured. It is appropriate that ERO has taken steps to ensure review teams check and record how schools manage students with challenging behaviour. I note also ERO's advice that the BAS have been revised for consistency with the 2016 Guidance.

## Chief Ombudsman's opinion

181. It is my opinion that:
  - a. Miramar acted unreasonably and oppressively in using its '*time-out room*' to manage B's behaviour; and

- b. the Ministry's failure to provide schools with clear and unambiguous up-to-date guidance in relation to the use of seclusion was an unreasonable omission.

## Recommendations

182. Miramar, the Ministry, and ERO have made a number of changes as a result of this complaint, Ms G's investigation, and the complaint and investigations in respect of Ruru. I note, in particular, the changes that have occurred at a national level with the issuing of new guidance, the legislative change to reinforce the prohibition on seclusion in schools, and the process now in place for any concerns about the use of seclusion to be escalated immediately to the Ministry.

183. I recommend that:

- a. notwithstanding the apology previously provided for the distress caused, Miramar provides B and his parents with a further written apology for the failings identified in this report;
- b. in recognition of the circumstances in which B was secluded and the nature of that seclusion, as well as the financial implications of the additional support B has needed over the past year, Miramar makes an *ex gratia* payment of \$3000 to B;<sup>13</sup> and
- c. Miramar takes the following steps in respect of recommendations a and b:
  - i. within 15 working days of this opinion being issued, provides me with a copy of the proposed apology for my review, before this is sent to B and his parents;
  - ii. within one month of this opinion being issued, confirms that the *ex gratia* payment has been made.

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<sup>13</sup> It is rare for an Ombudsman to recommend such a payment, but in my opinion, the facts in this case are sufficiently singular as to justify it. I say this because every case will depend on its own facts, and I do not seek to set any precedent of wider application.