

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 050

REGISTERED TEACHER: SMN

PANEL MEMBERS

Marilyn Mooney, Chairperson

Terry Hayes, Registered Teacher

Anne Moloney, Registered Teacher

ATTENDANCE:

The teacher was represented by Ms Alanna Duffy, with instructing solicitor Mr Simon Abraham, Tisher Liner & Co Lawyers

Counsel Assisting: Ms Anne Sheehan with Ms Clare Sherman solicitor instructing

DATE OF HEARING: 28 and 29 May 2007

DETERMINATION UNDER SECTION 42(2):

On 6 June 2007 the panel decided that the teacher remain registered as a teacher.

REASONS

BACKGROUND

The teacher has been a registered teacher since 31 December 2002.

By letter dated 15 November 2004 the employer notified the Institute that it had taken action in relation to the alleged serious misconduct and/or lack of fitness to teach of the teacher. The teacher was employed at the school.

The teacher resigned with effect from 12 November 2004. The employer had commenced an inquiry in relation to the teacher.

The allegations against the teacher relate to incidents that occurred in 2003 and 2004. By way of background, in 2001 the teacher was on leave without pay from the school. In 2002, the teacher returned to the school to work 0.5 as a classroom teacher of literature at all year levels. In 2003, as the school was unable to continue its literature program, the teacher worked as a part time language studies teacher at all year levels. The teacher had one month's leave without pay at the beginning of the year and then returned to the school. She was on sick leave from 28 March 2003, and the whole of term 2. She returned for part of term 3 and was then on sick leave until the last week of term 4. In 2004, the teacher returned to the school on a 0.5 part time basis. The teacher only attended the school on Tuesdays, Wednesday mornings and Fridays.

The matter was first referred to the Disciplinary Proceedings Committee on 13 May 2005 and the Committee referred the matter to investigation with a view to having a formal hearing.

On 2 August 2006, the Institute arranged for a Consultant to investigate the allegations and interview witnesses. The Consultant completed her investigation and supplied the Institute with her report and witness statements in September 2006. The teacher chose not to participate in an interview with the Consultant.

On 20 September 2006, the Disciplinary Proceedings Committee determined that the inquiry proceed to a formal hearing.

A panel was constituted in accordance with section 39 of the *Victorian Institute of Teaching Act 2001*.

A Notice of Formal Hearing dated 5 March 2007 was served upon the registered teacher's solicitor by registered post.

At the commencement of the hearing, Counsel Assisting submitted that allegation 2 be withdrawn. The panel consented to the submission.

Nature of allegations:

The allegations of possible serious misconduct and/or lack of fitness to teach against the teacher are:

1. Engaged in unprofessional behaviour towards students, including inappropriate physical contact.
 - a) On 26 March 2003, the teacher lifted student 1 off the floor and moved her five metres across a classroom. When another student, student 2, accused the teacher of assault, she attempted to make a deal with him to not tell anyone about the incident.
 - b) On 6 August 2003, the teacher pushed a student, student 3, against a wall after she accidentally bumped into her causing her glasses to fall.
 - c) On 17 February 2004, the teacher tied student 4's hands together with masking tape after he failed to clean up in a class.

THE LAW

Section 27 of the Act states:

27. Employer to notify Institute of action against teacher

(1) The employer of a registered teacher must inform the Institute if the employer has taken any action against the registered teacher in response to allegations of serious incompetence of the registered teacher, serious misconduct of the registered teacher or that the registered teacher is unfit to be a teacher or any other actions that may be relevant to the registered teacher's fitness to teach.

The terms *serious misconduct* and *unfit to be a teacher* are not defined in the Act. The panel was referred to case law regarding disciplinary proceedings in other jurisdictions.

According to the High Court in *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 the purposes of disciplinary proceedings in relation to a profession are:

- to protect the public
- to maintain proper standards of conduct for the profession, and
- to protect the reputation of the profession.

These procedures are not meant to punish the teacher although this may be an unintended consequence (see *New South Wales Bar Association v Evatt* (1968) 117 CLR 177). The purpose of these proceedings is to protect students in Victorian schools. A decision to deregister a teacher is very serious and requires great care (see *Victorian Lawyers RPA Ltd v Vodicka* (2000) VSC 272).

The standard of proof that applies in disciplinary proceedings is the *balance of probabilities*. The appropriate standard of proof that applies in civil matters was considered in *Briginshaw v Briginshaw* (1938) 60 CLR 336 where the High Court said that the ordinary standard of proof applied *subject only to the rule of prudence that any*

tribunal should act with much care and caution before finding that a serious allegation ... is established.

And later:-

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

The observations of the High Court have been followed in numerous cases and in particular in relation to disciplinary proceedings (see *Barwick v Law Society of New South Wales* [2000] HCA 2, and *Murphy v The Bar Association of NSW* [2001] NSWSC 1191).

Whether misconduct is serious will depend upon the facts of each case. Conduct would not be serious if it was trivial or of momentary effect at the time. To be serious, conduct must be a substantial departure from the accepted standards for the teaching profession, and the departure must be the fault of the teacher (see *Parr v Nurses Board of Victoria* decided VCAT 2 December 1998)

If the act or omission that constitutes the misconduct is within the will, power or control of the teacher it is more likely to be serious misconduct. If the act was done wilfully or recklessly without regard for the consequences, then it is more likely to be serious misconduct (see *Re: Christine Trigger and The Australian Telecommunications Commission* (1984) 4 FCR 242).

A failure by the teacher to understand that the conduct complained of was serious misconduct will indicate the teacher's unfitness to teach.

The **test** set out in the case law is conduct:

which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency. Allinson v General Medical Council [1891-4] All ER 768

The conduct the subject of the inquiry may indicate a character defect incompatible with a self respecting profession. Or the conduct may illustrate that the teacher would not be able to work satisfactorily in a school environment. Whether conduct amounts to serious misconduct will depend on the minimum standards demanded by the teaching profession. Conduct that deserves disapproval may not be serious misconduct (see *Ziems*).

The degree of remoteness of the conduct in question from professional practice must also be considered according to *A Solicitor v The Council of the Law Society of New South Wales* (2004) **HCA 11** which it is stated at paragraph 34:

...the nature of the trust, and the circumstances of the breach, were so remote from anything to do with professional practice that the characterisation of the appellant's personal misconduct as professional misconduct was erroneous.

A teacher's position is one of power and influence in relation to the student - a position of trust. The misconduct must reflect in a significant way on the suitability of the person to work as a teacher. It must illustrate attitudes or characteristics inconsistent with the moral qualities required of a teacher (see *Yelds v Nurses Tribunal & Ors* (2000) NSWSC 755; *New South Wales Bar association v Cummins* (2001) NSWCA 284).

The term *fit and proper person* is intended to cover conduct other than dishonesty and include significant impropriety, lack of integrity or bad faith. Persistent failure to meet a teacher's obligations to the education community shows a disregard for these obligations and not just carelessness, incompetence or lack of organisation. A failure by the teacher to understand that the conduct complained of was serious misconduct will indicate the teacher's unfitness to teach (see *Cameron v Bar Association of NSW* [2002] NSWSC 191 and *Marten v Disciplinary Committee of the Royal College of Veterinary Surgeons* [1965] 1 All ER 949).

A continuing lack of moral responsibility and an absence of insight and understanding of right and wrong in the context of ethical fitness would be a strong indication of unfitness (see *New South Wales Bar Association v Cummins* (2001) NSWCA 284 and *Siguenza v Secretary, Department of Infrastructure* [2002] VSC 46).

DOCUMENTS CONSIDERED

The Panel was provided with the following documentary evidence:

- Notice of Formal Hearing dated 5 March 2007
- Witness statement of the Principal dated 29 August 2006 (1 page) **001**
 - P0 - witness statement of the Principal dated 17 September 2004 (34 Pages) **002 – 035** and attachments:
 - P1 – Curriculum Vitae the Principal (6 pages) **036 – 041**
 - P2 – The School Charter (24 pages) **042 - 065**
 - P3 – Document titled 'Staff wellbeing-our values' (2 pages) **066 - 067**
 - P3A – Equal Opportunity Policy (9 pages) **068 - 076**
 - P3B – Document: 'Roles and Responsibilities' (3 pages) **077 - 079**
 - P4 – Incident report, the Assistant Principal, 26 March 2003 (2 pages) **080 - 081**
 - P5 – Incident report, , 26 March 2003 (2 pages) **082 - 083**
 - P6 – Medical Certificate, doctor 1, undated (2 pages) **084 - 085**
 - P7 – Medical Certificate, doctor 2, undated (2 pages) **086 - 087**
 - P8 – Diary Note, the Principal, 8 October 2003 (2 pages) **088 - 089**
 - P9 – Letter the Principal to the teacher, 8 October 2003 (2 pages) **090 - 091**
 - P10 – Letter the Principal to the teacher, 28 October 2003 (3 pages) **092 - 094**
 - P11 – Letter the Principal to doctor 3, 21 October 2003 (21 pages) **095 - 115**
 - P12 – Letter doctor 3 to the Principal 23 October 2003 enc Psychiatric Examination and Report (8 pages) **116 - 123**

- P15 – Letter the Principal to the teacher, 17 February 2004 (9 pages) **135 - 143**
- P17 – Minutes of meeting, 17 February 2004 (3 pages) **148 - 150**
- P20 – Letter parent 1 to the Principal, 24 February 2004 (2 pages) **157 - 158**
- P21 – Letter the Principal to the teacher 27 February 2004 (3 pages) **159 - 161**
- P22 –Minutes of meeting 17 February 2004 (3 pages) **162 - 164**
- P23 – Minutes of meeting 27 February 2004 (3 pages) **165 - 167**
- P26 – School Handbook (64 pages) **172 - 235**
- P30 – Letter the Principal to the teacher, 2 March 2004 (3 pages) **245 - 247**
- P55 – Documentation of complaints process (3 pages) **324 – 326, 336 – 344** (9 pages) and **364 – 432** (69 pages)
- P56 – Incident Report teacher 10, 24 March 2004 (4 pages) **433 - 436**
- P57 – Letter the teacher to the employer 25 March 2004 (2 pages) **437 - 438**
- P58 – Letter Cleaning Service, 02 April 2004 (2 pages) **439 - 440**
- Witness statement of teacher 7 dated 28 August 2006 (1 Page) **496**
 - T7-1 - witness statement of teacher 7 dated 16 September 2004 (3 Pages) **497 - 499** and attachments:
 - T71a – Incident Report, 26 March 2004 (2 pages) **500 - 501**
- Witness statement of the Assistant Principal dated 28 August 2006 (2 Pages) **504 - 505** and attachments
 - AP-1 – letter of response to correspondence from the teacher dated 5 March 2004 (2 Pages) **506 - 507**
 - witness statement of the Assistant Principal dated 15 September 2004 (10 Pages) **508 - 517** and attachments:
 - AP-1a –Assistant Principal, Curriculum Vitae (3 pages) **518 - 520**
 - AP-2 – Incident Report, 26 March 2003 (2 pages) **521 - 522**
 - AP-3 – the teacher Notes, 6 August 2003 (3 pages) **523 - 525**
 - AP-4 – Minutes of Meeting, 17 February 2004 (3 pages) **526 - 528**
 - AP-5 – Minutes of Meeting, 27 February 2004 (3 pages) **529 - 531**
 - AP-6 – Minutes of Meeting, 2 March 2004 (2 pages) **532 - 533**

The following exhibits were presented to the panel:

- A. Statement of teacher 3 dated 16 September 2004
- B. Statement of the Principal dated 29 August 2006
- C. Statement of the Assistant Principal dated 6 September 2006
- D. Statement of teacher 7 dated 28 August 2006
- E. Statement of the teacher and Curriculum Vitae dated 23 May 2006
- F. Statement of Principal 2 dated 23 April 2007
- G. Reference of teacher 11 dated 19 April 2007
- H. Statement of the teacher’s second support person dated 22 May 2007
- I. Statement of teacher 12 dated 22 May 2007

THE EVIDENCE

The Panel heard evidence by oath or affirmation from the following witnesses:

- The Principal
- The Assistant Principal
- Teacher 7
- The teacher

Allegation 1: Engaged in unprofessional behaviour towards students, including inappropriate physical contact

- (a) On 26 March 2003 the teacher lifted student 1 off the floor and moved her five metres across a classroom. When student 2 accused the teacher of assault, she attempted to make a deal with him to not tell anyone about the incident.**

The Panel received written and oral evidence from the Principal of the school. The Principal described the school's introduction in 1999 of an Assertive Discipline Policy which all staff were expected to abide by. The policy emphasised the reinforcement of positive behaviour with a structured sequence of behaviour and disciplinary consequences. One of its objectives was to protect the teacher from emotional involvement in any disciplinary encounter with children. The discipline policy was very emphatic and clear about the inappropriateness of physical discipline.

The Principal also explained the teacher's role as a specialist teacher. In 2003 she had conducted a special program. In 2003, because of staff changes, this program was disbanded and the teacher was required to develop and teach a language studies program to all classes (23) and students (550) in the school. In 2004 she was a specialist teacher. Previous to 2002 the teacher, apart from taking a year's leave of absence in 2001, had worked as a full time classroom teacher. The Principal explained that in 2000 several parents had requested that their children not be placed in the teacher's class. She did not give the teacher the reasons why.

The Principal explained that she first became aware of the incident involving student 1 on the 26 March when the Assistant Principal reported to her that the teacher had approached him about an incident in a language studies class. The Principal said she was also informed by teacher 7, the grade teacher of student 1, that the teacher had manhandled student 1 in a language studies class in her room. Teacher 7's report stated that 'student 1 was lifted off the floor and taken to approximately five metres as she was assumed to be not listening as she had a pen in her hand.' The report also stated that 'student 2 accused the teacher of assault. The teacher then made him write an essay about assault.'

The Principal called a meeting for 27 March at which herself, the Assistant Principal, the teacher and teacher 12, the teacher's support person, were in attendance. The Principal explained that she did not speak to any children in the class before the meeting as this was best left to the class teacher (teacher 7). The Principal stated that the meeting was arranged primarily to assist the teacher with strategies to ensure that such an incident

did not occur again. The Principal believed that the teacher had not been coping well in the classroom and was experiencing stress and strain. Once the discussion focused on the student 1 incident, the Principal informed the teacher that it was completely unacceptable to manhandle any child. The Principal told the Panel that the teacher responded with words to the effect 'Where is it written that I can't manhandle a child? Show me the legislation.' The Principal said she 'warned and counselled the teacher about the inappropriateness of ever touching a child in a rough manner.' The Principal said that the teacher refused to acknowledge that she had done anything inappropriate, walked out of the meeting before it concluded and went home. The Panel heard that the teacher returned on the following day with a medical certificate and took paid sick leave for the rest of term 1. On the last day of the holiday period the teacher rang the Principal to state that she could not face the children again and had a medical certificate for the whole of term 2.

The Assistant Principal at the school from 2000 to Term 1 2004 gave written and oral evidence to the inquiry. He described an occasion on 26 March when he was on yard duty at lunchtime. The teacher approached him and complained of the behaviour in her language studies class. The teacher explained that she had placed both hands on student 1's shoulders and moved her to another part of the room, as she had not been paying attention. She also said that another student, student 2, had said that such action was assault. The teacher said she told student 2 that he was wrong and that she would phone his parents if he said it again. The Assistant Principal said he told the teacher that it was highly advisable not to touch students unless it was necessary for safety reasons. The teacher then said words to the effect 'Is it written in legislation that I can't touch students?' The Assistant Principal said he replied that it was always inappropriate to manhandle students but he didn't know where it was written. He offered to find out and subsequently contacted an officer of the employer. On the basis of the officer's advice, the Assistant Principal said he repeated his advice to the teacher regarding the manhandling of students. He also informed the Principal of his conversation with the teacher. On 27 March he attended the meeting with the Principal, the teacher and teacher 12. He corroborated the Principal's account of the meeting. At the meeting, in response to a remark about high standards from the teacher, he said he replied that it was okay to have high standards but if the teacher was having difficulties with students she was obliged to follow the school's discipline procedures, as was everyone else. He believed the teacher's response and attitude at the meeting, including her leaving before the meeting had concluded, to be inappropriate.

Teacher 7 gave written and oral evidence to the inquiry. Teacher 7 was the class teacher for the class in which the incident involving student 1 occurred. Teacher 7 explained that on returning to the class at the end of the teacher's language studies class she overheard the teacher say to student 2 that 'This is just between you and me student 2.' Then the teacher said words to this effect to her, 'student 2 and I have a deal, there is no need to tell anyone.' Concern for the safety of the children prompted teacher 7 to ask student 1 if she felt safe, and then to question student 2 about the conversation. Student 2 told her that the teacher had lifted student 1 off the floor, carried her for about five metres and then made her stand out the front until the teacher had finished speaking. Student 2 said he accused the teacher of assault. In response the teacher made him write an essay on the meaning of assault. She also told him that what he had

said was slanderous and that she could take legal action against him. Teacher 7 said she considered the teacher's actions to be unprofessional in that she had manhandled a student and intimidated another who had said he would report the manhandling. She provided the Principal with a written report of the incident, though she could not think of why her actual conversation with student 1 was not included in the report. Teacher 7 described student 1 as a physically tiny, cooperative and happy student and student 2 as a forthright student who spoke his mind and let you know how he felt if something was wrong. She explained that she had a class of 31 students, which she ran as a collaborative classroom, and where children were allowed to work on the floor in a cleared space at the front of the room near the blackboard. She described her relationship with the teacher as a professional one in that she, as a leading teacher, distributed information to her in the same way as she did with all teachers.

The teacher gave written and oral evidence to the Panel. The teacher explained that she had been a teacher since 1970. She had taught at the school since 1991 and at school 1 in 2004. At the school she was a full time classroom teacher until 2000. In 2001 she took a year's leave. In 2002 she requested the Principal that she work part time, which was granted. In 2002 she devised and taught a program to all classes. In 2003 the program was replaced because in the absence of the school's LOTE teacher she was asked to create and deliver to all classes a language studies program for half/three quarters of an hour each week. In 2004 she was given a specialist allotment. In her time as a class teacher the teacher said she was aware of one instance where a parent had requested that she not teach her child. She believed this parent to be the one who in a previous year, as a reading support teacher, had brought her younger child to class, to which the teacher objected.

The teacher strenuously denied the allegation regarding student 1. She said she was physically incapable of lifting and carrying student 1, whom she described as of average stature, 'not a diminutive child'. The teacher described how student 1 had chosen to work on the floor as allowed by teacher 7 and that she did so while waving her legs about, causing a potential hazard. The teacher feared she would trip over her. When she sought the whole class' attention to look at the blackboard and did not immediately get student 1's attention, she physically touched student 1, who was then sitting or kneeling, on the shoulders or tops of both arms and turned her around to face the blackboard. She said she did so to ensure both her and student 1's safety, as she did not want to trip over the child. In hindsight, the teacher agreed she might have achieved a similar effect by more persistently saying something like 'student 1, please turn around and pay attention.'

The teacher said that this incident occurred about 2/3 of the way through the lesson and she did not speak to student 2 about his calling out until the end of the lesson. She described student 2 as typical of many the school students who thought they had a right to 'centre stage', and that student 2 had sensationalised a minor incident. Consequently, she asked him to write an essay about the meaning of assault and said if there were any further occurrences she would be taking it up with his parents. She saw it as appropriate disciplinary action regarding student 2's calling out and was not an attempt to hush student 2 up or intimidate him about the student 1 incident. The teacher denied telling teacher 7 that she had made a deal with student 2 not to tell

anyone about the incident, though she may have said something about the matter not going any further, meaning that student 2 had understood what had been said and would not behave that way again. Therefore, the teacher stated, there was no need for her to tell anyone about his behaviour.

She sought out the Assistant Principal in the playground after a casual conversation with teacher 1 about the incident. Teacher 1 had said to her that it was inadvisable to touch a student under any circumstances and she was therefore seeking clarification as to what the regulations were concerning such. The teacher said that she would never use the word 'manhandle' and that the Assistant Principal introduced the term into the conversation.

The teacher described the 27 March meeting as one in which she was presented with the allegation regarding student 1 as though it were a fact, even though no one had bothered to check on its veracity. She stated that she would 'not be coerced into saying things that did not happen' and accordingly left the meeting. The following day she sought sick leave for the rest of the term, which was granted.

(b) On 6 August 2003, the teacher pushed student 3, against a wall after she accidentally bumped into her causing her glasses to fall.

The Principal told the Panel that she received an oral report from a classroom teacher, teacher 3, that she had seen the teacher push student 3 in a rough manner against a wall after student 3 had bumped into the teacher and knocked her glasses to the floor. The Principal said that she called a meeting with herself, the teacher, the Assistant Principal and teacher 12, the teacher's support person, to discuss the incident. The Principal said that at this meeting the teacher was in a very agitated state, couldn't recall the incident, and seemed taken aback by the allegation. The Principal said that the meeting didn't resolve anything and that due to the teacher's agitated state she sent her home. The Panel heard that in the Principal's professional opinion, the situation could have been handled by using a combination of verbal/hand action to warn the student to stop, rather than pushing a student across the room. The Principal said that she didn't interview student 3 as she felt the incident best handled by the classroom teacher.

The teacher denied this allegation. She explained it thus: 'At the end of the lesson, I was holding my diary and glasses in my hand when student 3 knocked my glasses out of my hands as she ran into me after teacher 3 had told the class to quickly pack up. So that my glasses would not be stood on I put my hands on her shoulders and told her to stand still so that I could pick them up. The force of her bump into me had knocked the glasses more than a metre away from where I stood close to the blackboard. I did not push her in any way.'

During her oral evidence the teacher said that the incident occurred towards the end of a language studies lesson. She said that in order to reinforce desirable behaviour, she had made a list of those children who had behaved well and also listed the names of those who were misbehaving in a 'warning bubble' which was in accordance with the

Assertive Discipline Policy procedures. The teacher said 'I was admonishing some and praising others. The children were not in their usual seats. When I have a disruptive class I use the process. Teacher 3 didn't seem to use the process. I created the bubble and I sent a child to another class and another nine I wrote on paper to show the Assistant Principal. One child was causing most of the disruption. The child who blew paper bullets through the end of a biro was removed.' the teacher reported that student 3 was 'sitting at a table' and that teacher 3 'was not happy with me talking the way I was. She told the children to pack up quickly and when I spoke to her about some of the children's behaviour, she was dismissive of me as a fellow teacher.' The teacher said that there was a sense of urgency relating to the time taken to speak to the children so the pack up was done in haste with the result that 'student 3 ran straight into me. My glasses flew to the front of the room. I was going to tell the Assistant Principal that I was upset with the class and that I wanted him to know that I thought the children were taking advantage of the situation', i.e. that language studies was the only subject for which the children had another teacher come to their room. The teacher told the Panel, 'I was not distressed enough to hurt a child. It was a split second and natural thing to do – to hold the child and say, "Stand still whilst I get my glasses." Student 3 did exactly what her teacher told her to do and that's why she was in a rush.' The teacher explained that she did not say to student 3 what was on her mind, i.e. that the glasses cost \$300.

(c) On 17 February 2004, the teacher tied student 4's hands together with masking tape after he failed to clean up in a class.

The Principal said she first became aware of the incident involving student 4, on or around 24 February 2004 when the parent of student 4 rang to inform her that student 4 had told him of an incident in which the teacher had tied his hands with masking tape at the end of a class because he would not help clean up. The parent of student 4 said he did not want to make waves but the Principal needed to know in case there were other incidents. The Principal requested the parent of student 4 put the matter in writing which he did. In the requested letter, the parent of student 4 indicated that he and his wife had been alerted to the incident by other parents. When questioned, student 4 told his parents that 'it was done in a fun situation and was no big deal'. The parent of student 4 added, 'however other students and parents may have taken it out of context.' The Principal said that she was informed later by a teacher 13 that parents had talked to her about the incident. Some months later, student 4 also asked her if she knew that he had been tied up in the class.

In a meeting on 2 March the Principal informed the teacher of the incident involving student 4 and requested a response in writing by 5 March. The Principal stated that she did not discuss the incident beforehand with the teacher because to raise any issue related to her professional behaviour was 'monumental'. In her written response the teacher acknowledged that she did tape student 4's hands but it was done in jest. In reply (11 March), the Principal indicated that she considered such action a serious breach of professional conduct. She stated 'It is of concern that you appear to regard this as an acceptable form of discipline in the circumstances you describe. You are mistaken in your understanding of your duty of care to students. It is important that you be aware that physical contact with students and any action that involves physical

restraint, except in exceptional circumstances, is a serious breach of your professional obligation and cannot be tolerated.’ In her oral evidence, the Principal elaborated on her concern, believing such punitive action to be detrimental to a student’s self esteem and possibly traumatic for the child and the children witnessing such action. That same day, the Principal stated that she was approached by the teacher in the staffroom at lunchtime. The teacher proceeded to talk loudly about student 4’s’ behaviour in the class in words to the effect, ‘I have just had student 4 in my class and he was the best at packing up. Now Principal, why do you think that may be? What do you say about that, Principal? Can you explain something I may have done that may explain this good packing up?’ The Principal was concerned that a confidential matter seemed to be being talked about so publicly. The conversation was ended when another teacher intervened and asked ‘Is that student 4?’ to which the teacher replied ‘Yes. ’

The Assistant Principal also testified that he attended the meeting on 2 March 2004 with the Principal, the teacher, and the teacher’s second support person, where the teacher was given a letter requiring her to respond to a number of complaints, including the student 4 allegation, by 5 March. At lunchtime that day the Assistant Principal said he overheard the conversation between the Principal and the teacher. To him it appeared as though the teacher was attempting to intimidate the Principal. As well, the teacher appeared to be suggesting that her taping of student 4’s hands had improved his behaviour. The Assistant Principal believed such action to be totally inappropriate and one which could have had a traumatic effect on student 4 and other students in the class.

The teacher in her evidence to the Panel did not deny that the incident occurred. She said that student 4 had not followed instructions regarding the cleaning up of the class room. Instead he was in the process of unravelling a long strip of masking tape. While he was holding it above his head she wound it ‘loosely’ around his hands making the comment ‘If you’re going to waste the tape then let’s do something more useful with it’ (or similar words). She then unwrapped the tape. The teacher believed the incident had been blown out of all proportion. It had been done in jest as student 4 had confirmed to his parent and the teacher did not even think of it as a disciplinary matter. Instead, it was a lighthearted way of making the point that materials should be put to useful purposes. The teacher admitted that, in hindsight, she should not have acted as she did because of the way such actions can be misconstrued by both the child and other children in the class. The teacher said she believed that it was appropriate to make physical contact with a child when safety is an issue and that that there might also be occasions where a gesture to a child might accompany a verbal request.

After leaving the school, the teacher taught for the rest of 2004 at school 1. She described the school as providing a very different professional environment where the staff were very welcoming and supportive. She was also provided with her own classroom for teaching children with special needs – gifted and learning difficulties. She continues to tutor some of those students. Written testimony from Principal 2, Principal of school 1 during 2004, attested to the teacher’s capabilities as a teacher: ‘... she did all that was asked of her and, in some cases, exceeded our expectations. The students for whom she was responsible improved under her tutelage.’

DISCUSSION OF EVIDENCE

Allegation 1(a)

The Panel concludes that the actual charge in the allegation that the teacher physically carried student 1 five metres across the room cannot be substantiated. It was based on the observations of a pupil, student 2, who, in his conversation with teacher 7, may have embellished the physical contact which did occur. Teacher 7, in turn reported the conversation to the Principal. The Panel, in fact, was surprised that no attempt was made at the school level to substantiate the terms of the allegation by seeking student 1's and other students' versions of the incident. Equally the Panel considered that the teacher's explanation of her actions oversimplified her intentions. There may well have been a concern for hers and student 1's safety but that does not preclude the fact that there was probably also an intention to direct student 1's attention towards the blackboard. As the teacher herself admitted there are more appropriate non-physical ways of achieving such.

The teacher's interactions with student 2 are not crucial to an allegation of serious misconduct, though they provide a context for the action which led to the allegation. Teacher 7 believed they were designed to ensure that student 2 did not go any further with his complaint. The teacher justified her actions as an appropriate disciplinary action because student 2's calling out was disruptive, and she implied that teacher 7's misinterpreted her intentions.

The conversation with the Assistant Principal regarding legislation related to physical contact with students took place. The Assistant Principal suggested there was a level of agitation in the teacher's request. The teacher suggested that her request was put more calmly, though she provided no clear reason as to why she sought clarification of the legislation.

Allegation 1(b)

The panel considers that the incident involving student 3 did take place as agreed by all, but the dispute is in regard to the manner in which the teacher managed the situation. The atmosphere in the class at the time of the incident was both rushed and tense. It is well known that changeover time between lessons is a moment when behavioral incidences and accidents are more likely to happen. The class, in general, had been particularly disruptive on this occasion and in the 'cut and thrust' of moving about under pressure from their class teacher to hurry up, it is likely that student 3 rushed forward to get ready for the next class and inadvertently knocked the teacher's glasses, causing the teacher to halt and restrain the child to prevent damage to an expensive pair of glasses.

Allegation 1(c)

There is no disputing the fact that the incident occurred. The teacher admitted to it and agreed that she should not have wrapped masking tape around student 4's hands. What is in dispute are the degree to which the teacher's actions can be characterised as inappropriate physical contact used for disciplinary purposes; and her action's effect on student 4 and the other children in the class. The teacher claimed that it was an instantaneous action done in jest to make a light-hearted point about not wasting

materials, especially materials belonging to others. Student 4 himself, in the letter from his parent, described it as 'a fun situation' and 'no big deal'. The Principal and the Assistant Principal characterised the teacher's actions as inappropriate physical contact which was punitive in nature and potentially traumatic for student 4 and other children in the class.

FINDINGS UNDER SECTION 42(2) OF THE ACT

When making its decision the Panel considered that the primary purpose of disciplinary proceedings is to protect students, the teaching profession and the public, by ensuring maintenance of proper standards of teacher conduct.

The Panel had to consider whether the teacher had engaged in serious misconduct and/or was unfit to teach. In making its findings the Panel was mindful of the following:

- The teacher's long history as a teacher, including nearly thirteen years at the school and the fact that the allegations amount to three incidents in a concentrated eleven month period in the teacher's long teaching career.
- The teacher's acceptance, in hindsight, that any physical contact with students, other than for safety reasons, is either inappropriate or problematic and should be avoided at all costs.
- The fact that in none of the three incidents did the school administration seek evidence directly from the students involved or their classmates who may have witnessed the alleged actions, or the effects upon them.
- The teacher's reluctance to admit that her teaching load, particularly in 2003 where she taught over 500 students in 23 classes per week, was stressful in ways that impacted on her disciplinary procedures and behaviour towards students.
- The teacher's subsequent teaching performance at school 2 in what she considered to be a more welcoming professional environment.

The Panel found that the three incidents were discrete events with conditions unique to them, and as such there was not a pattern of behaviour that demonstrated the teacher's serious misconduct or unfitness to teach. Indeed, in the Panel's view, the incident involving student 3 was not a matter of a teacher disciplining a child at all, but rather a spontaneous, human re-action to preserve the glasses from any further damage other than what the fall inflicted.

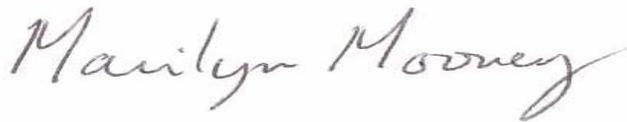
Consequently the Panel finds that:

Allegation 1(a), as stated, unproved

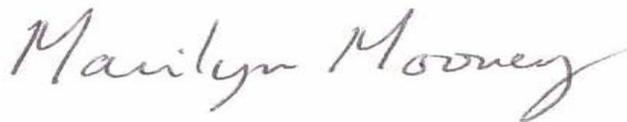
Allegation 1(b) as stated, unproved

Allegation 1(c), on the teacher's own admission proved but that the action involved while inappropriate did not constitute misconduct or serious misconduct.

The Panel finds the teacher's behaviour inappropriate and deserving of disapproval and modification, but not serious misconduct as required under Section 42(2) of the Act and the principles expressed in the case law presented to the Panel.



MARILYN MOONEY, CHAIRPERSON



**per :
TERRY HAYES, REGISTERED TEACHER**



**per:
ANNE MOLONEY, PANEL MEMBER**