BARRIERS TO INCLUSIVE EDUCATION IN NEW ZEALAND: ENFORCING A RIGHT TO SPECIAL EDUCATION

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Despite the ideology of an inclusive public education system, the ubiquitous discontent with the provision of special education in New Zealand is illustrative of wide scale problems and systemic failure. There has been an increasing tide of complaints relating to barriers to inclusive education for students with special needs from enrolment, to accessing support, and removal from education. Significant international law developments such as the United Nations Convention on the Rights of persons with disabilities has strengthened state obligations to ensure there are no barriers to inclusive education. Commentary by the United Nations Rapporteur on the right to Education has set out that the right to education must be capable of enforcement otherwise the substance of the right is illusory. In 2014 community law centre Youthlaw Aotearoa was involved in successfully bringing a case to the High Court in which the court overturned the decision of the Auckland based school board of trustees to exclude a student with disabilities. Known as the 'Green Bay case', it has been cited as a key case in catalyzing awareness and change in enforcing the right to special education in New Zealand.

I INTRODUCTION

This paper outlines the impact of reform of special education policy in New Zealand since the introduction of Special Education 2000 policy ('SE2000'). There is an increasing prevalence of school discipline being taken against special needs students in schools and a significant amount of criticism levelled at the provision of special education services since the introduction of SE2000. Strategic litigation has been utilized to enforce a right special education such as the recent case of *A v Hutchinson*[1] (otherwise known as *A v Green Bay*). This paper investigates the scope of the right to special education in New Zealand and the impact of strategic litigation.

Despite the ideology of an inclusive public education system, the ubiquitous discontent with the provision of special education in New Zealand is illustrative of wide scale problems and systemic failure. The New Zealand Herald has claimed that '[i]f the public was asked to choose the most worthy use of their taxation, children in need of special education would probably be at or near the top of the list'.[2] It is claimed that New Zealand is arguably in breach of its domestic and international law obligations. It is also alleged that the current status of special education in New Zealand is arguably one of the most pressing human rights issues facing New Zealand.

There is no doubt that the right to education is an essential human right and it is an essential means of realizing other rights.[3] 'Children develop their self-worth and respect for others through education'[4] Education increases the ability to contribute to, and fully participate in, families and communities. Education is the primary means for young people who have been economically

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and socially disadvantaged to lift themselves out of poverty, through developing skills and qualifications necessary for paid work.[5]

Barriers to inclusive education have consistently emerged as significant issues being the most frequent category of complaints for the Human Rights Commission, Office Of The Children's Commissioner, Families Commission, Ombudsman Office, IHC (Society for Intellectually Handicapped Children) and specialist youth community law Centre Youthlaw Aotearoa.[6] It has been claimed that there are 'considerable variations in educational standards for students with disabilities and unsafe school environments'.[7]

In 2014 Youthlaw Aotearoa ('Youthlaw') was involved in successfully bringing a case to the High Court in which the Court overturned the decision of an Auckland based School Board of Trustees to exclude a student with disabilities. The case presented at an opportune time with a changing legal landscape affording greater recognition of international conventions. The case of *A v Hutchinson* [2014] NZHC 253 (24 February 2014) otherwise known as *'A v Green Bay'* ('the Green Bay case') has been cited as a key case in seeking to enforce a right to special education and catalyze change at a policy level through strategic litigation.[8]

II The Right to Education and the Law

A *Domestic Law*

The *Education Act 1989* ('the education act') is the primary piece of domestic legislation which sets out a right to a free state sponsored education. Section 8 of the act sets out that 'people with special educational needs, whether because of disability or otherwise, have the same rights to enroll and receive education at state schools as people who do not'.[9]

Although Section 8 does not contain a vast amount of detail, international conventions which the New Zealand government has ratified color interpretation of domestic law. The New Zealand government has also developed its own disability strategy and guidelines affirming international law covenants providing more detail on the implementation of government international law and policy.[10]

B *International Law*

The United Nations Committee on Economic, Social, and Cultural Rights has stated that education in all its forms shall exhibit the following interrelated and essential features:

- availability
- accessibility
- acceptability; and
- adaptability[11]

There are a number of relevant international conventions such as the United Nations Convention On the Rights of the Child ('UNCROC')[12], and the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD')[13] which inform the right to special education in New Zealand.

UNCROC sets out obligations on state parties to ensure children can access a right to education on the basis of equal opportunity.

Article 24, a central article of the UNCRPD[14] sets out that state parties are to ensure:

- there is an inclusive education system at all levels;
- that children with disabilities are not excluded from primary and secondary education on the basis of disability;
- that persons with disabilities can access an inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live;
- that in realizing the rights of persons with disabilities to education, reasonable accommodation of an individual's requirements is provided;
- that persons with disabilities receive the support required within the general education system to facilitate their effective education;
- that effective individualized support measures are provided in environments that maximize academic and social development consistent with the goal of full inclusion.

III Reasonable Accommodation

Reasonable accommodation is a central concept when considering a right to special education. 'Reasonable accommodation' is defined the following:

Necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[15]

This definition prima facie provides for a logical and necessary inference of a positive obligation on states to undertake affirmative action where necessary to reasonably accommodate a person with special educational needs.

The United Nations special rapporteur on the right to education also provides commentary and guidance on giving effect to the right to Education. Key requirements the rapporteur has set out for countries in terms of implementing reasonable accommodation can be summarized as follows:

- The obligation to respect the right to education implies that states much avoid measures that hinder or prevent the enjoyment of the right to education
- The obligation to protect the right to education implies that state parties must take measures that prevent third parties from interfering with the enjoyment of the right to education
- The obligation to fulfil or facilitate the right to education implies that states must take positive measures that enable and assist communities to enjoy the right to education
- The obligation to fulfil or provide the right to education obliges state parties to provide a specific right when an individual or group is unable for reasons beyond their control to realize the right themselves by the means at their disposal.[16]

Lack of support or attempts to exclude special needs students from education may be unlawful if a state has not adhered to its obligations to reasonably accommodate a student with special needs.

IV JUSTICIABILITY

The rapporteur has also stated that the right to education should be 'justiciable' meaning that a right is effective and is able to be enforced. States must ensure that 'in addition to legislative measures, administrative, judicial, economic, and educational steps must be taken. State parties are also obliged to develop and set policies and set priorities consistent with [international law obligations]'.[17] In addition to this, effective remedies must be available to redress violations of the right. This includes access to independent complaints procedures and to the courts with necessary legal and other assistance. 'Litigation promoting the right to education is in the public interest. Violations of the right may be voiced in the media but they must be subject to effective adjudication'.[18]

Justiciability is thus a central component of an effective and genuine right to special education. It would be illusory to refer to a right to special education if it is not justiciable with components of enforcement and appeal.

V MAINSTREAMING SPECIAL NEEDS STUDENTS

Approximately a quarter of a century ago, the process of mainstreaming students with special needs into mainstream schools commenced. Prior to 1970, children with disabilities were segregated from mainstream schooling and society. Changing societal attitudes towards inclusion resulted in amendments to the *Education Act* with the resulting consequence that exclusion from mainstream could only be justified in the most exceptional circumstances.

Administration of special education was drastically altered with the introduction of the 'Tomorrow's Schools' policy otherwise known as Special Education 2000 or 'SE2000'. Prior to this, special education support and funding had been administered centrally by the Ministry of Education ('MOE'). SE 2000 was aimed at achieving mainstreaming of all special needs students at a local level and obviating the need for central bureaucratic administration and operating costs.

VI FUNDING OF SPECIAL NEEDS SUPPORT

Since SE2000, accessing support for special educational needs is now premised on a hierarchy system. Assessment of need of a student is now undertaken by the student's local school. Provision of support and funding is now primarily made through distribution of a bulk fund known as a Special Education Grant ('SEG'). The SEG is allocated to schools based on the number of students enrolled in a school and its decile rating. The local school is then vested with discretion to administer the SEG as required for all students in the school with low to moderate special educational needs.

When a student has higher needs that require targeted and intensive support, the school may apply jointly with the student's family to the MOE for a range of tiered initiatives. For what are termed 'extremely high and ongoing high needs', there is the Ongoing and Reviewable Resourcing Scheme ('ORS'). ORS is assessed based on fairly prescriptive, stringent criteria and example benchmarks. Students that do not have 'extremely high and ongoing high needs' but other high needs may apply for a number of other initiatives such as the Severe Behavior Initiative, Severe Language Initiative and a short term Intensive Wrap around Service.

There is also provision for support for some students through specialist teacher support at school known as Resource Teacher of Learning and Behavior ('RTLB'). Under Section 9 of the *Education Act* all students with special needs should have an individual education plan ('IEP')

that sets out a student's individual learning needs, education goals and the support to be put in place to achieve those goals.[19]

Under current MOE guidelines ORS funding is targeted at 1% of the school population.[20] There is no real explanation of reasoning behind the 1% cap. A 1999 MOE policy analyst report notes the MOE itself had actually approximated that 3% of all students had high or very high needs.[21] This estimate is also anecdotally supported by reports of stakeholders in the sector.[22] Given the limit of 1%, students with high needs who cannot obtain ORS support then face grappling to have their needs met within bulk SEG funds which schools should be utilizing to meet the needs of low to moderate needs students.

It has been reported that the narrow criteria under the high needs funding means that many students are not included.[23] This is not because those students do not need such support but rather because criteria is applied very prescriptively and narrowly.[24] It is also claimed that the criterion and benchmarks within ORS are arbitrary and inconsistent.[25] Extensive written applications must be formulated and it seems emphasis is placed on written content rather than a child's special educational needs. Any assessments of the child made in support of the application are paid for by the parents. The reliance on written reports means that children with similar special needs may have entirely different outcomes through the application process. Moreover, the application process for high needs funding is fraught with obstacles. MOE policies which dictate the process are subject to change and alteration without notice. There is a lack of consistency and transparency. There are no published guidelines or policy explaining how eligibility is assessed. Moreover, there is lack of any effective monitoring of decision making and no published protocol and procedure required.[26]

A review of SE2000 undertaken after implementation recorded that just under half of high needs applications succeed. Then report also indicated that the number of applications that failed from low-decile schools, and from Maori and Pacific island students was disproportionately high. It has also been reported that anomalous results have appeared – there are examples of two students with similar conditions applying, but only one receiving funding. The categories appear to be inflexible and do not allow any cross-over.[27] Anecdotal reports indicate that students with intellectual disabilities who cannot point to a physical need have more chance of accessing funding if exhibiting violent or aggressive behavior.[28]

Compounding the problems associated with this is the fact that SEG funds are calculated based on total enrolment numbers and decile rating. Funds are not allocated on the basis of calculated need of special needs students within a school. This formula bears no relationship to the actual number of special needs students enrolled and has no assessment or analysis of the actual support and funding required within the school. It is claimed that this funding methodology fails to ensure access to support for each student that requires support for their special educational needs. The current allocation of resources can severely stretch a school's SEG funds when they try to meet all the needs of special needs students that are enrolled. This is particularly true when certain schools obtain an exemplary inclusion reputation and attract more students with special needs despite not having the SEG funds to accommodate all of them.[29]

VII Impact of Special Education Policy Reform

From 1999 to 2001 a review of SE2000 was undertaken by Dr Cathy Wylie ('the Wylie report'). The Wylie report found that the introduction of SE2000 had placed a 'heavy responsibility' on mainstream schools. Throughout consultation with moderate needs students, reports of loss of

support and opportunity were marked themes Magnet schools with reputations of inclusion faced demand that exceeded standard SEG funding Even when coupled with ORS and other resources SEG grants were reported to be woefully inadequate [0] Subsequent reviews of SE2000 undertaken by the Education Review Office have also confirmed that students with special needs continue to encounter systemic barriers that prevent equitable participation and outcomes in education [31]

Anecdotal reports from those in the sector convey a bleak picture [3'] Special needs students may be refused enrolment, unable to access support required to participate in mainstream class, be excluded from portions of the school day, denied entry to extracurricular activities such as school camps and subject to discipline and removal from school for misbehavior related to special educational needs [33]

VIII Discipline Under the Education Act

The impact of SE2000 on the volume of complaints and legal queries relating to access to education has been substantial In particular there has been a rise in reports of disciplinary action being taken by schools against special needs students Schools allege they cannot manage special needs students due to lack of resources and routinely seek to remove students for misbehavior related to their special needs

Section 14 of the *Education Act*[3"] allows schools to take formal disciplinary action to remove a student from school when a student has been guilty of gross misconduct or continual disobedience Section 14 is aimed at genuine misbehavior that constitutes a harmful or dangerous example to other students A principal in the first instance makes an assessment that a student is suspended The matter is then considered by the school board to determine the student's continued future at the school

Guidelines issued by the MOE provide guidance to schools on procedural requirements that must be adhered when taking such action [35]

In essence, schools are required to

- adhere to the principles of natural justice
- conduct a fair investigation,
- take into consideration the student's individual circumstances and any background information that is relevant,
- Seek to minimize disruption to a student's education as far as possible, and
- take into consideration all options before making a decision

Natural justice includes acting fairly, flexibly, and ensuring that the decision is properly considered, reasoned and documented The guidance is somewhat akin to principles that would guide a criminal process In essence, you should be informed in advance of the substance of an allegation against you, given a chance to respond and have an impartial tribunal consider all the evidence before making a decision It is also crucial that a decision is properly documented indicating that a decision maker considered all relevant evidence, how the decision applied reasoning that was consistent with the criteria set out, and reached a conclusion only after considering all evidence

Students already face significant hurdles during the disciplinary process Usually with a criminal process, natural justice would also include provision to allow questioning the evidence presented in support of the allegations Although a student is entitled to attend a school Board

meeting, speak, and have their views considered, there is no provision to enable cross-examination of any staff members or witnesses. Rather, questions are generally directed to the school board for consideration beforehand.[36]

The principal making the decision in the first instance to take formal disciplinary action is required to adhere to a fair investigative and determination process. When the school board considers the allegations, it has a separate function under the *Education Act* to perform a 'check' on the principal's decision. The Board must consider afresh the allegations and the evidence. The Board must ensure that it allows the accused student the opportunity to be heard and present an alternative view of events. The board must not be guided or seek to pre-determine the decision on the basis of the principal's allegations. The Board must also properly document its decision indicating the reasoning under taken, evidencing how criteria was considered and applied and how all options were considered. The board must be able to show in the written records if removal from school is chosen, that it was the last resort after all other options were considered in light of the student's individual circumstances.

IX The Consequences and Long Term Effects of Removal From Education

Requiring schools to adhere to natural justice requirements is arguably crucial given the long term consequences of removal from education for students. A longitudinal study conducted in the United Kingdom of excluded students across a four year period found that excluded students were 2.5 times more likely to run afoul with the law and have police contact. In addition to this, these students were also three times as likely to be arrested, and 9 times as likely to be summoned to court compared to non-excluded students.[37] In an international study of students in various countries including the United States, it was found that excluded students were 50% more likely to engage in anti-social behavior and 70% more likely to engage in violent behavior as opposed to non-excluded students.[38]

Principal Youth Court Judge Andrew Becroft has remarked up to 80% of offenders in the Youth Court in New Zealand are not formally engaged in the education system and this is what comprises 'virtually the whole problem of the youth court'.[39] The cost to society is immense and there are also associated resultant costs due to crime, and unemployment subsequent to removal from education.

Think tank Philanthropy Central (UK) in its 2005 report estimated that the cost of removal of a student from school on society to be approximately £63,851 per student (United Kingdom). Approximately one quarter of this amount was calculated to be due to lost future earnings, and the bulk of the cost was attributable to additional spend via state services in education, health, crime and social services.[40]

X No Right to Appeal Removal From School

Once a student is removed from school there is no right to appeal that decision. There is no independent tribunal where a school's decision can be challenged, which significantly impinges on the justiciability of the right to education in New Zealand.[41]

The only options available to a student are the following:

- To seek a reconsideration. This essentially involves the student asking the school Board to reconsider its decision. The board is able to refuse to do so or simply confirm its existing decision. A reconsideration usually requires new information or change of circumstances to

warrant a successful review.

- To lodge a complaint with the Ombudsman. This provides little real effective remedy for a student who is removed from education. The Ombudsman can take a number of months (on average 50 days)[42] to investigate and the Ombudsman only has the ability to issue a recommendation which is not binding on a school. Often a student will then have been out of school for months and the recommendation cannot ameliorate the harmful effects of long term removal from education. A student may also consider a complaint to the Education Review office ('ERO'). ERO will investigate specific complaints but as a general rule only reports on systemic issues to the MOE rather than individual cases of removal.
- To seek a judicial review of the decision in the High court. Judicial review is the only court process available and it is limited. Judicial review allows a claimant to challenge the process of any administrative entity of the state that is making a decision.[43] School boards by virtue of carrying out a state function of education are subject to these provisions. Importantly, the high court may only consider if a school board in making its decision followed the requirements of procedure set out or properly applied specified criteria to remove a student. Crucially, a student is not able to appeal the substance of a decision but only challenge the process. The high court can then only quash a decision on the basis process was not followed. This does not immediately allow a return to school and at times the court will remit the matter back to the school board for consideration afresh. Moreover, the cost of judicial review proceedings are extremely cost prohibitive ranging up to $30,000. This restricts the availability and accessibility of such action for most students and their families.

There is no effective monitoring or requirement for adherence to a uniform process in taking disciplinary action for schools. In fact, the *Education Act* allows schools significant discretion[44] to run operations of schools as needed without oversight.[45] As such, removal from school can at times be on the basis of incorrect facts, or premised on decisions that are disproportionate to actual misbehavior or some other reason which cannot be attributable to the fault of the student.[46] When students are removed from education they are being denied access to education. With no right of appeal to an independent tribunal, it is certainly arguable that the right to education is not justiciable nor is it accessible, adaptable acceptable or available. A child that has been removed from school is inherently vulnerable given age and the isolation from society which results. The effects of removal from education are particularly traumatic and devastating when dealing with a further marginalized child with special needs.

XI Special Needs and Misbehavior

Children in New Zealand with special needs have a right to an education that is adapted to them to enable achievement at a level that is equal and comparable to their peers. The *Bill of Rights Act 1990*[47] ('BORA') and *the Human Rights Act 1993* ('HRA')[48] set out that discrimination against anyone by virtue of their disability is prohibited under New Zealand law. Section 8 of the *Education Act*,[49] international law and also the government's own disability strategy policy also bolster the strength of the right to a special education in New Zealand.

Disability is defined broadly to include physical disability or impairment, physical illness, psychiatric illness, intellectual or psychological disability or impairment, any other loss of or abnormality of psychological, physiological, or anatomical structure or function, reliance on a guide dog, wheel chair or other remedial means, and the presence in the body of organisms capable of causing illness.[50]

There have been significant advances in the diagnosis and support of conditions such as autism or Asperger's syndrome. There is growing recognition that some behaviors of children with such conditions will have associated behaviors that may be at times disruptive and difficult to deal with in mainstream classroom settings. The UNCRPD and associated international law is very clear that children with such special needs must be reasonably accommodated and supported to achieve inclusive education and give effect to the right to education. In sum, such needs are no different from physical disabilities such as blindness, deafness or requiring a wheelchair and must be supported.

XII Wilful Misbehavior

The *Education Act* empowers schools to target genuine misbehavior on the part of a student which forms a harmful and dangerous example to other students or risks the safety of other students and members at school.[51] Section 14 of the *Education Act* has a particular subsection that allows removal from school where there is a significant safety risk posed by a student. The threshold for taking action under section 14 is extremely high. Vitally, in order to make a finding of gross misconduct or continual disobedience there must be a finding that the behavior is not something that is merely trivial. Courts have held that gross misconduct should be striking and reprehensible to a high degree.[52] The purpose section of the *Education Act*, section 13,[53] sets out very clear obligations on schools to retain a student in education wherever possible. It also details that all possible options should be considered enabling retention in education where possible rather than the removal from school which should be a final resort.

There is an increasing prevalence of disciplinary action in respect of special needs students. It is important when considering the right to special education to investigate the inter-relationship between disability, behavior problems, misbehavior and special needs. There are compelling reasons to say where a child with a disability such as autism is not well supported in a mainstream school environment, the child may exhibit behaviors that could be construed to be gross misconduct or continual disobedience. Schools may rely on a rationale that such behavior poses a risk to the health and safety of others at school justifying removal from school. Alternatively, schools are increasingly claiming such behavior is gross misconduct or continual disobedience.

Prior to the ratification of the UNCRPD by New Zealand, there was some confusion as to whether gross misconduct which was unintended was genuine misconduct.[54] Following ratification of international conventions such as the UNCRPD and increasing public awareness of disabilities such as autism, there appears to have been a sea change in the developing law around a right to special education. Cases in other jurisdictions outline obligations on state schools to be inclusive.[55] The extent to which a state must take positive affirmative action rather than simply refrain from any conduct that is discriminatory has not yet been established by international precedent.[56]

It is frequently reported that formal disciplinary processes are generally the exception rather than the norm with special needs students.[57] The phenomena known as 'kiwi suspension' is a widespread and frequently utilized tool by schools who seek to remove troublesome students. Schools routinely suggest that a student isn't suited to the school and that it would save them trouble and further punishment if they just left or stayed away. The lack of formal process renders the student without recourse to challenge the removal as it lacks formality and is not recorded with the MOE. When a student seeks to enroll at another school, the MOE may not offer support and assistance on the basis that the student voluntarily left school.

XIII State Obligations

The issues facing access to inclusive education in New Zealand require consideration of justiciability and analysis of accessibility, acceptability adaptability and availability As a preliminary matter, SEG grant totals are non-negotiable and cannot be increased to meet an excess demand of special needs students Secondly, applications for high needs funding and other tiered initiatives are premised on submitting applications to the MOE for consideration If an application is unsuccessful, there is no independent tribunal for a student or their parents to appeal the decision Rather, under Section 10 of the *Education Act*[58] parents may request arbitration to have an adverse decision re-opened The MOE provides parents with a choice of three arbitrators chosen by the MOE Parents must make a selection within those offered There is a substantial imbalance of power in the circumstances and parents are left to interpret a complex system of entitlements and criteria without support, resources or relevant background to guide them These proceedings are not considered legally aidable[59] and the use of legal representation is actively discouraged [60] The arbitrator's decision is final and is not open to any further scrutiny The parents must then endure a substantial stand down period before any further application for funding support can be made raising real questions of justifiability and accessibility, acceptability, adaptability and availability

The *International Covenant on Economic and Social rights*[61] sets out that states have obligations to undertake steps by all appropriate means, to the maximum of its available resources to achieve fulfilment of a right to education In other words, states must demonstrate that 'measures being taken are sufficient to realize the right to education for every individual in the shortest possible time using the maximum available resources' [62]

Genuine questions arise when considering whether all maximum available resources are being directed towards supporting special education needs under the SEG grant funding model [63] The model itself is premised on a flawed methodology which does not actually assess the actual needs of special needs students in schools It is certainly questionable that such behaviors of special needs students that are not adequately supported are genuine misbehavior justifying invoking disciplinary provisions under Section 14 Coupled with reported issues of inadequate SEG funds due to lack of high needs funding where needed and oversubscription of special needs students, access to inclusive education is a pressing issue [64] The 2010 Review of special education found that schools are forced to try 'to balance strong (sometimes overwhelming demand) for special education support and services against capped finite budgets' [65]

Reporting to the United Nations pursuant to UNCROC by Action for Children and Youth in Aotearoa ('ACYA') on the right to education has reflected similar issues [66] It has been reported that this inflexibility in funding criteria has resulted in schools deliberately treating children differently to attempt to access support for special needs students For instance, in a case where a school that sought support for two students with difficult behavior was turned down (on the basis the behavior was not severe enough) following suspension from school of the students, extensive support was then provided [67] Furthermore, given the bias towards written reports at the expense of parents who can afford to provide such, it is a legitimate concern that the right to a special education is dependent on economic means which are often out of reach to the most disadvantaged and vulnerable children in lower socio-economic areas and lower decile schools This results in further marginalization of the most vulnerable children

Arguably, by invoking Section 14 against students with special needs for behavior resulting from lack of support, schools are acting in a discriminatory manner towards these students Schools in their role administering a public state sponsored education as agents of the state may

be in breach of the obligations of the BORA, HRA, international conventions and domestic law and failing to ensure reasonable accommodation. The lack of sufficient SEG grant funding could be viewed as a failure by the state to utilize the maximum available resources to allow special needs students to achieve an education that is comparable and equal to their peers. Even more concerning, recent investigative journalism revealed that the state had failed to spend allocated funds for special education leaving a surplus that had not been applied.[68]

XIV Previous Cases Considering the Right to Special Education

The changing legal landscape in New Zealand following the ratification of the UNCRPD strengthened the obligation to provide reasonable accommodation of special needs when the Green Bay case was argued. Although prior cases considering the right to special education had been argued, it had been prior to the ratification of the UNCRPD. The growing plethora of discontent provided a platform for action at a strategic level to seek policy change. The Green Bay case presented as an ideal case for strategic litigation to develop legal case law precedent in the area.

A *The Daniels Case*

Prior to the Green Bay case, the only case which had touched on a general right to special education was the case of *Daniels v Attorney-General* (3 April 2002) HC AK M1516/SW99, and *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) ('the Daniels case').[69] The claimants in the Daniels case were parents of special needs students ('the parents'). They alleged that the introduction of SE2000 which had resulted in the closure of a number of special schools and facilities, impinged on children's rights to special education. The parents sought judicial review of the Minister of Education's decision.

The parents sought to challenge action taken by the Minister under the following section of the Education Act:[70]

> The minister may disestablish any special school, class, clinic, or service established under subsection (1) of this section, if he is dissatisfied with the manner in which the school, class, clinic, or service is being conducted, or if he considers that sufficient provision is made by another similarly established special school, class, clinic or service, or by any other school or class in or reasonably near to the same locality ['the section']

The parents sought to judicially review the Minister's decision to disestablish special units in schools and special schools with the introduction of SE2000 on the basis that process had not been adhered to.

In the High Court Baragwanath J held that there was a justiciable right to education. Education was required to be suitable, regular and systemic and found that right had been breached.[71] On appeal, the Court of Appeal took a far more narrow approach focusing on procedural rights rather than any substantive right to education.

The court on appeal held that under the section there was an obligation on the minister when choosing to disestablish any facilities to ensure that every special needs student would be able to receive a suitable, regular and systemic education at another school in the same locality. Based on evidence submitted, the court found there was no evidence that the Minister had made due enquiries and ensured that this was possible. As such, the decision was in breach of the procedural requirements set out in the *Education Act* and could be quashed. Despite this success for the

parents, there was no further consideration or enunciation by the court as to the scope of a right to special education in New Zealand The case was pleaded generally and did not consider any individual circumstances and application of a right to special education for any particular student As such, there was little ability to provide guidance on the scope of the right to special education

B *The Anderson Case*

Subsequent to the *Daniels* case but preceding the ratification of the UNCRPD by New Zealand, an individual case had been taken by a claimant student (via his litigation guardians) relating to enforcing his right to special education The claim alleged that the MOE had breached its duty to him in failing to properly support his special educational needs (*Anderson v Attorney-General*[72] *(the Anderson case)* The claim was premised in tort law It was claimed that the MOE had been negligent owing to a breach of duty of care as it was reasonably foreseeable that harm would result to a claimant as a result of the MOE's actions [73]

Following the implementation of SE2000, the claimant had been removed from a special school and placed in mainstream education with ORS funded support Following the placement, the student was expelled from the mainstream school due to behavioral issues It was asserted by the claimant that special education services of the MOE had breached its duty It was pleaded that special education services had failed to make decisions in the sole interest of enhancing the claimant's educational prospects and had failed to provide sufficient funding and resources for the claimant's special educational needs

Special education services was empowered by law to determine in consultation with relevant schools and parents, the level of funding to be provided to a school for each verified student with special education needs The relevant policy set out that Special education services was also obliged to use its best endeavors to ensure that each verified student would benefit from the level of service that met the student's needs identified in an IEP having regard to the funding available

The court assessed the findings of the Court of Appeal in the *Daniels* case and noted that no general duty of care arose under the setting up a schemes or policies relating to special educational services The court concluded that it was not its role to rule on policy matters stating

> Section 8 [of the education act] provides for the right to education for special needs children How the obligation to provide that special education generally is met how it is funded and to what extent it is to be funded quintessentially involve the consideration of economic social and political factors concerning policy and the allocation of resources Parliament cannot have intended that there would be a tortious remedy by way of damages from implementation of policy decision [74]

The court in the *Anderson* case did however make it clear that this would not preclude a claim by an individual directly affected by the exercise of powers under the legislation

C *The Kissell Case*

Subsequent to the ratification of the UNCRPD, an individual case alleging differential treatment and discrimination against a special needs student from a private educational institute was launched in the Human Rights Review Tribunal pursuant to the HRA

The basis for finding a breach under the HRA is where a person can evidence discrimination on the basis of differential treatment to another person in similar material circumstances by virtue

of reasons related to a prohibited ground of discrimination (for example disability). The relevant provision of the HRA is section 57 which sets out that:

> (1) It shall be unlawful for an educational establishment, or the authority responsible for the control of an educational establishment, or any person concerned in the management of an educational establishment or in teaching at an educational establishment –
>
> (a) To refuse or fail to admit a person as a pupil or student; or
>
> (b) To admit a person as a pupil or student on less favorable terms and conditions than would otherwise be made available; or
>
> (c) To deny or restrict access to any benefits or services provided by the establishment; or
>
> (d) To exclude a person as a pupil or student or subject him or her to any other detriment – by reason of any of the prohibited grounds of discrimination [75]

The case of *Proceedings Commissioner v Heather Kissell (trading as Rolleston Early learning centre)*[76] ('the Kissell case') involved a 4 year old boy diagnosed with global developmental delay and dyspraxia who sought to enroll in the early learning centre operated by Ms Kissell. The facts set out that Ms Kissell allowed the boy to enroll on two conditions:

1. That the boy's parents were to pay for 6 hours of additional teacher aide time daily for the boy to provide one on one supervision (to supplement the 6 hours of funded teacher aide time provided by special education services); and
2. The boy was to be picked up from the Rolleston Early learning centre earlier than other children at 4pm (rather than the usual finish time of 5.45pm for other children)

The boy's parents claimed that their son had been subject to discriminatory treatment in breach of the HRA. The Tribunal agreed with the boy's parents and held that Ms Kissell by requiring the parents to pay for extra teacher aide time and excluding the boy earlier than other children had breached section 57 of the HRA. Whilst the Tribunal had sympathy for Ms Kissell, it held that Ms Kissell's restrictions amounted to admitting the boy on less favorable conditions and restricting access to services due to his disability. The Tribunal explicitly set out that although allowing the boy to finish at the same time as other children would have been more difficult, that there would have been ways to resolve this that did not breach the HRA and it was mandatory for those in the education sector to ensure that reasonable accommodation was made for special needs.[77]

Although the *Kissell* case was decided in the context of a private educational institute, it did provide some persuasive precedent given a changing legal landscape with greater emphasis on the applicability of international obligations in the public education system. The Green Bay case presented an opportunity to raise the issue of access to special education in the public sector in a public school.

XV Strategic Litigation

The Green Bay case presented as an ideal strategic case to highlight systemic injustices and ongoing breaches of human rights in the public education system. Although, there was a scant

body of existing judicial review case precedents relating to students removed from school with special needs such cases were decided prior to ratification of relevant international conventions and had not considered reasonable accommodation and whether disciplinary action resulted in discrimination [78]

Youthlaw had historically functioned as a body producing work such as reports in the law reform sector, highlighting issues with policy that required attention and reform A call that was received on Youthlaw's free 0800 legal advice line regarding the exclusion of a special needs student from Green Bay high school provided the opportunity to extend law reform to strategic litigation

> Strategic litigation involves an organization or individual taking a legal case as a part of a strategy to achieve broader systemic change The case may create change either through the success of the action and its impact on law policy or practice or by publicly exposing injustice raising awareness and generating broader change It is important that strategic litigation is used as one part of a wider campaign rather than being conceived of as an end in itself [79]

Axiomatically, strategic litigation's primary purpose is not to resolve an issue for an individual claimant The very concept of litigating a wider cause is somewhat contrary to general perceptions of litigation and the law being a means to resolve disputes for individuals Strategic litigation is rather viewed as a key tool to change law and policy at a higher level by setting legal precedent Courts may generate a ruling that has wider applicability beyond the individual claimant and may catalyze awareness and change Incidental effects of such litigation include publicity, media coverage, and highlighting issues in the public arena even if the case is not successful [80]

There are challenges and risks associated with strategic litigation Litigation by its very nature is costly, uncertain, time consuming and is limited to the remedies that a court has jurisdiction to grant There are also risks around publicity and negative media coverage The impact of litigation on the individual claimant may be immense when individual interests may be sidelined for the overall objective Lawyers are also required to be cognizant of professional obligations to promote client's best interests at all times and any strategic litigation must be carefully managed to ensure consistency with these obligations

Youthlaw is a not for profit organization and was required to submit extensive evidence in support of waiver of filing and hearing fees applications to the High Court The waivers were successful with the High Court registry agreeing that the case was of significant public interest Youthlaw was also extremely fortunate to have the support of a leading Education law and human rights specialist barrister who considered that the case was of such importance that pro bono assistance was offered

XVI Why the Case Presented a Strategic Litigation Claim

By way of overview, student 'A' in the Green Bay case was a moderate needs student in mainstream school that did not qualify for high needs funding The school reported a stretched SEG fund that was not able to accommodate student 'A"s needs Because student 'A' was not receiving support his behavior escalated On the premise of misbehavior the school undertook a formal disciplinary process and excluded student A' citing difficulties with managing 'A's behavior associated with his special needs

Owing to the fact that the school had undertaken a formal disciplinary process, student 'A' was fortunate to have the ability to challenge the exclusion through judicial review It was patent

during the phone call from A's mother that was received by Youthlaw's senior solicitor advising on the legal advice line, that the school had failed to follow a process that would have adhered to the requirements set out in the Education Act and accompanying guidelines. As a consequence, Youthlaw formed the view that it was highly likely the student would be successful in challenging the removal on procedural grounds through judicial review. The strength of the case could be contrasted with earlier cases where a general right to special education had been pleaded, where the court had not been willing to interfere with policy. Rather, this case involved a clear legal claim of improper process and allowed the consideration of on an ancillary basis of additional issues of a right to special education, reasonable accommodation and possible discrimination.

XVII The Facts of the Green Bay Case

The relevant detailed factual background was as follows.[81] A[82] was a young 14 year old boy who had been diagnosed with dyslexia and Asperger's syndrome. Resultant mental health and learning and behavioral difficulties stemmed from this and A had difficulty coping with some aspects of the school curriculum. A at times reacted aggressively to cope with anxiety. From a very early age A had received treatment from psychiatrists, psychologists, and a number of medical professionals. During the course of his education he had been under the stewardship of an educational psychologist. In order to assist A with his disabilities A had also taken part in the SPELD program, been assessed by the Kari centre, had engaged in learning programs, undertaken art therapy, received psychiatric help, participated in man alive counselling and received RTLB support. Extensive Individual education plans ('IEPS') had also been developed.

Prior to entering high school at Green Bay High School ('Green Bay') A had been quite well supported through his intermediate school's SEG fund with extensive input and planning with the intermediate school Special Education Needs Coordinator ('SENCO') and RTLB. With this extensive wrap around support A had flourished in the mainstream and was able to achieve an education to an equal and comparable level to his peers.

When A transitioned to high school, wrap around services were not activated and the RTLB service was reduced due to fiscal constraints. As support was reduced, A found it difficult to cope with the new high school environment. A's behavior deteriorated and escalated as he struggled to cope with high school and the challenges presented. This increased pressure and anxiety had a particularly debilitating effect on A due to his disabilities. Before formal disciplinary action was taken against A by Green Bay, A was involved in a number of incidents resulting in informal disciplinary measures.

It is relevant to note here that A's IEP formulated with input from his educational psychologist had set out strategies for school staff to deal with A's behavior and methods to defuse any escalation. De-escalation in the IEP involved measures such as avoiding confrontation and allowing A to leave class to retreat to a quiet area unobstructed (such as the Dean's office). A's IEP also set out that given his learning difficulties he should be accommodated and tactile classes such as woodwork or metal work allowed him to better engage in the curriculum.

Given the reduction in support, A's mother repeatedly expressed concern to Green Bay that A's defiance would escalate. A's educational psychologist offered her services to Green Bay to further brain storm ways to support A to ensure he could manage in the mainstream. Unfortunately this offer by the educational psychologist was not taken up by Green Bay. Green bay did however continue to petition the MOE for further funding to support A. The school repeatedly advised

the MOE its SEG fund was too stretched to put in place the support that A needed to cope in the mainstream

On 5 July 2013, A brought his skateboard into his English class in first period A was asked by the teacher to leave his skateboard at the front of the room 10 minutes later he took the skateboard and left the classroom and began to skateboard backwards and forwards in front of the classroom Evidence in the case records that the teacher at this point may have tried to take the skateboard from A This was contrary to the guidance set out in the IEP to avoid escalation

Although there were differing accounts in the evidence,[83] it appears that A may then have fallen off the board and the teacher may have tried to pick the board up (again contrary to guidance set out the in IEP) A then reacted aggressively and yelled obscenities at the teacher The teacher, again contrary to the IEP, ordered A to hand over the skateboard or accept the consequences He then ordered A to report to the school Dean s office A then started to skateboard towards the dean's office, understanding he was reporting to his quiet area in order to calm down as set out in the IEP The teacher, in further contravention of the IEP then followed A as he departed There was a further exchange between A and the teacher As A was entering the building of the dean's office A pulled the door closed behind him to stop the teacher following him inside The teacher's arm was inadvertently caught in the door and staff then moved to physically restrain A

Subsequent to this, the class bell rang and A wanted to go to his next class Of significance was the fact that his next class was multi-materials, a tactile class for which he had a particular interest and flair School staff refused to let A attend his next class and A was sent home that day The principal of Green Bay then commenced formal disciplinary action under Section 14 of the *Education Act* and suspended A for gross misconduct The matter was then set down for consideration by the Green Bay school board of trustees at a Board of trustees meeting on 11 July 2013

At the Board meeting A's mother was not given the opportunity to read a statement and was not given the opportunity to present A's side of the story A's mother and a support person who attended with her gave evidence to the court that the board chair verbally stated to all those present at the outset of the meeting, that 'exclusion was being tabled as a mechanism to obtain funding' This provided strong indication of predetermination in decision making A's mother reported that the entire meeting was extremely brief and the meeting only lasted a number of minutes There was little discussion about how the criteria in the *Education Act* had been applied to the circumstances

There no discussion of whether or not the incident which had led to the suspension was such a serious one off incident warranting classification as gross and reprehensible justifying suspension from school under the guise of gross misconduct A's mother's evidence to the court was that the chair-person of the Board returned after a brief recess and advised that Green Bay was unable to continue to meet A's needs in the mainstream No reference was made to the reasoning applied justifying the most serious of consequences being permanent removal from school in accordance with MOE guidelines

The written record following the decision was extremely sparse and contained no evidence of the Board's reasoning, nor any application of relevant provisions of the *Education Act* There was nothing to indicate that the criteria under the *Education Act* had been considered Further, there was no record to show the options considered and why exclusion was the last resort considered most appropriate in the circumstances The notes from the meeting simply stated under reasons for the decision

> A has a long history of complex behavioral and learning needs requiring a significant level of support. The mainstream setting does not provide sufficient resourcing to ensure that A's educational needs are met AND ensure the safety of other students and staff at the school.[84]

It appeared to be patent that there had been a breach of natural justice requirements. A's mother was never given the opportunity to speak, there appeared to be pre-determination, a lack of consideration of all relevant evidence and failure to apply tests set out under the *Education Act*. It was also clear that obligations to ensure the decision was properly documented had not been adhered to.

It was apparent that if A had been adequately supported, A may not have been facing formal disciplinary action given requests for further funding to supplement an inadequate SEG grant had been denied. Youthlaw filed judicial review proceedings in the Auckland High Court on behalf of A seeking review of the Board's decision hoping to highlight the additional wider issues. The purpose of judicial review and scope of remedies available meant that procedural considerations rather than substantive discrimination and human rights issues were not central to the pleadings before the court.[85]

XVIII High Court Considerations

The High court posed a series of questions:

- Did the principal investigate all facts fully in compliance with obligations under the *Education Act* before deciding to suspend A?
- Did the Green bay board genuinely consider all material it should have under obligations of the *Education Act* such that it was justified in making a decision to respond in the most serious manner – exclusion and permanent removal of the student from school?
- Was A's behavior gross misconduct?[86]

There was a strong argument that another student in A's position that had been involved in a scuffle with a teacher would not have been subject to the same treatment. There was the possibility that A had been discriminated against under the HRA and BORA due to his disability was also raised with the court in pleadings. The court assessed the evidence and made the following findings:

- Under the *Education Act*, there was no time limit on the principal to investigate the incident and the individual circumstances of the student. It was held that the principal should have taken more time to establish the full facts of student A in light of his disability. It was evident from the evidence placed before the court that the teacher had not followed the guidance provided for in A's IEP. Further investigation would have revealed that A's support had been significantly reduced and there may have been ways to increase support – such as taking up the offer of A's educational psychologist for further input. As a consequence of these findings, the court quashed the principal's decision to suspend.
- The court also held that the Green Bay Board had not considered all possible options, nor was the Board able to demonstrate adequate documentation that evidenced that a fair process in accordance with the principles of natural justice had occurred. It seemed that the ancillary issue of funding had dominated the Board's reasoning process. It was held that this was an improper process in light the obligations under the *Education Act* and MOE guidelines.

As a result of those findings, the court determined it was not necessary to consider whether A's behavior had amounted to gross misconduct nor whether any discrimination issues had arisen.[87]

Although A's judicial review was successful and his exclusion was quashed, as a case of strategic litigation it was not simply a case about A's individual circumstances and returning A back to school. Unfortunately, human rights and discrimination issues were not expressly considered by the court but did form part of the background to the case. On appeal (which was ultimately dismissed), the Human Rights Commission, Crown Law and IHC applied as interveners on the case on the basis signification human rights issues had been raised.

The case was intended to highlight the real issue facing a significant portion of the school population with special needs battling for assistance through inadequate SEG funds. The frequent resort of schools to disciplinary action often in breach of the *Education Act* being the central plight brought to the attention of the public and judiciary.

Indeed, the aftermath of the judgment for A was not at all a success. Green bay school sought to appeal and did not engage and support A's return to school.[88] Following an attempt to return A to an unwelcome environment, A was severely traumatized and left mainstream education.[89] The immense personal cost to A was simply tragic although on a strategic litigation level, the case was a success.

XIX Strategic Litigation Successes From Green Bay

The Green Bay case evidenced a case where there was a lack of compliance with domestic and international law to give effect to a right to special education and set a precedent for the future. The court was clear in its pronouncement that the principal of Green Bay was aware that she was dealing with a student with special education needs. This fact should have informed her investigation and decision making. It required her to make full enquiries and ascertain whether additional support and other options were available before seeking to suspend the student. It implicitly affirmed the right to special education in New Zealand and set out duties of educational providers in terms of inclusive education in a disciplinary context.

The Green Bay case lead to intense media interest in the plight of special needs students and greater public awareness of such issues. A's mother herself remarked to the media 'I didn't just do this for my son. I stood up for others who were struggling with special needs students at schools who were keeping them out of class or putting them in the naughty room for hours at a time'.[90] Members of the legal fraternity published articles claiming that there were points of note and lessons for all school boards to consider.[91] The increased awareness of this issue also led the New Zealand Herald to run a series of articles and editorials highlighting issues with funding of special education and deficiencies in the system.[92] More recently an inquiry was launched by the government to investigate the provision of services for special needs children given the intense public interest in the issues raised.[93]

There appears to have been some acknowledgement that there are issues with the provision of special education. The government announced a review and 'update' to special education this year to focus on improving accessibility and availability of services to students with special educational needs.[94] This announcement was made in conjunction with an increase to the budget allocated to special education.[95]

Although the Green bay case was significant and was a successful strategic litigation, there is still room to improve in the realization of a right to special education. The Green Bay case is only part of a wider struggle for change at a policy level and there is still significant progress to be

made before it can be said that the right to a special education is justiciable, accessible, adaptable, available and acceptable.

This paper has provided an overview of the impact of SE2000 and the effect on the provision of special education services in New Zealand. This paper has also canvassed how strategic litigation has sought to develop and enforce the scope of a right to special education, in particular in the Green Bay case. Strategic litigation has provided a platform to render the right to special education justiciable in light of domestic and international obligations.

Keywords: right to special education; New Zealand.

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