A COMPARATIVE ANALYSIS OF SCHOOL DISCIPLINE AND PROCEDURAL FAIRNESS IN PRIVATE SCHOOLS IN AUSTRALIA AND THE UNITED STATES

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ABSTRACT

Regardless of whether they work in public or non-public schools, whether in Australia or the United States (US), principals have the duty to have effective policies and procedures in place promoting and maintaining safe, disciplined, and orderly schools. As such, this paper is a comparative analysis of disciplinary practices and policies in Australia and the US with regard to the amount of procedural fairness, the term used in Australia, or procedural due process, as it is identified in the US, students receive when facing long term suspensions and/or expulsions. Although the rules applicable to public schools are inapplicable to faith-based schools, this article reviews the levels of procedural fairness/ procedural due process students receive in non-public schools in Australia and the US. After examining practices in both nations, the article offers specific guidelines for discipline policies, concluding with the exhortation of the need for consistency in providing procedural fairness for students in non-public schools facing suspensions and/ or expulsions.

I INTRODUCTION

The promotion of positive school discipline and effective management of student behaviour are key functions of principals and teachers.[1] Education Law and policy governing discipline and student behaviour management are grounded in principles advocating proactive, positive, and educative approaches to managing student behaviour to give effect to the rights of children to learn in safe environments free from disruptions, intimidation, harassment, and discrimination.[2]

Officials in all schools, regardless of their status as public or private (or non-public), or in Australia or the United States (US), are expected to have effective policies and procedures in place promoting and maintaining safe, disciplined, and orderly schools. Education Law and regulations also deal specifically with disciplinary methods and

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procedures such as suspensions and expulsions from schools, owing to the serious nature and consequences of such measures. When facing suspensions and/or expulsions, students generally have rights to procedural fairness (natural justice or due process) aimed at ensuring that they receive fair hearings resulting in decisions that are impartial and unbiased.[3]

The doctrine of procedural fairness, the term used in Australia, or procedural due process, as it is identified in the US, applies to public schools because they are state institutions. Yet, debate continues as to whether in private or non-public schools, including those that are faith-based, education officials are bound, or ought to be bound, by procedural fairness when dealing with school discipline matters. While case law in both Australia and the US agree that there are no obligations on the part of officials in private schools to afford students procedural fairness because, as noted in their application packages, any rights students have are contractual in nature in most jurisdictions. Even so, unlike the US, school registration requirements in Australia explicitly require private schools to have school discipline policies that make provision for procedural fairness.

In light of continuing discussions on school discipline, following this introduction, the remainder of this article, which is divided into three substantive parts, adopts the position that all schools, both public and private, in Australia and the US, should be bound by principles of procedural fairness or due process. The second part of the article sets out the law relating to procedural fairness in Australia with reference to relevant case law; this part briefly outlines the common law doctrine of natural justice (this article uses the term procedural fairness) in terms of administrative decision-making and its application to private schools.

The US perspective in the third part of the article discusses the comparable right to due process starting with the Supreme Court's ruling in *Goss v. Lopez*,[4] the high-water mark of student rights for those facing suspension and/or expulsion from public schools for more than ten days before turning to another disciplinary sanction in the form of corporal punishment. The fourth part of the article offers practical recommendations for educators and their attorneys in Australia and the US. The article concludes by taking the position that there is a need for consistency across all jurisdictions in terms of procedural fairness for students who attend private schools.

II PROCEDURAL FAIRNESS IN AUSTRALIAN SCHOOLS: PRINCIPLES OF PROCEDURAL FAIRNESS

Procedural fairness, also referred to as natural justice,[5] is a fundamental principle underpinning administrative decision-making applicable to the management of school discipline in public schools. Procedural fairness originates in common law and 'is concerned with the fairness of the procedure for decision-making.'[6] Procedural fairness requires that administrators, such as school principals, follow a fair decision-making procedure: 'what is required by procedural fairness is a fair hearing not a fair outcome.'[7]

Hence, procedural fairness is concerned with the fairness of the process by which decisions are made, not their outcomes.[8]

In the seminal case of *Kioa v West*, Mason J held that 'the law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in making administrative decisions which affect rights, interests and legitimate expectations,[9] subject only to the clear manifestation of a contrary statutory intention.'[10] Relevantly, procedural fairness applies to the exercise of statuary powers that 'must be exercised fairly, i.e. in accordance with procedures that are fair to the individual considered in light of statutory requirements….'[11]

Fairness in this sense 'is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustices.'[12] Thus, as noted by Mason J, 'The critical question in most cases is not whether principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?[13] This question can be answered in part with reference to the two rules of procedural fairness – the right to be heard (the fair hearing rule), and the right to a fair and impartial decision (the bias rule).[14]

The right to be heard requires that persons affected by exercises of power 'must be given an opportunity to deal with relevant matters adverse to his (sic) interest which the repository power proposes to take into account in deciding upon its exercise.'[15] Put simply, persons whose rights and interests are affected by adverse administrative decisions are entitled to know all the relevant details of the matter or allegation and to have the opportunity to respond.[16] This includes proper notification of the matters or allegations, being provided with all the necessary information in a timely manner and receiving information about the process.

At the same time, the right to be heard includes granting parents and students access to information on discipline policies and procedures. Having access to all relevant information is therefore essential for fair and impartial hearings. As explained by *Hall J in X v University*, 'a hearing is unlikely to be fair when a decision-maker…does not disclose relevant material…and a fair hearing is not possible if disclosure is not adequate.'[17] Similarly, in *R v Governors of Dunraven School ex parte B*, Sedley LJ noted that it is 'unfair for the decision-maker to have access to damaging material to which the person at risk here, the pupil through his parent has no access.'[18]

The second rule requires decision-makers to act fairly and impartially, that is without bias whether actual or apprehended (perceived).[19] This means that decision-makers must be objective and ensure that their decisions are based only on the information relevant to the matter. Bias may arise from personal conflicts of interest, reliance on irrelevant material, or the conduct of decision-makers. Bias may also be evident if it appears that decision-makers already made up their minds about the outcomes irrespective of the actual hearings. Issues of bias may arise for, example, if school principals investigate disciplinary matters and decide on the punishments. Procedural fairness is therefore

ultimately aimed at ensuring that administrative actions or decisions adversely affecting persons are carried out in fair and appropriate manners.

III PROCEDURAL FAIRNESS AND SCHOOL DISCIPLINE

In the school context, procedural fairness is particularly pertinent to decision-making in relation to school discipline matters. Actions by school and education department administrators about student suspensions and expulsions invariably engage the right to procedural fairness. Further, the failure to provide procedural fairness likely gives rise to legal disputes.

Suspensions and expulsions are generally reserved for the more serious breaches of school discipline codes of conduct. Moreover, given the serious nature and consequences for them, decisions to suspend or permanently exclude students requires closer attention to procedural fairness. This principle is articulated in *J suing by his Litigation Guardian v Bouvaird*, a case about the suspension and expulsion of a high school student, in which the New Zealand High Court stated that 'the need for the process to be fair, however, is basic. It applies most acutely where a principal or his or her delegate, [is] faced with an issue of serious behaviour that could result in a child being stood down or suspended…'[20]

The principle enunciated in *Bouvaird* is also illustrated in *Kennedy and Anor v Boyle and Anor*. In *Kennedy* the court, while recognising the right of the school to take disciplinary action, took the approach that disciplinary decisions having serious consequences for students, are 'amenable to judicial review if the decision is made in breach of natural justice, or without regard to relevant considerations, or by having regard to irrelevant considerations.'[21]

The procedural factors the court considered in *Kennedy* were the extent to which the matter had been fully investigated, the information on which the decision was made, the 'serious and dipropionate implications' for the students concerned and the timeframe in which the decision was made.[22] While in *Kennedy* the court acknowledged the seriousness of the discipline matter and the time constraints, it concluded that 'it is still necessary to carefully consider an individual case, on its merits, [and] in reaching a decision "all the individual circumstances must be weighed."'[23]

As reaffirmed in *Bouvaird* and *Kennedy*, procedural fairness (natural justice) in schools, is aimed at ensuring that officials apply fair and lawful procedures when making administrative decisions, such as excluding students from school that have serious consequences for them.

IV PROCEDURAL FAIRNESS IN STATE SCHOOLS

In Australian state schools, the right to procedural fairness is settled. In *DM v State of New South Wales*, for instance, Simson J ruled that a school principal has a duty to provide procedural fairness when deciding to exclude a student.[24] Applying *Kioa*, Her

Honour decided that persons whose rights may be affected by administrative actions must be given opportunities to put their cases forward by explaining or refuting the evidence before them.[25]

Along with the application of common law, procedures for dealing with suspensions and expulsions in accord with principles of procedural fairness whether explicitly or implicitly are present in legislation or regulations. In Western Australia, for example, the School Education Act (1999) makes provision for independent and representative discipline panels, with s 93(6) providing that the Minister may give directions in writing to a Panel as to its procedure and a Panel is to give the child whose case is before the Panel, the child's parents and the school's principal an opportunity to be heard, but otherwise a Panel may determine its own procedure.

V PROCEDURAL FAIRNESS IN PRIVATE (INDEPENDENT) SCHOOLS

The duty to provide procedural fairness in Australian private schools[26] is less settled and is still a contentious issue despite some judicial authority finding that procedural fairness does not apply in private schools because the source of their authority and decision-making is derived from contact law, not administrative law.[27] In *Ge v Taylors Institute of Advanced Studies Limited*, Kellam J, though, observed that 'the question of whether a student is entitled to rely on principles of natural justice or procedural fairness, to challenge a decision to suspend or expel him or her from a school, is not the subject of clear and consistent authority in Australia.'[28] Still, it is not definitive that procedural fairness is inapplicable in private schools. As also noted by Starke J in *Dage v Baptist Union of Victoria*:

> 'That it is a serious question of law I do not think can be doubted and can be identified as follows whether pupils at school – when it comes to serious matters such as expulsion – are entitled to rely on principles of natural justice.'[29]

A case most often cited for the proposition that a principal in a private school is not bound by the rules of natural justice or procedural fairness is *Seymour v Swift* in which Blackburn J reasoned that 'there is no principle of law by virtue of which a headmaster of a private school has to act or acts in a quasi-judicial capacity and is therefore bound to apply rules of natural justice.'[30] In this case a student who was expelled from school successfully claimed that the headmistress had not provided him with an opportunity to reply to the allegations.

Starke J followed the position of *Seymour* in *Dage v Baptist Union of Victoria*[31] in which a student was expelled for persistent unruly behaviour that officials claimed 'had a very serious effect on the school as a whole.'[32] The plaintiffs claimed that because the expulsion of their son was contrary to the principles of natural justice, they were seeking an injunction to stop the expulsion. Although Starke J noted the position in *Seymour*, His Honour did not address the scope and application of natural justice other than noting that

it is not settled in Australia and is a serious question of law to be considered given the serious consequences flowing from such disciplinary decisions. His Honour's referring to authority also flagged the role of 'public interest' and the argument that in decision-making 'all large bodies must of course be governed in the public interest.'[33]

More recently, in *Bird v Campbelltown Anglican Schools Council*,[34] the court denied a claim to procedural fairness based on an implied term of contract but did so not without some qualifications. The applicants claimed that the expulsion of their son breached an implied term of the contract between the plaintiffs and respondent that they would have been procedural fairness before their child was expelled.

In *Bird*, Einstein J found that there was no duty to provide procedural fairness and that any 'requirement for natural justice must be found in the terms of the contract' and the Condition of Enrolment signed by the parent 'made no reference to procedural fairness or natural justice.'[35] However, His Honour did not preclude contractual obligations being 'cut down' or varied' provided this was 'only to the extent to which there was some contrary public policy of a type that would override contractual obligations, or if there was some equity which precluded the parties to the contract from relying on their strict contractual rights.'[36]

While Australian jurisprudence does not readily assist in resolving the contractual issues, *Bird v Ford* refers to cases in other common law jurisdictions that bound private schools to procedural fairness based on implied terms of contract. One case, from England, was *Gray v Marlborough College*[37] in which 'it was accepted that the standard terms and conditions that formed part of the basis of the contract between a private school and a pupil's parent were subject to an implied term requiring the school to act fairly in requiring the removal of the pupil and, in particular, to consult with the parent in advance.'[38]

Absent express or implied contractual obligations, the duty to provide procedural fairness may be found in other school policy documents such as discipline and behavioural management policies. One such example is the Lindisfarne Anglican Grammar School policy on 'Grievances and Disputes Procedural Fairness for Students' that sets out the procedural fairness requirements in decision-making, on which parents and students can rely.[39]

The duty to provide procedural fairness based on contractual terms and conditions is not new. White referring to *Wood v Wood* [40] pointed to legal precedent that natural justice principles apply to 'every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.'[41] Such bodies include private organisations such as sporting clubs, trade associations, and professional disciplinary bodies.[42] By analogy, this is well illustrated in the employment law context that insofar as decisions about discipline and termination of employees procedural where fairness is applied, a process which involves notifying employee of the allegations and giving them

opportunities to respond. This goes to the heart of what is reasonable and fair in decision-making processes concerning serious issues relating to rights and interests of individuals.

As explained by Stewart, if an employer 'fails to afford an employee a reasonable opportunity to hear the allegations and give a considered response before any decision is taken to sack them, the dismissal is more likely to be ruled unfair.'[43] Although the term procedural fairness is not used in the Fair Work Act (2009) (Cth), in relation to unfair dismissal, s 387 provides redress based on dismissal being 'harsh, unjust or unreasonable' and contemplates procedures that are fair and reasonable. In determining 'fairness,' s 387(c) considers 'whether the person was given an opportunity to respond.' In this regard, the source of obligation to afford procedural fairness may be one of contract or statutory authority. The statutory basis for procedural fairness is discussed later in the article.

It is further argued that procedural fairness obligations in private schools may reasonably be derived from 'public interest' or 'public policy' principles as suggested by Starke J in Dage. However, in *Bird v Ford*, Barrett JA suggested that '[t]he prospects of showing that public law principles and remedies were directly applicable to a private school's decision to expel were much more problematic.'[44] The mere fact private schools serve public functions or receive public funding does not necessarily mean the powers exercised by their school administrators are subject to judicial review.

Barrett JA nonetheless noted judicial support for reviewing the exercise of power that has public consequences even where it concerns a private organization.[45] His Honour added that the '[t]he importance attached to education and the rights of children to be educated, coupled with the fact that parents are required by law to have their children educated and private schools are regulated by statute, suggests that it is at least arguable that some measure of public power may be found to be at work in expulsion decisions.'[46] This is illustrated in the Canadian case of *Burke v Yeshiva Beit Yitzchak of Hamilton and DC*[47] in which the court agreed that judicial review of a private school's expulsion decision was available because 'a public law component involved when the education of a pupil is interfered with by the drastic punishment of expulsion sufficient to merit this court's review of the process leading to expulsion.'[48]

Similarly, in *CD v Ridley College*,[49] a private school was held to be bound by the principles of natural justice when expelling a student. The Court reasoned that the school incorporated under statute provided a 'public service (and a critically important public service), namely, the education of children, and, as a result, it must be subjected to some degree of public accountability' that it is in 'the public interest that private schools (although they may be permitted latitude, in certain areas, not available to public or government-funded schools) operate within the principles of natural justice when it comes to the expulsion of students.'[50] While not precedential, the arguments here are persuasive for Australian schools.

Private schools in Australia, whether secular or faith-based, serve a public function delivering education as a social and public good. As such, all schools are accountable to

the broader society and community. This is highlighted by the statement of the Independent Schools Council of Australia (ISCA) that although its member schools are independent and autonomous, they 'are highly accountable, being responsible to their local communities, required to meet public standards of educational and financial accountability, and comply with the legislative, regulatory and reporting requirements that apply to all schools.'[51] Accordingly, all schools, whether private or state-run, are called on to create safe, supporting, and caring school environments for students, underpinned by values of fairness, equity, and justice.

Therefore, notwithstanding judicial orders denying claims to procedure fairness, some case authority leaves open the question of procedural fairness in private schools. In fact, these cases do not entirely preclude the need for decision-makers in private schools to afford students procedural fairness in serious disciplinary matters. Private schools may thereby be subject to procedural fairness based on express or implied contractual terms or based on public interest principles as suggested in *Bird* and *Dage*.

VI STATUTORY REQUIREMENTS AND PRIVATE SCHOOL REGISTRATION

Arguments based on contractual terms and public interest remain unsettled. Even so, the incontrovertible basis for procedural fairness obligations in private schools in most jurisdictions in Australia arises from private schools' obligations to comply with Registration Standards derived from statute that cannot be overridden by contract.

All private schools in Australia must be registered and maintain registration in order to operate lawfully as schools.. Registration Standards issued under the relevant state education legislation generally includes standards relating to governance, financial resources, staffing, premises, facilities, curricula, students, safety, behavioural management, and conduct. In most jurisdictions, Registration Standards relating to the management of students' behaviour explicitly include reference to Standards incorporating compliance with procedural fairness.

In Western Australia, for example, the Minister may determine registration standards for private (non-government) schools[52] and on application for registration or renewal of registration as a private school, the Chief Executive Officer must be satisfied that inter alia 'the school will observe any standards determined by the Minister under section 159.'[53] The registration and ongoing registration of all private schools in WA are therefore subject to the statutory based standards issued by the Minister.[54] Relevantly, Standard 14.3 requires that 'the management of permitted forms of behaviour, discipline or punishment *conforms to the principles of procedural fairness* and the prohibition of unlawful discrimination' (emphasis added).[55] The Explanatory Notes on Standard 14 state that 'as a minimum procedural fairness requires' that:

- 'there is a clear relationship between the rules and the allegation against students;
- students are informed about the nature of the complaints or alleged breaches in such a way that they are capable of understanding them clearly;

- disputed matters are fully investigated;
- students are given reasonable opportunities to respond to the allegations or complaints;
- both investigators and decision-makers/adjudicators (who may be the same persons) are free from bias and from the perception of bias; and
- decision-maker act reasonably and consistently with school policy.'[56]

Similar requirements apply in most other jurisdictions. For example, in Tasmania, Standard 13(3) requires the governing bodies of new schools to 'demonstrate that the behaviour and management of students will observe the *principles of procedural fairness* and the prohibition of discrimination' (emphasis added).[57] In Victoria, Section 4.3.1(6) of the Education and Training Reform Act 2006 (Vic) applicable to all schools requires school policies relating to the discipline of students to be based on principles of procedural fairness and must not permit corporal punishment.[58]

In New South Wales, the guidelines for registering schools states that 'a registered non-government school must have policies relating to discipline of students attending the school that are based on principles of procedural fairness.'[59] Private schools in the Norther Territory[60] and the ACT[61] are required to have a school policy for the discipline of students that includes procedural fairness. The position in Queensland and South Australia is less clear but there would be little justification to treat students differently in private schools in those states than in other states where procedural fairness is part of the registration standards.

VII BACKGROUND ON PRIVATE SCHOOLS IN THE US

In light of the US Supreme Court's judgment in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,[62] state officials have power 'reasonably [to] regulate all schools, to inspect, supervise, and examine them, their teachers and pupils.'[63] In practice, though, other than health and safety code issues, state and federal educational officials impose fewer rules on non-public schools than on public schools. Acknowledging the role of parents, the Pierce court added that '[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'[64] As a result, state and federal educational officials defer to parental choices in selecting where their children are educated, avoiding charges that they interfered impermissibly over the education of children who attend faith-based schools.

Less than two years after Pierce, in *Farrington v. Tokushige*,[65] the Supreme Court reaffirmed the parental right to send their children to non-public schools as a means of satisfying compulsory attendance laws. The court rejected attempts by public officials to regulate foreign language schools in Hawaii, most of which were Japanese; the others provided instruction in Chinese or Korean.

As a result of *Pierce* and *Farrington*, there are two reasons why state officials in the US have minimal oversight over faith-based schools. First, post-*Pierce*, courts have recognized that, like in Australia, the rights of students, or their lack thereof, are governed by the terms of the enrolment contracts their parents signed with their schools. Second, in the years following Pierce, in particular, courts have avoided regulating religiously affiliated, or faith-based, non-public schools for fear of running afoul of the Establishment Clause.[66] The courts and state officials avoid getting involved in faith-based schools in the US, seventy-five percent of which are religiously affiliated,[67] because in dozens of cases the US Supreme Court has ruled that the schools and their students cannot receive direct public financial assistance,[68] from the Federal or state governments. Following *Pierce* and *Farrington*, if matters such as student discipline is not explicitly addressed in student handbooks, then students do not have rights, for example, to procedural due process when discipline or not to be subjected to corporal punishment.

VIII PROCEDURAL DUE PROCESS IN DISCIPLINE IN THE US

Absent constitutional or contractual rights as expressed in handbooks, US courts do expect officials in non-public schools to afford students the same procedural due process rights or fundamental fairness they would have received had they attended public schools. In other words, while the interpretation and enforcement of disciplinary rules in non-public schools must be fair, consistent, and in good faith while neither being arbitrary nor capricious, these principles are inapplicable in non-public schools. Even so, while fundamental fairness does not require discipline policies in non-public schools to include language mirroring US constitutional law, fundamental fairness does expect that their rules satisfy some element of substantive due process while the procedures are clear and fair. Still, when dealing with faith-based schools, courts ordinarily grant broad discretion to school officials in interpreting contractual language in the limited litigation that has emerged.

An illustrative case arose in Ohio where an appellate court upheld the expulsion of two students from a religious elementary school. The court affirmed an order in favor of school officials because of the parents' confrontational tactics and unwillingness to follow the dispute resolution process in the student handbook. The underlying issue was parental dissatisfaction with how officials handled confrontations their children had with other students in the school. Absent 'a clear abuse of discretion by the school in the enforcement of its policies and regulations,'[69] the court refused to intervene.

The upshot of cases such as the one in the preceding paragraph is that unless express or implied contractual provisions are at issue, courts are unlikely to treat actions of educational officials in non-public schools as exhibiting bad faith simply because the outcomes involved the use of discretion. Consequently, courts in the US have avoided addressing questions about the dismissal of students for such matters as the severity of disciplinary penalties when compared with past offenses or offenses by other students or dismissals for poor academic performance, a topic beyond the scope of this presentation.

It almost goes without saying that educators in non-public schools, not to mention parents, are aware of the rights the peers of their children have in public schools. As such, because the disciplinary provisions in most handbooks in non-public schools mirror the contents of what is present in most public schools, the remainder of this part of the article highlights the rights of students facing discipline in public schools in the US. Even though there are no reported cases on the following issues, because they are inapplicable in faith-based schools due to the contractual nature of the relationship between parents and the schools, it is worthwhile to observe what occurs in public schools with regard to suspensions and expulsions as well as corporal punishment, likely the two most widely used forms of school discipline, because doing so provides background for non-public schools.

IX SUSPENSIONS-EXPULSIONS

In *Goss v. Lopez*,[70] a dispute from Ohio, representing the high-water mark of student rights in American public schools, the Supreme Court enunciated the minimum standards educators must follow when suspending students for ten days or less. Even so, Goss must be viewed as fitting on a continuum of discipline. At the lowest level, if students know,[71] or reasonably ought to know, school rules and punishments are appropriate to their offenses,[72] regardless of whether misbehaviour occurs in or out of schools, courts are unlikely to interfere as long as educators treat similarly situated individuals similarly by providing them with the requisite levels of due process.[73]

Goss applies most directly to the second level of discipline, short-term exclusions from school not exceeding ten days. The Justices held that when faced with such exclusions, due process requires officials to give students "oral or written notice of the charges against [them] and, if [they] den[y] them, an explanation of the evidence the authorities have and an opportunity to present [their] side of the story."[74] The Court found no need for a delay between when officials give students notice[75] and the time of their hearings, conceding that in most cases disciplinarians may well have informally discussed alleged acts of misconduct with them shortly after they occurred.[76]

Buttressing its analysis, the *Goss* Court explained that if the presence of students in schools constitute threats of disruption, they may be removed immediately with the due process requirements to be fulfilled as soon as practicable. The Court expressly rejected the claim that students should be represented by counsel, be able to present witnesses, and be able to confront and cross-examine witnesses when facing short-term exclusions.

In dicta the Supreme Court essentially created a third level of due process. The Court pointed out that '[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures . . . [and that] in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.'[77] States have followed the Court's suggestion and developed statutory guidelines when students are subject to long-term suspensions and/or expulsions.

In light of the *Goss* Court's declaration that school officials had to provide students with due process, public school officials must satisfy the following four elements in providing procedural due process. First, students and their parents are entitled to notice, usually within three school days. Letters sent home to parents should provide information about the relevant facts and ask them to contact school officials to set up disciplinary hearings. Second, at the hearings students and their parents must be afforded opportunities to respond by presenting their sides of the stories.

Third, hearings should take place in the presence of fair and impartial third-party decision-makers. In other words, as discussed earlier, decision-makers should be free from bias as discussed above at various points. Fourth, hearing officers must base their decisions on the contents of the records before them, meaning they must act only on evidence presented at the hearings over which they preside. Insofar as these hearings are administrative in nature, designed to result in a reasonably prompt and fair process in order to keep schools safe, dissatisfied parties can seek judicial review.

X CORPORAL PUNISHMENT

In its only case on the merits of a claim, *Ingraham v. Wright*,[78] a dispute from Florida, the Supreme Court refused to invalidate corporal punishment as per se unconstitutional. Ruling that the Eighth Amendment's prohibition against cruel and unusual punishments was designed to protect those guilty of crimes and was inapplicable to paddling students to preserve school discipline, the Court rejected an analogy between children and inmates. Noting that most jurisdictions at that time permitted corporal punishment while professional and public opinion was divided on the practice, the Court refused to strike it down as unconstitutional.

Corporal punishment remains legal in 19 jurisdictions, mostly in the American South.[79] Still, courts have invalidated corporal punishment when the actions of school officials are "shocking to the conscience."[80] At the same time, courts have upheld the rights of educators to use reasonable, defensive, meaning that may not strike back, force to defend themselves and others from harm when confronted by violent or misbehaving students.[81]

XI RECOMMENDATIONS

In light of the law applicable to students in public schools, when dealing with discipline policies in private and faith-based schools, whether in Australia or the US, educators and their attorneys may wish to consider the following suggestions.

First, educational leaders should adopt clear, concise, well-written discipline policies consistent with the teaching of ethos or faith-based schools while tampering justice with mercy.

Second, leaders should create broad-based teams to devise, and revise, policies consisting of a cross section of their school communities including, for example, a member of the governing board, an administrator, the board's attorney, a teacher, a staff member, a parent, and perhaps a students in upper grades to get insights into the perspectives of what young people are thinking.

Third, educational leaders should act on the advice of their attorneys but should select them carefully. More specifically, school leaders should rely on advice for attorneys who practice in the area of Education Law rather than general practitioners because they will be well versed in legal matters impacting schools.

Fourth, insofar as parents, rather that students, sign registration forms, policies should require parents to sign acknowledgements that they read, reviewed, and agree to have their children abide by the discipline rules in student handbooks. Policies should also direct patents to explain the rules to their children and perhaps having older students sign acknowledgements like their parents. While having students sign forms may not hold up in court, doing so can help to teach them young people the importance of keeping their word once they have signed contracts.

Fifth, school officials should reserve the right to change handbook language as needed. Even, so, as discussed in the 11th recommendation when revising policies, educational officials should generally wait until the start of new school years to implement changes so as to provide students and their parents with sufficient notice of the new rules they will expected to follow. If officials fail to provide parents and students with sufficient notice of changes in rules, they run the risk of having courts invalidate any modifications as arbitrary and/or capricious. Almost needless to say, when school officials change their discipline policies, whether in the middle or, or the start of a new year, they should inform staff, students, and parents about what they have done consistent with items 7 through 10 below.

Sixth, policies should clearly describe the rules and provide examples of a range of penalties for first, second, third, and later offenses such as verbal and written warnings, short term suspensions, and possible expulsions. In addition, policies should note that if misbehaviour is egregious enough, officials may refer offenders to law enforcement agencies.

Seventh, policies should identify the amount of procedural due process if any, that students may receive for being disciplined consistent with the natures of their offenses consistent with the Goss continuum. Policies should also address how students and/or their parents may file appeals with educational officials challenging adverse actions such as long-term suspensions and/or expulsions from schools.

Eighth, educational leaders should review school disciplinary rules with the faculties and staff members at the start of school years, highlighting changes in any of the rules. In addition, officials should meet with new teachers, and other employees such as

counsellors, who join their staffs after the start of a school years individually to ensure that they are knowledgeable about the rules applicable to students.

Ninth, leaders should conduct student assemblies and provide instruction in appropriate classes about the need to comply with school rules. Sessions should focus on the desired behaviours for all in schools while providing them with tips to enhance their self-control in situations wherein they might be tempted to misbehave.

Tenth, officials should communicate school policies by including them in faculty and staff handbooks, in materials sent home to parents, and on school board owned and operated websites.

Eleventh, educational leaders should meet regularly with their policy writing and revising teams along with staff to evaluate their discipline policies and procedures. Moreover, leaders should make sure that they update their policies annually so they are consistent with appropriate federal and state laws. Reviews should take place on breaks between school years because by waiting a while after controversies occur, they should have had time for carefully reflection resulting in better thought out changes than if they acted immediately.

In a related point, by documenting that have reviewed their policies, and noting the dates on which they did so at the end of policies, in the event of litigation, this will demonstrate that school officials have done all that they can to keep their policies current in this ever evolving area known as Education Law. For example, if school officials seek to discipline a student for violating a school rule about the use of social media but the rule was five years old, it should be evident that educators were not up to date about changes in technology. Conversely, if a policy had been modified six months earlier and something new arises, then the courts are likely to live educators the benefit of the doubt because changes in technology occur at what seems to be the speed of lightening.

XII CONCLUSION

Former Australian High Court Chief Justice Robert French wrote that 'procedural fairness is part of our culture. It is deeply rooted in our law. It lies at the heart of the judicial functions and conditions the exercise of a large array of administrative powers affecting the rights, duties, privileges and immunities of individuals and organisations.'[82] It is thus well established whether at common law or in legislation, that in exercising administrative powers and functions to suspend or expel students, school principals or other relevant decision-makers must afford them procedural fairness or due process whether in Australia or the US. The need for such process is to ensure that when rights and interests are seriously impacted, officials follow fair and proper processes allows students, and likely their parents, to respond to allegations as well as to being judged by impartial, unbiased decision-makers.

Notwithstanding the contractual foundations of the parent-school relations in private schools in both Nations, when similar powers are exercised to suspend or expel students there is little justification not to extend procedural fairness to them given the public interest and public functions performed by private schools. While common law establishes that there is no duty on principals to adhere to procedural fairness, it is not clear cut. Since the decisions in *Seymour*, *Bird*, and *Ge* in Australia, this issue has now become more settled as private schools in most Australian jurisdictions are now obliged by statutory based registration requirements to include procedural fairness in school discipline policies. Other than *Pierce's* deference to educators in operating their non-public schools, there is no explicit case imposing a procedural due process requirement on educators in faith-based schools in the US.

Whether in Australia or the US, procedural fairness or due process ultimately results in better decision-making processes as well as in judgments that are rational, fair, and justifiable. Thus, this discussion of procedural fairness-due process should be both of great interest and relevance to educational leaders when making decisions in all schools in Australia and the US, regardless of whether they are public or non-public.

Keywords: Faith-based Schools, Private Schools, Procedural Fairness, Procedural Due Process, Student Rights.

ENDNOTES

1 See, e.g., *School Education 1999* (WA) ss 63 and 64.

2 See, e.g., Government of Western Australia, Department of Education and Training, 'Student Behaviour in Public Schools Policy and Procedures' (4 January 2016) <file:///J:/Documents/Admin%20Law/Policy_Student%20Behaviour%20Policy%20v2.2%20and%20Procedures%20v2.5.pdf> and 'School Security for Public Schools Procedures', <file:///J:/Documents/Conferences/Policy_School%20Security%20for%20Public%20Schools%20v3.0%20%2014.5.19.pdf>. Private (non-government) schools must meet safety and school discipline standards for the purpose of registration.

3 *DM v State of New South* (n 24).

4 419 US 565 (1975).

5 The two concepts are often used interchangeably but as Mason J in *Kioa v West* (1985) 159 CLR 550, 583 notes: 'It has been said on many occasions that natural justice and [procedural] fairness are to be equated…And it has been recognised in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness…'

6 Naomi Sharp, 'Procedural Fairness: The Age of Legitimate Expectation is Over' (2016) 90 *ALJ* 797.

7 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 25.

8 Judith Bannister, Anna Olijnyk and Stephen McDonald, *Government Accountability. Australian Administrative Law* (Cambridge University Press, 2018).

9 The application of 'legitimate expectation' has been criticised by the High Court in *Re Minister for Immigration & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. Legitimate expectation is not considered in this article. For a critique on legitimate expectation see Naomi Sharp, 'Procedural Fairness: The Age of Legitimate Exception is Over' (2016) 90 *ALJ* 797.

10 *Kioa v West* (1985) 159 CLR 550, 584.

11 Ibid

12 *In re Minister for Immigration & Multicultural & Indigenous Affairs, Ex parte Lam* (2003) 195 CLR 502, 511 (Gleeson J).

13 *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

14 Judith Bannister, Anna Olijnyk and Stephen McDonald, *Government Accountability. Australian Administrative Law* (Cambridge University Press, 2018).

15 *Kioa v West* (1985) 159 CLR 550, 628.

16 *X v University of Western Sydney* [2014] NSWSC 82 [176].

17 Ibid [180] (Hall J).

18 *R v Governors of Dunraven School ex parte B* [2000] ELR 156.

19 Judith Bannister, Anna Olijnyk and Stephen McDonald, *Government Accountability. Australian Administrative Law* (Cambridge University Press, 2018).

20 *J suing by his Litigation Guardian v Bouvaird* [2007] NZHC 560, [67].

21 *Kennedy and Anor v Boyle and Anor* [2015] NZHC 536 [23 March 2015], [24]. In this case students were suspended from a rowing team for breaching the school's code of conduct and Civil Aviation regulations by riding on a baggage carousel at Auckland's airport. The boys would thus have been unable to take part in a rowing competition and compete for a place the national trials. An interim injunction was successfully sought restraining the school from implementing the decision. The court noted the implications and the 'irreparable adverse consequences for these two boys, if the decision process in found to be unlawful' [32].

22 Ibid [18] – [19].

23 Ibid [25].

24 *DM v State of New South* in which a student who assaulted a female student with a knife was exclude from school, cited in Paul MacMahon, 'Case Note - Procedural Fairness in Student Discipline: DM v State of New South Wales. Unreported Supreme Court of New South Wales, Simpson J., 16 September 1997', (1998) 3 (2) *Australia & New Zealand Journal of Law and Education* 87-9.

25 Ibid.

26 Private schools or non-government schools include independent schools and the Catholic system schools.

27 *Seymour v Swift* (1976) 10 ACTR 1 cited in Naomi White, 'Natural Justice, Children and the School' (1997) 13 *Australian Journal of Law and Society* 191, 193; *Charles Phillip Bird by his tutor Vredê Jane Bird v Campbelltown Anglican Schools Council* [2007] NSWSC 1419.

28 *Ge v Taylors Institute of Advanced Studies Limited* [2003] VSC 345, [41].

29 *Dage v Baptist Union of Victoria* [1985] VR 270, [3].

30 *Seymour v Swift* (1976) 10 ACTR 1 (Blackburn J) cited in Naomi White, 'Natural Justice, Children and the School' (1997) 13 *Australian Journal of Law and Society* 191, 193.

31 *Dage v Baptist Union of Victoria* [1985] VR 270, [3]. In this case an interlocutory injunction was granted to restrain the expulsion of a student several weeks before his final exams.

32 Ibid [4].

33 Ibid [3] in which Starke J cites Field J in *Hutt v The Governors of Haileybury College* (1887) 4 TLR 623.

34 *Charles Phillip Bird by his tutor Vredê Jane Bird v Campbelltown Anglican Schools Council* [2007] NSWSC 1419.

35 Ibid [42].

36 Ibid [34, 36]. At that time there was no statutory requirement that non-government schools comply with the principles of procedural fairness.

37 *Gray v Marlborough College* [2006] EWCA Civ 1262

38 Ibid [20]. See also *CD v Ridley College* (1996) 140 DLR (4th) 696 and *Gianfrancesco v The Junior Academy Inc* (2003) 169 OAC 169.

39 Lindisfarne Anglican Grammar School, Policies <http://www.lindisfarne.nsw.edu.au/index.php/resources/policies.html>.

40 *Wood v Wood* (1874) LR 9 Ex.

41 Naomi White, 'Natural Justice, Children and the School' (1997) 13 *Australian Journal of Law and Society* 191, 192.

42 In *Forbes v NSW Trotting Club* (1979) 143 CLR 242 the club was bound by the principles of natural justice.

43 Andre Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 2014) 252-253.

44 *Bird v Ford* [2014] NSWCA 242, [22].

45 Ibid [22].

46 Ibid

47 *Burke v Yeshiva Beit Yitzchak of Hamilton and DC* (1996) 90 OAC 81.

48 Ibid

49 *C.D. v. Ridley College*, 1996 CanLII 8128 (ON SC), <http://canlii.ca/t/1w5jb> (retrieved on 2019-08-16).

50 Ibid [30].

51 Independent Schools Council of Australia, 'Autonomy and Accountability' <https://isca.edu.au/about-independent-schools/about-independent-schools/autonomy-and-accountability/>.

52 *School Education Act 1999* (WA) s 159.

53 Ibid s 160(d).

54 *School Education Act 1999* (WA), 'Standards for Non-Government Schools 2018, determined by the Minister for Education and Training in accordance with section 159 of the *School Education Act 1999*', <https://www.education.wa.edu.au/standards>.

55 Ibid. This Standard was first introduced from 8 February 2016.

56 Ibid

57 Education Regulations 2017 (Tas) Sch 3, Standard 13(3). This also applies to the renewal of registration: See Schedule 4, Standard 13(3).

58 *Education and Training Reform Act 2006* (Vic) s 4.3.1(6): *Guidelines to the Minimum Standards and Other Requirements for Registration of Schools Including Those Offering Senior Secondary Courses*: <https://www.vrqa.vic.gov.au/schools/Pages/standards-guidelines-requirements-for-schools.aspx>.

59 *Education Act 1990* (NSW) s 53A; The NSW Guidelines <https://rego.nesa.nsw.edu.au/ starting-a-new-school/initial-registration/requirements/discipline>; *Education and Early Childhood Services (Registration & Standards) Act* 2011 (SA) – Education Standards Board, Standard 3.

60 *Education Act 2015* (NT) Pt 7 s 125(n).

61 *Education Act 2004* (ACT) s 83 and s 104(5) and s 105(3) in relation to procedural fairness.

62 268 U.S. 510 (1925).

63 Ibid -534.

64 Ibid - 535.

65 273 U.S. 284 (1927).

66 According to the First Amendment, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; (1791). The US Supreme Court has reviewed dozens of cases over the permissible boundaries of aid to faith-based schools. See, e.g., Charles J. Russo. 'The Supreme Court, 1st Amendment Religion Clauses, and Education: An Overview.' In W.E. Jeynes (Ed.), *Handbook of Christianity & Education*, Wiley-Blackwell: Hoboken, NJ, 419-440 (2018).

67 For the most recent federal data, see*, The Condition of Education, Private School Enrolment, National Center for Educational Statistics, Jan. 2018* <https://nces.ed.gov/ programs/coe/i ndicator_cgc.asp> (" In fall 2015, some 5.8 million students (10.2 percent of all elementary and secondary students) were enrolled in private elementary and secondary schools. Thirty-six percent of private school students were enrolled in Catholic schools, 39 percent were enrolled in other religiously affiliated schools, and 24 percent were enrolled in nonsectarian schools.").

68 See Office of Non-Public Education Frequently Asked Questions – General Issues Related to Nonpublic Schools Aug. 2019, <https://www2.ed.gov/about/inits/ed/non-public-education/files/onpe-faqs-aug2019.pdf> "The Department does not have jurisdiction over private elementary and secondary schools unless they are direct recipients of federal financial assistance from the Department….. The regulation of private and home schools is primarily the responsibility of state and local governments. The Department of Education Organization Act expressly prohibits the Department from exercising 'any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system…except to the extent authorized by law.' (20 U.S.C. § 3403(b))." Ibid - 2.

69 *Allan v. Caspar*, 622 N.E.2d 367, 371 (Ohio Ct. App. 1993).

70 419 U.S. 656 (1975).

71 *Martinez v. School Dist. No. 60*, 852 P.2d 1275 (Colo. Ct. App. 1992).

72 *Kolesnick By and Through Shaw v. Omaha Pub. Sch. Dist.*, 558 N.W.2d 807 (Neb. 1997).

73 *Goss*, n. 67.

74 Ibid 581.

75 *See McGrath v. Town of Sandwich*, 22 F. Supp.3d 58 (D. Mass. 2014) (refusing to dismiss a claim against a principal who violated a student's clearly established due process right to be told about the evidence against him so he could have had a fair opportunity to respond to charges he faced at a suspension hearing).

76 *See*, *e.g.*, *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623 (6th Cir. 2013).

77 *Goss*, n. 70.

78 430 U.S. 651 (1977).

79 Christina Caron, 'In 19 States, It's Still Legal to Spank Children in Public Schools,' *N.Y. Times*, Dec. 13, 2018, <https://www.nytimes.com/2018/12/13/us/corporal-punishment-school-tennessee.html>.

80 *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000), *reh'g en banc denied*, 244 F.3d 143 (11th Cir. 2000).

81 *Smith ex rel. Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168 (2d Cir. 2002); *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168 (3d Cir. 2001).

82 Chief Justice Robert French, 'Procedural Fairness – Indispensable to Justice?' (Sir Anthony Mason Lecture, The University of Melbourne Law School, 7 October 2010) <http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>.