

THE HIGH COURT

[2021] IEHC 392

[Record No. 2021/91 JR]

BETWEEN

THE BOARD OF MANAGEMENT OF A SPECIAL SCHOOL

APPLICANT

AND

THE SECRETARY GENERAL

OF THE DEPARTMENT OF EDUCATION AND SKILLS,

JACK CLEARY, CHRISTINA CASSERLY AND JOSEPH J. KEANE

RESPONDENTS

AND

LS AND DL

NOTICE PARTIES

JUDGMENT of Mr. Justice Barr delivered electronically on the 8th day of June, 2021

Introduction

1. The applicant is the board of management of a special school, which provides primary education for children with special needs. There are 29 pupils in the school, with a staff of 31, made up of five teachers, including a principal, a director of education and the remainder are special needs assistants. There is a pupil/assistant ratio of 1:1 in the school. All of the students have autism spectrum disorder, together with other learning and cognitive difficulties.
2. The first named respondent is the Secretary General of the Department of Education and Skills. She has a role to play when the expulsion of a child has been challenged pursuant to s.29 of the Education Act, 1998 (as amended). The extent of her role will be examined later in the judgment. The remaining three notice parties were the members of an appeal committee set up pursuant to s.29 of the Act (hereinafter they shall be referred to collectively as "*the appeal committee*").
3. The notice parties are the parents of a boy of fifteen years of age, who will be referred to hereafter as "C". He is five feet, three inches in height and weighs 72kg. This will be relevant in relation to the nature of the challenging behaviours exhibited by him, which led to his expulsion from the applicant's school. C has been diagnosed as suffering with Xq28, a chromosomal disorder, the exact aetiology and consequences of which are not clearly understood; autistic spectrum disorder and a moderate to severe developmental delay.
4. The genesis of the present application can be set out in the following way: C has been enrolled in the applicant's school since September 2014. His school reports prior to 2019, do not indicate any particular concerns in relation to challenging behaviour. However, from 2019 onwards, there was a deterioration in his behaviour in school, necessitating his removal from the classroom at break time and during other periods, which were subsequently extended to permanent removal from the class. During this time, he received 1:1 attention from an SNA, acting under the instruction of the class teacher.

5. C's behaviour further deteriorated, necessitating a 2:1 SNA/student ratio. A meeting was held on 6th March, 2020, where the difficulties posed by his challenging behaviour, was discussed with the notice parties and other people involved in his care.
6. The school was closed from March 2020 until 2nd September, 2020 due to the lockdown imposed as a result of the Covid-19 pandemic. Initially, on his return to school in September 2020, C was accompanied by a psychologist, who was part of the home support team. He was started on reduced hours in school, of two hours' duration on 2nd September; three hours on 3rd September and four hours on 4th September. These days passed off without incident.
7. Unfortunately, in the period 7th September, 2020 to 18th September, 2020, C engaged in serious challenging behaviours, which resulted in a number of assaults to members of staff, together with incidents of self-harm to C and damage to school property. These events will be described in greater detail later in the judgment. A number of crisis meetings were held, but no solution was found. As a result of the events, the principal of the applicant school, wrote a report in which she proposed to the board of management that C should be expelled from the school, as his continued presence therein constituted a serious risk to the health and safety of other students, to staff, to C himself and to school property.
8. The notice parties were put on notice of the principal's proposal. A hearing was held before the board of management of the applicant on 29th September, 2020. Due to that meeting not being quorate, a further expulsion hearing was heard before the BOM on 5th October, 2020. Again, the notice parties and various stakeholders in the care of C, were present at the meeting. At the conclusion of that meeting, the BOM reached the decision that, having regard to the serious nature of the matters and the risk posed to the safety of persons using the school, including C, the appropriate course to take was that he should be expelled. The BOM was satisfied that the school had tried a series of interventions and believed that all avenues to find a solution had been exhausted.
9. Under the Education (Welfare) Act, 2000, the Education Welfare Officer was notified of the decision. Under that Act, it is necessary for a decision to expel a student to be reconfirmed by the BOM after consultation with the Education Welfare Officer and after a designated period of time. On 11th November, 2020 the BOM confirmed its decision that C should be expelled from the applicant's school. The notice parties appealed that decision to the first respondent pursuant to s.29 of the 1998 Act. The Minister for Education and Skills appointed a committee to hear the appeal. Each of the parties submitted further documentary evidence for the consideration of the committee. An appeal hearing was held on 9th December, 2020.
10. In an undated determination, which was furnished to the first respondent on 21st December, 2020, the appeal committee allowed the appeal against the expulsion essentially on the basis that they had concluded that all reasonable efforts to enable C to participate in and benefit from education had not been fully exhausted. They made a recommendation that the school should readmit C and remove the expulsion from his

record. However, they further noted that the school could suspend C, while they made enquiries as to the availability of other supports and interventions that would permit C's return to the school.

11. On 8th January, 2021, the first respondent issued a direction to the applicant to contact the notice parties to arrange for C's return to school. His direction went on to state: "*This direction covers [C's] return to your school. Any other recommendations made by the appeals committee are a matter for the board of management/school to consider.*"
12. On 15th February, 2021, the applicant was given leave to proceed by way of judicial review to challenge the determination of the appeal committee and the direction issued by the first respondent. In essence, it was submitted on behalf of the applicant that the appeal committee acted in excess of their jurisdiction in directing the applicant to carry out more extensive inquiries prior to making the decision to expel the student; that they acted on irrelevant considerations in reaching that determination and in the alternative, that the appeal committee acted irrationally in reaching the conclusion that the applicant had not carried out sufficient or adequate inquiries as to what other supports or interventions may be available to enable C to remain at the school, prior to reaching the decision that he should be expelled from it. The applicant also submitted that even if the determination and recommendation of the appeal committee were upheld, the direction of the first respondent should be struck down, as it did not accurately reflect the true content of the determination and recommendation of the appeal committee.
13. In response, it was submitted on behalf of the respondent that the appeal committee had acted entirely within jurisdiction because the code of behaviour adopted by the applicant, specifically provided that the BOM had to be satisfied that all necessary inquiries in relation to an alternative solution to the problem, had been carried out prior to reaching the decision to expel the student. As the appeal committee stood in the shoes of the BOM, it was open to it to make a finding on the evidence that had been presented to it at the hearing on 9th December, 2020, that adequate inquiries of other state agencies had not been carried out. It was submitted that having regard to such finding, the appeal committee was entitled to overturn the decision to expel C from the school. The notice parties resisted the application brought on behalf of the applicant along broadly similar lines.
14. The court is of the view that the following issues are the key issues in this case: (a) was the appeal committee entitled to inquire into whether the school authorities had made all necessary inquiries of other state agencies and stakeholders in relation to the availability of alternative supports and interventions for C, prior to reaching the decision to expel him; (b) if the appeal committee was entitled to undertake such inquiry, did it take into account irrelevant matters when reaching its conclusion that adequate inquiries had not been carried out prior to reaching the decision to expel C from the school; and (c) was the decision reached by the appeal committee irrational having regard to the totality of the evidence before it. Depending upon the decision reached by the court on these

issues, the ancillary question as to whether the direction issued by the first respondent was lawful, may arise for determination.

Background

(i) Events prior to September 2020

15. C started in the applicant's school in 2014, when he was nine years of age. In her evidence to the appeal committee, the School Principal, Ms. Cullinane, stated that in 2015 there had been an incident where C had head-butted a member of staff, causing her to suffer a concussion injury, for which she has been on medication to the present time.
16. Thereafter, while C exhibited challenging behaviours consistent with his diagnosis, it does not appear that there were any potentially serious incidents. The court has reviewed the annual school reports that were issued for each of the relevant academic years. In the early years, these reports were largely complimentary of C's behaviour and were optimistic in relation to his progress at the school.
17. However, by the latter part of 2018 and into the following year, it is clear that C's behaviour became more challenging. It was necessary for his travel arrangements to be changed, as it was considered unsafe for him to be brought to school in a car, even with an escort. He was then provided with transport in a small PSV, but this had to be changed to a larger vehicle with a higher ceiling. Within the school itself there were also concerns due to the effect of his challenging behaviour on the other students in the class. A decision was made that it would be necessary for him to have his meal breaks and other rest periods in a separate room in the company of his SNA. Subsequently, it was necessary to withdraw him fully from participation in the class, even for work periods. Thus, by the end of 2019, C was being educated within the school but in a separate room on a one-to-one basis with his SNA, under the direction of the class teacher.
18. By March 2020, C's behaviour had escalated, to such a point that it was necessary to allocate a 2:1 ratio for him. This meant that an SNA had to be taken from another student, who would then have to share an SNA with a third student and the free SNA was deputed to work with C.
19. On 6th March, 2020 a meeting was held to discuss C's behaviour and the difficulties in managing same. That meeting was attended by Ms. Cullinane; Caroline Leonard (the school's behaviour analyst); James Russell (teacher); Verge Connery (behaviour analyst from C's home support team); Marilena Norton (behaviour analyst on the home support staff); Dr. Judi Demodaran (psychiatrist) and C's parents. The minutes of this meeting were available to the appeal committee. It is not necessary to set out the entirety of those minutes, but to note that the principal stated that due to health and safety issues in the school and C's deteriorating behaviour, it was going to be necessary to increase the staff pupil ratio for C to 2:1. Ms. Cullinane stated that staff who had been working with C since September had become burnt out due to his challenging behaviour.
20. It was also noted in the minutes that due to a risk assessment that had been carried out in relation to C's challenging behaviour, a decision had been made that his participation in

community trips outside the school, would have to be suspended. There was considerable discussion at the meeting in relation to efforts to control C's challenging behaviour, including the issue of medication, which had been prescribed by the psychiatrist. However, it was noted that an increase in that medication had resulted in an increase in challenging behaviours in the home and therefore the medication had been reduced as and from January 2020. At the meeting, the principal also dealt with the policy set out in the school's code of behaviour in relation to expulsion. The expulsion criteria section in the code was read out. It was indicated that C's behaviour met all the necessary criteria. Ms. Cullinane explained that she did not want to expel C and that the purpose of the meeting was to find a solution to help him regulate his behaviours in school, but she noted that the school was finding it extremely difficult to manage the level and intensity of his behaviours.

21. The principal pointed out that the school had excellent staff and an excellent behaviour analyst, but the school itself had been built for small children and was falling down. The classrooms were only a quarter of the space that they ought to be. The notes recorded that C's mother and the psychiatrist agreed that the building was not suitable. They queried whether the parents should look for other places for him. The principal repeated that she did not want to expel C and that the purpose of the meeting was to make them aware of where they were with regards to managing his behaviour in school and to see had any of the team any suggestions that could be put in place to make C more successful at school.
22. The minutes also noted in slightly different type, which I presume indicates that these are parts of the notes inserted by C's parents, that they were somewhat shocked and taken aback at the mention of the possibility of expulsion, as they had not been made aware of a high level of challenging behaviours being exhibited by C in the school prior to that meeting. They noted that the North Kildare Disability Team were not present at the meeting, but they were also shocked and had confirmed that they were not informed of the behaviour, nor had they been asked for help. It was suggested that in the future, the parents should be advised of any high level incidents, so that they could support the school as best they could in relation to them.
23. The upshot of the meeting was that the school's behaviour analyst, Ms. Leonard, was to put in place a further intervention known as Differential Reinforcement of Other Behaviour (hereinafter referred to as "DRO") for use with C in the school. She was given a copy of C's DRO from the home. C's medication was to be reviewed by the psychiatrist and C's parents, and when that had been done, the school was to be informed of any changes to the medication. Ms. Cullinane was to update the Special Education Needs Officer (hereinafter "SENO").
24. There was very little time for the school to implement the 2:1 ratio, or the DRO intervention, because the school closed some days after the meeting, due to the lockdown caused by the Covid-19 pandemic. There were further meetings between the school, C's parents and various people involved in the care of C during the summer months. These

were primarily designed to prepare for a successful resumption of schooling for C as soon as schools were allowed to reopen. It was agreed that C would not return to the school until Wednesday 2nd September, rather than on Monday 31st August, so as to allow the other students time to settle into the school routine. It was further agreed that C's reintroduction to the school environment would be done on a phased basis, whereby he would attend for a number of hours each day on an incrementally increasing basis.

25. At a meeting held on 20th August, 2020, the issue of some of the home support staff coming to the school to assist C reintegrate back into the school regime was discussed. However, Ms. Connery, explained that there were forty banked hours of home support from the HSE, but C's parents, wished to keep as many of those as possible for use within the home, due to the fact that C's mother had her father living in the house with them and he was terminally ill with cancer.

(ii) Events in September 2020

26. C returned to the applicant's school on 2nd September, 2020. C is currently fifteen years of age. The court has seen photographs of C taken in September 2020. These were exhibited to the affidavit of Ms. Smith, at exhibit MS7. While C is not a tall boy, he is a reasonably stocky teenager. This is relevant in light of events that occurred later in September 2020.
27. When C returned to school he was accompanied by a member of the home support team, Mr. Maher, who is a qualified psychologist. C attended for two hours on 2nd September and for three hours on the following day and for four hours on the third day. There were no incidents of excessive challenging behaviour during that period. The minutes of a meeting held on 4th September, 2020 noted that "C did well for the last three days with Paul here."
28. The first of a number of incidents occurred on Monday 7th September, 2020. On that occasion, Mr. Maher had accompanied C to school, but had remained out of sight, observing matters on a screen from another room. During the day C was engaging inappropriately with a piece of equipment. A staff member attempted to get it back from C. He then began kicking her. Later, the swing in the OT room was taken down towards the end of the day to be fixed and C was denied access to it. When he came back into the room, he swiped the mask off the staff member's head; he then kicked and kned two holes in the classroom wall. On his way out to the bus to go home, C threw his bag and jacket at the perspex in the reception area and he hit the same staff member on the head knocking her glasses off. Bruising had been reported by the staff member, who had been kicked, and the staff member who had been hit while C was leaving the premises, reported feeling pain in the area of her head.
29. On the following day, Tuesday 8th September, 2020, C engaged in challenging behaviour when he was denied access to some crisps. He became destructive in the toilet. Both staff members that were with him tried to deescalate the situation. C barged through the staff and accessed the reception area, where he head butted and hit the perspex above the counter, behind which the secretary was sitting. At that point C saw a guitar that was

in the area and wanted access to it. There was a crack in the perspex as a result of the blow from his head. C was brought to the sensory room and was told that he would be provided with a guitar when he got there. In the sensory room, C attempted to pull down the projector. Staff had to stand in his way to block him. He sat down and became calmer. He engaged successfully with a staff member playing the guitar. He was then transitioned back to the classroom. (In the reports, the word "*transitioned*" is used to mean bringing C from one environment to another.) Once he was back in the classroom he was encouraged to take a break before his next transition to the playground. He continued to ask for access to the staff member and the guitar that he had been playing with. He was denied access to these and was told that they would discuss it further when he was sitting down for his break. C then proceeded to knee the wall and made two holes in it.

30. There was a further incident on Wednesday 9th September, 2020, which precipitated a meeting with C's parents and other carers later that day. On that day C had gone into the bathroom and took his underwear off and put them under the tap. Staff tried to prevent him doing this and he shoved their hands away. He then engaged in barging behaviour and was blocked by two staff outside the room. However, he managed to barge into another classroom. Three staff members attempted to block him while in the classroom. He attempted to head butt the behaviour analyst, but she managed to block him. His teacher reported bruising on her leg from the incident, as she was pushed into tables and furniture during the barging episode. The classroom was cleared of students and staff.
31. C obtained access to food belonging to another pupil. Staff managed at that point to transition him out of the classroom and back to his own room. C engaged in property damage during the transition due to termination of an activity when he had been playing ball in the playground, which was finished, as it was time to go home. C kicked a hole in the wall and then hit the class teacher twice on the head with an open hand and once on the back as she moved away. C also hit staff with the zip of his coat when it was handed to him to begin his transition out to the bus.
32. A meeting of those involved in the care of C, including his parents and members of his home support team, was held on 9th September, 2020. The purpose of the meeting was to discuss the escalation in C's challenging behaviours. Ms. Cullinane stated that C's behaviour had escalated since Mr. Maher had left. She asked if it was possible for Mr. Maher to come back to the school. She stated that school staff had been following the directions given by Mr. Maher, but were barely managing with the 2:1 ratio. Ms. Cullinane stated that she had contacted NEPS for support and sought consent from C's mother to refer him to that service. Ms. Connery asked why the school would seek support from NEPS. Ms. Cullinane explained that they could give support with behaviours of concern and that the school should seek this support as the behaviours were occurring in school and NEPS was a psychological service provided by the Department of Education. It was also decided that the intervention of the occupational therapist would be explored. Ms. Cullinane stated that C was struggling to be successful in school. She stated that

they were looking for all support that was available to them to make him successful in school.

33. There was a discussion around whether Mr. Maher could come back into the school to provide support, as he had done in the first three days of C's return to the school. Ms. Connery stated that she would try to make Mr. Maher available, but it would have to come out of the home support hours. C's mother stated that she could not lose any home support hours, as they were required within the home due to her father's illness. The issue of medication was also raised, but C's mother expressed the view that they had decided that medication would not be considered again, as it had been proven that C did not require it at home.
34. Ms. Leonard, the school's behaviour analyst, stated that she felt that they had perhaps moved too fast in phasing out Mr. Maher, due to the lack of hours which could be given from the home support hours. She felt that perhaps it might be better to have phased him out of the picture more slowly. However, C's mother had stated that in relation to additional hours for Mr. Maher, she was extremely stressed at home with C, with her father's illness and also due to the fact that C's father suffers from MS. C's mother stated that funding must come from somewhere, but it could not come out of the home support hours.
35. Ms. Cullinane inquired whether they could write a letter to support an application for more hours for Mr. Maher from the HSE. However, Ms. Haastrup, the social worker, stated that more hours were not a possibility, as the family were receiving the maximum available support from the HSE.
36. Ms. Connery stated that she would try to make accommodation to give Mr. Maher to the school for one hour per day. She stated that she would hopefully let the school know at a meeting on the following Friday if she could get Mr. Maher into the school for one hour at the end of the school day, as that appeared to be the most challenging time.
37. On Thursday 10th September, 2020, while bringing C to the sensory room, he was asked to wait on a chair. He hit the door release button with force with his hand, it cracked and fell to the floor. He then went to try press the fire alarm buttons; staff attempted to block him, but he was successful and the fire alarm sounded. The whole school evacuated to the fire assembly point. On his transition to the assembly point, C attempted to barge past staff back to where he had been and attempted to press more alarms on the way out.
38. On the transition back into the school from the fire assembly point, C got into the principal's office by barging past staff. He found an empty wrapping paper tube and he was allowed to take that with him out of the room. C then proceeded to hit two staff members with the tube while going out to the playground. The tubing was removed from C, but he continued to use his fist to hit two staff members, who moved away to protect themselves.

39. While in the playground, C would not engage in a ball activity and while staff waited for him to engage, he stripped off all his clothes and threw some items into the field next to the playground. At this point, it should be noted that due to his Xq28 condition, C's genital development has been arrested. It will remain at the pre-pubescent stage. Staff got towels to attempt to cover C and eventually brought him inside to the bathroom. Once in the bathroom, he attempted to put clothes under the tap and was successful putting some clothes down the toilet. He was splashing water on his body from the tap. Staff attempted to block him, but were slapped out of the way. He was given a towel, but this was also put down the toilet and was swung around the bathroom. The class teacher continued to encourage C to get dressed. He attempted to pull the toilet seat off and then took the lid off the cistern and threw it on the ground. Staff blocked a second attempt to lift this from the ground and moved C out of the bathroom into a classroom. He was put on a chair to get dressed. Other staff members put paper up to block the window. C ripped one t-shirt that he was given to put on. Once dressed and back at the table, C ripped the tablecloth that covered his desk.
40. A further meeting of C's carers was held on 11th September, 2020. Ms. Cullinane stated that she had contacted the education welfare officer (EWO) to organise a meeting between her, the SENO and NEPS. The issues that had occurred since the previous meeting two days earlier, were discussed. There was a discussion in relation to putting padding in the area in the room used by C. Ms. Cullinane asked Ms. Connery if she could provide the school with support from Mr. Maher and when that might be, if it was available. Ms. Connery stated that she could send Mr. Maher to the school on Monday and Wednesday. She said that she would organise this towards the end of the school day, as it was previously stated that challenging behaviours were occurring at a higher rate at that time. However, Ms. Leonard stated that since the last meeting, challenging behaviours were now occurring both morning and afternoon and as a result of this the school were flexible as to any hours that Mr. Maher might be available.
41. In the course of the meeting, C's mother stated that she was not happy about C being on reduced hours in school. Ms. Cullinane stated that they were entitled to full days' attendance at school, but that C was not in a place at that time where he could be successful in school. She informed C's mother that if the parents kept pushing for longer days, she would have to enact the code of behaviour in order to keep everyone safe. Ms. Cullinane stated that she was contacting everyone she could (NEPS, EWO, SENO, Middletown Centre for Autism) as she wanted C to successfully return to full hours in school as soon as was feasible.
42. Ms. Leonard asked Ms. Connery to let the school know when Mr. Maher would be available to come to the school. Ms. Connery stated that he would be available on Monday at 12pm. However, from the notes available to the court, it does not appear that Mr. Maher returned to the school
43. The next recorded incident occurred on Tuesday 15th September, 2020, when C urinated on his trousers while in the bathroom and in a separate incident had pulled down his

trousers in the classroom and had urinated on his trousers again. He had engaged in barging to get back into the classroom that he was being transitioned from. He had attempted to barge into the life skills room where another student was listening to music. A staff member scraped her wrist against the doorframe as they attempted to block him entering the room. There was also an incident of high intensity self-injury (head-butting door and window) while being denied access to a classroom on a further transition.

44. On Wednesday 16th September, 2020 it was recorded that there were minor incidents throughout the day. In the last hour of the day, C had engaged in throwing an item in the sensory room, plus self-injury behaviour, including head hitting with his fist when he was denied access to an object, due to the fact that it was broken. He also hit the socket on the wall and broke the connection leaving the plug hanging off the wall with wires exposed. He kicked a staff member as they tried to block the plug. On transition from the sensory room, C gained access to the behaviour support office to access the broken item that had been denied to him. When transitioned back to the hallway to put his shoes on, C continued to ask for the item and hit his head off the wall. He then stood up to access the fire alarm switches. The class teacher blocked him and was punched in the head. On the transition out to the bus, C attempted to gain access to the reception area, as his teacher was behind the counter. The door to the reception was locked, so C began to bang on the perspex, which snapped off. C continued to bang snapping more pieces of the perspex off, until staff were able to transition him out the door.
45. The major incident which led to the decision to invoke the expulsion procedure, occurred on 17th September, 2020. On that occasion, C attempted to strip when in the sensory room when an activity was terminated by C himself. He had handed an item that he was playing with over to staff and was not satisfied by what he was given next. The class teacher encouraged him to ask for what he wanted, at which point C pulled his trousers back up. C had seen a birthday cake that was sent in for another student and asked for cake intermittently throughout the day. He was reminded each time that he was going to get an ice cream, as a van was arranged to come to the school. C engaged in self-injury behaviour when denied access to a classroom, by banging his head off the window to the classroom.
46. On another transition later in the day, C attempted to gain access to a room; staff blocked the door and C hit the staff member in the face, pulled her hair and struck the staff member in the face a second time removing her face mask. C managed to gain access to the life skills room by barging past two staff members. They were attempting to block C from accessing the fridge, as he continued to ask for cake, C punched the staff member on the head with a closed fist. The staff member had to swap out, as she immediately felt dizzy from being hit and the class teachers swapped in to continue to block C and complete his transition to the OT room. The injured staff member was a longstanding member of the school staff, was a behaviour analyst and an instructor in Professional Crisis Management (PCM) within the school. C had engaged in self-injury behaviour when denied access to balls, by hitting his head off the ground and banging his fist off the ground.

47. On Friday 18th September, 2020, there were three separate incidents of high intensity self-injury behaviour in the form of hand and head banging, when C was denied access to an assembly and a guitar, and the OT room. There was some low intensity bargaining during the day, which was managed by staff. There was high-intensity bargaining on the last transition from the sensory room. C managed to knock a member of staff over onto a beanbag and C fell on top of them.
48. The staff member, who had been the subject of the assault on 17th September, 2020, had required medical treatment. She had attended at the school on 18th September, 2020, but in the morning had told Ms. Cullinane that she was in extreme pain in her head and neck. She was advised to attend with her GP. She was diagnosed as suffering with whiplash. She remained out of work until the following Tuesday, 22nd September, 2020. The pain persisted, which resulted in the staff member taking further sick leave from 2nd – 7th October, 2020.
49. On 18th September, 2020, Ms. Cullinane arranged an emergency meeting, which was attended by C's class teacher, Ms. Campbell (EWO) Carmel Carey (SENO) and Bridget Rodden (NEPS). The purpose of the meeting was to discuss C's behaviour. Ms. Cullinane had earlier contacted an inspector in the first respondent's department, who had advised her to convene such a meeting. The minutes of this meeting are in contention between the parties.
50. As recorded in the minutes, there was an extensive discussion in relation to C's challenging behaviours as exhibited in the incidents earlier that month. All aspects of his education and care, including his home environment were discussed. There was extensive discussion in relation to the interventions that had been used up to that point; the staffing ratio that had been employed and the general layout of the school. At the conclusion of that wide-ranging discussion, the NEPS representative Ms. Rodden, was recorded as having stated *"Sounds like school has tried everything, at this point school needs to make a decision about invoking the code of behaviour. Parents not able to cope at home and understands DC's reluctance, will contact colleague about emergency referral to NEPS"*. The minutes went on to note that Ms. Carey asked whether the school had linked with NCSE behaviour support, to which Ms. Cullinane replied that they had not, as they had a lot of support from NDT, but they would link with NCSE.
51. The notes further recorded that Ms. Cullinane was concerned that it reflected badly on her that she had not invoked the code of behaviour earlier after the head hitting incidents; to which Ms. Campbell (SENO) demurred, saying that Ms. Cullinane had given C every chance and had taken behaviour support advice. Ms. Campbell stated that Ms. Cullinane could use those circumstances to her advantage, as it showed that she had given time to see if interventions were effective and that was exactly what the principal had done. Ms. Rodden was recorded as stating that the situation was impacting on everyone's wellbeing. In relation to other placements, Ms. Cullinane asked Ms. Carey whether there were places for C elsewhere, to which Ms. Carey stated that there were not, unless to a residential

premises. Ms. Cullinane asked Ms. Campbell, Ms. Carey and Ms. Rodden for a letter of recommendation for C.

52. Later on 18th September, 2020, Ms. Cullinane arranged for an emergency meeting of the BOM, at which a decision was made to suspend C from school for a period of three school days. A letter was sent by Ms. Cullinane to the notice parties on that date informing them of the suspension.
53. Before leaving the minutes of the meeting of 18th September, 2020, it is necessary to deal with certain objections that were made to those minutes by some of the people who had participated at that meeting. In an affidavit sworn on 26th April, 2021, (which was after the date of the appeal committee determination), Ms. Bridget Rodden, the NEPS psychologist, stated that she had received the draft minutes of the meeting held on 18th September, 2020, in early October 2020. She stated that she had been unhappy with the minutes, as she considered that they were inaccurate in some respects. However, as she thought that the minutes were merely internal school documents, she decided not to respond to them at that time. She went on to state that when she became aware that the draft school minutes were to be used in the appeal hearing before the appeal committee she wrote to the applicant on 8th December, 2020, setting out her concerns in relation to the minutes.
54. Ms. Rodden went on to state in her affidavit that the minutes were inaccurate insofar as they indicated that she and Ms. Campbell had communicated at the meeting, that the school had tried everything and that they needed to follow their own code of behaviour. She also took issue with the following statement "*NEPS had in those meetings advised that they thought the school did everything we could have done for the student*". Ms. Rodden stated that she did not regard that as an accurate account of the statement that she had made at the meeting.
55. However, when one looks closely at the letter which Ms. Rodden had sent to the applicant on 8th December, 2020, being the eve of the hearing before the appeal committee, which letter is exhibited at exhibit BR1 to the affidavit sworn by Ms. Rodden, it is clear that she did not take issue with those specific statements which were attributed to her in the minutes of the relevant meetings. In that letter, she had taken issue with the following statements that had been attributed to her: that it was not fair to compare the home and school environments; that environment was a huge problem – look for emergency accommodation, only way to keep him is segregated with limited access; that there was not as much stimulation at home as in school; and that in relation to the behaviour support plan, she was concerned re sustaining 2:1 staff ratio and parents refusing to accept reduced hours. Thus, she did not take issue in that letter with the statements which she subsequently demurred from in her affidavit sworn on 26th April, 2021.
56. A further meeting was held between Ms. Cullinane, Ms. Leonard and the EWO, SENO, and NEPS on 21st September, 2020. Ms. Cullinane is recorded as having stated that she did not see that there was anything that could be done in a period of three days. It was necessary to look at the expulsion criteria in the code of behaviour. She had emailed the

NCSE for behaviour support and had also looked to the building section in order to get support; however, she had got no response and stated that she felt that they needed emergency accommodation, a teacher and SNA, in order to have some chance of reintegrating C back into school safely. Ms. Carey stated that she would have to look at the allocation of SNAs that they already had in the school. Ms. Rodden was recorded as having stated that there were no places available in Middletown this year. There may be places available in April 2021. She advised that there be continued engagement with all services (NEPS, NCSE). She was going to see if the case could be escalated with her manager and she asked if the school had talked to the HSE team.

57. Following the conclusion of that meeting, Ms. Cullinane sat down with the school management team and also with C's teacher to discuss the issues. She reviewed the CCTV footage of the incident that had occurred on 17th September, 2020. She had an in-depth discussion with the behaviour analyst concerning C's behaviours. Ms. Leonard was of the view that the school had tried absolutely everything. She had made confidential inquiries with another behaviour analyst that she knew, but that person was not able to suggest any further interventions that could be tried.
58. Ms. Cullinane stated that they had spoken to the NCSC advisor assigned to the school about the student in an unnamed manner; the advisor had read through all the interventions that they had tried and stated that she felt that she would be of no help to the student in the case and that the school were the specialists.
59. Having reviewed all the interventions that had been tried by the school, which in her report furnished to the appeal committee, numbered thirty-five interventions in total, and having regard to the serious risk that C posed to the health and safety of staff and students in the school, as well as to himself, and having regard to the fact that following the discussions that she had had with the NEPS psychologist, the SENO and the NCSE advisor, there appeared to be nothing to suggest that anyone had any meaningful additional suggestions that had not already been trialled, she came to the decision that she would have to recommend expulsion.
60. On 22nd September, 2020, Ms. Cullinane wrote to the notice parties informing them that she had formed the view that C's behaviour constituted a real and significant threat to the health and safety of persons in the school. She had referred the matter to the board of management, with a recommendation that C be expelled from the school. She compiled a report in relation to her recommendation that C be expelled. This was furnished to the notice parties on the following day, 23rd September, 2020.
61. A hearing was convened by the BOM to consider the expulsion of C on 29th September, 2020. Present at that meeting were the school principal, C's mother and various people who had been involved in the care of C, including members of the home support team. There was extensive discussion of the behaviours that had been exhibited by C, which had led to the necessity for the hearing. Evidence was given by C's mother, by Ms. Cullinane and by Ms. Connery, who is the leader of the home support team. Evidence was also given by Mr. Adam Harris, of the charity AsIAM, which caters for people with

autism spectrum disorder. No decision was reached by the BOM as a result of that meeting, due to the fact that it transpired that the meeting was not quorate.

62. A further hearing to consider the issue of expulsion was held by the BOM on 5th October, 2020. It was attended by all of the parties who had attended the previous hearing and by Ms. Leonard and a person identified as "WR", who I think was a member of the newly constituted BOM.

63. The BOM reached the following conclusion which was recorded in the minutes:-

"On the basis of the information available to the board and given the very serious nature of the matter, the board has formed the opinion that C should be expelled. The board has not formed this opinion lightly. It has made this decision in order to ensure the safety of the pupil and other students and staff in the school. The board is of the view that the school has tried a series of interventions and believes all avenues to find a solution have been exhausted."

64. In accordance with the provisions of the Education (Welfare) Act, 2000, the EWO was notified of the decision of the BOM. The BOM confirmed its decision by letter dated 10th November, 2020, in which it stated that they had met on that date in order to consider the outcome of the consultations with the EWO over the previous twenty days and the opinion which had been formed at the board meeting on 5th October, 2020. The Board remained of the opinion that C should be expelled from the school. That decision was communicated to the notice parties by letter of the same date.

The s.29 appeal

65. The notice parties appealed the decision of the BOM pursuant to s.29 of the 1998 Act. Pursuant to the provisions of that section, an appeal committee was established. A hearing was held before the appeal committee on 9th December, 2020. In advance of that hearing, further evidence was submitted on behalf of the school authorities and on behalf of C's parents.

66. Following the hearing on 9th December, 2020, the appeal committee issued its determination and recommendation to the first named notice party, which was received by her on 21st December, 2020. In its determination, the appeal committee allowed the appeal for the following reasons:-

"The appeals committee concluded that all reasonable efforts to enable [C] to participate in and benefit from education have not been fully exhausted.

The appeals committee is of the view that it is possible to vindicate the rights of the school staff to a safe place of work and the duty of care of the board of management towards staff to provide same, while at the same time providing an opportunity for school management to engage further with outside support agencies, specifically the NCSE Behaviour Support Service, NEPS, AsIAm, Middletown Centre for Autism and also the support offered by Paul, the home behaviour support person, to explore whether [C] could be enabled to continue in

the school and to receive the support and education which are so vital to his wellbeing and development. There is nothing in the appeal committee's understanding of the provisions of the Education (Welfare) Act 2000 which would prevent the school from suspending [C] for a reasonable period of time sufficient to allow for such supports and interventions to be put in place and trialled. [C], having been out of school for six months due to Covid-19 Pandemic and subsequent extended school closure, persuaded the appeals committee that to enable his transition back to school, adequate time needs to be provided for the necessary planning and supports to be put in place, including reaching out to support agencies. For this reason, the appeals committee concludes that expulsion of [C] is not warranted and it therefore allows this appeal."

67. The committee concluded by issuing the following recommendation:

"The appeals committee recommends that the school readmit [C] and remove the expulsion from [C's] record."

68. By letter dated 8th January, 2021, the first respondent wrote to the applicant informing it that the appeal committee had upheld the appeal in this case. A copy of the appeal committee's determination was furnished. The first respondent gave the following direction to the applicant:

"I am directing your board of management to contact [C's parents] to arrange for [C's] return to school. This direction covers [C's] return to your school. Any other recommendations made by the appeals committee are a matter for the board of management/school to consider."

Submissions on behalf of the Applicant

69. The primary ground of challenge to the determination of the appeal committee, is that they acted *ultra vires* and/or irrationally in holding that the school principal had not carried out sufficient inquiries as to whether additional intervention and support might be available from state agencies, which would enable C to remain in the school, while not being an unacceptable risk to the health or safety of other students, or staff, or to himself.

70. It was submitted on behalf of the applicant that the key issue for the determination of the appeal committee should have been whether the challenging behaviours of C were sufficiently serious as to warrant expulsion. It was emphasised on behalf of the applicant that there was no question of there being any culpability or blame on the part of C for these challenging behaviours. It was accepted that they were purely a manifestation of his medical condition. Nevertheless, it was submitted that one had to have regard to the serious nature of the challenging behaviours, when considering whether they posed such a risk to other students, to staff and to C himself, that expulsion was the only realistic alternative. Counsel submitted that it was the nature of the behaviour and whether it warranted expulsion, which was the key issue that should have been addressed by the appeal committee: see *City of Waterford VEC v. Department of Education and Science &*

Ors. [2011] IEHC 278 and *FD (a minor) v. Minister for Education and Skills* & Ors. [2019] IEHC 643.

71. On the authority of the latter mentioned case, it was submitted that it was no part of the function of the appeal committee to inquire into the facilities available in the school, or whether the school bore any responsibility for the behaviour on the part of the student, or any alleged contribution to the problem by reference to any alleged deficiency in the services provided. In this regard, it was pointed out that the appeal committee had engaged in what appeared to be a criticism of the way in which the school was run. In particular, in relation to the incident on 17th September, 2020, the appeal committee appeared to have accepted evidence on behalf of the notice parties, that the school authorities bore some responsibility for the challenging behaviour on the part of C on that occasion, due to the fact that the birthday cake had been left in open view. There also appeared to be criticism in the evidence given by Mr. Harris, that the level of communication, or the consistency of the communication between the school and the parents, was not all that it should have been. It was submitted that the appeal committee ought not to have inquired into issues in relation to the day to day management of the school.
72. Counsel submitted that the appeal committee had made the necessary findings in relation to the character of the behaviour exhibited by C. The committee had stated that they "*judged [C's] behaviour in these incidents to constitute serious misconduct and to constitute serious breaches of the school's code of behaviour*". Later they had made the following finding: "*The appeals committee judged that [C's] behaviour had caused significant harm to staff members and to himself. They also concluded that his behaviour had caused significant disruption to the education of other students*". It was submitted that having regard to the cogent evidence that had been led in relation to the serious nature of the challenging behaviours exhibited by C in the month of September 2020, and having regard to the findings made by the committee and the content of the school's code of behaviour, it had been irrational on the part of the appeal committee to have held that the expulsion was not justified.
73. It was submitted that in essence, while the committee had found that the behaviour exhibited by C was sufficiently grave as to warrant expulsion, they had held that it was premature of the school to proceed to expel him, because they had not carried out adequate inquiries as to whether there were other supports and interventions available from other state agencies, which would enable C's return to the school, without being a source of danger to the health and safety of others.
74. In this regard, it was submitted that the appeal committee had misconstrued the code of behaviour, which merely directed that prior to reaching a decision to expel a student, the school principal had to carry out such inquiries as were deemed appropriate from relevant state agencies. In this regard, there was ample evidence before the appeal committee that exhaustive inquiries had been carried out by Ms. Cullinane in relation to the availability of any supports or interventions that would enable C to continue in the school.

75. It was submitted that it was not the role or function of the appeal committee to micromanage the inquiries that had been carried out by the principal, to see whether she had in fact exhausted all possible avenues to obtain a solution to the problem.
76. It was submitted that even if it was permissible for the appeal committee to carry out such an inquiry, the evidence before it had established that the school had carried out very extensive inquiries in this regard.
77. It was submitted that the minutes of the various meetings held in relation to the challenging behaviours exhibited by C, commencing with the meeting on 6th March, 2020, down to the meetings held with the EWO, SENO and NEPS on 18th and 21st September, 2020, clearly showed that the school principal had carried out very extensive inquiries. It was submitted that in these circumstances, the finding by the appeal committee that all reasonable efforts to enable C to participate in and benefit from education had not been fully exhausted, was irrational.
78. Counsel submitted that the appeal committee had also acted outside its jurisdiction in allowing the appeal against expulsion, while at the same time informing the school that it could suspend the student for an indefinite period, so as to see whether other supports and interventions could be trialled. It was submitted that that was not possible under the code of behaviour, which only permitted a suspension where the principal was of the belief that suspending the student from school would provide a solution to the problem. In this case, the principal did not have that belief and therefore could not suspend C. Furthermore, even if the school principal could suspend C in the circumstances envisaged by the appeal committee, there would be very little point in so doing, as it would not be possible to trial further interventions while the student was suspended.
79. It was further submitted that the appeal committee had acted irrationally in rejecting the cogent evidence on behalf of the school authorities, as furnished by Ms. Cullinane in her written submissions and in her oral evidence; instead the committee had preferred the extremely vague and unspecific assertions made by some of the witnesses on behalf of the notice party. In that regard, no specific interventions had been identified, nor had any specific support of any concrete nature been stated to be available to enable C's return to school in safety. In such circumstances it was submitted that the appeal committee had acted irrationally in reaching the findings and the conclusion that it had done.
80. Finally, in relation to the direction issued by the first respondent, it was submitted that, even if the court were to uphold the determination and recommendation of the appeal committee, it should still strike down the direction issued by the first respondent, due to the fact that it did not mirror what had been recommended by the appeal committee, which was that the expulsion should be revoked, but that C should remain suspended, while further inquiries were made; instead, the first respondent had simply directed that the expulsion be removed and C be readmitted to the school. While it was accepted that the direction of the first respondent did state that the school could consider the other

aspects of the recommendation made by the appeal committee, it was submitted that the direction itself was in clear and unambiguous terms and ought to be set aside.

Submissions on behalf of the Respondents

81. In response, Mr. Power SC on behalf of the respondents began by stating that this application was not an appeal from the decision reached by the appeal committee. It was submitted that it was not relevant whether the court agreed with the determination that had been reached by the committee. The only issue before the court was whether the committee had acted within jurisdiction in reaching the decision that it had.
82. In that regard, it was submitted that the appeal committee had acted entirely appropriately. It was submitted that from the content of their determination, it was clear that there was evidence before it which permitted it to come to the conclusion that exhaustive inquiries had not been carried out by the school authorities prior to reaching the very serious decision to expel C from the school. Having regard to the nature of C's diagnosis and to the special services provided by the applicant in the school, the decision to expel him from the school, was a matter of the utmost importance to both C and his parents. In such circumstances, it was reasonable that all avenues of inquiry should be exhausted prior to taking the drastic step of expelling the student from the school.
83. It was submitted that in determining whether the appeal committee had acted within jurisdiction, regard had to be had to the code of behaviour of the school, because in determining whether an expulsion was justified, one had to have regard not only to the nature of the conduct in question, but also to the content of the school's own policy on expulsion: see *SC (a minor) v. Secretary General of the Department of Education* [2017] IEHC 847.
84. It was pointed out that the code of behaviour provided that inquiries were to be carried out prior to reaching the decision to expel the student. The nature of such inquiries was all the more important when considering the question of expulsion of a student, who, due to his diagnosis and condition, bore no culpability for the behaviours in question.
85. It was submitted that having regard to the content of the school's own code of behaviour, the appeal committee was entitled to stand in the shoes of the board of management, as if it were considering the proposal to expel as put forward by the principal, and was further entitled to inquire into the issue whether sufficient inquiries had been carried out of all relevant state agencies to see whether there were any other supports or interventions that may be available, which would enable the student to continue in the school, without posing a risk to the health or safety of other students or staff or to himself.
86. It was submitted that that was an inquiry which the committee was entitled to make and they were entitled on the evidence before them to reach the conclusion that both the school principal and the BOM, had acted prematurely in moving to expulsion, without carrying out exhaustive inquiries as to whether there were other relevant supports and interventions available. Counsel suggested that that may have been due to the fact that

the school principal and the board itself appeared to be operating under the incorrect impression that they could only suspend a student for a maximum period of three days. It was submitted that under the law and under the school's code of behaviour, there was no such limitation on the period for which a student could be suspended. Such limitations as existed at law, merely provided that for a suspension of longer than three days, that had to be sanctioned by the board and where the suspension in any one school year was going to exceed twenty days, then the parents and/or the student if over eighteen years, would then acquire a right of appeal pursuant to s.29 of the 1998 Act. However, the key issue was that there was no necessity for the principal, or the board, to rush to a decision to expel C within the period of the three days' suspension.

87. It was submitted that taking all the circumstances into account, the appeal committee had adopted an entirely reasonable, consistent and logical approach to the evidence before it. They had recognised that the behaviour on behalf of C was a serious risk to the health and safety of other people using the school, including to C himself. However, they had also reached a conclusion that it was premature to come to the "nuclear option" of expulsion, when there were other possible supports and interventions which might be utilised to enable him to continue in the school.
88. It was submitted that the committee had acted reasonably in overturning the decision to expel C and had merely gone on to point out that the school could deal with the situation in a way that protected the health and safety of other staff and students, by imposing a suspension on C for a reasonable period, to enable the school authorities to carry out further inquiries as to the availability of other supports and interventions.
89. Finally, it was submitted that the direction issued by the first respondent had not been *ultra vires* because the only matter that had been before her was whether or not the appeal should be allowed against the expulsion that had been imposed by the applicant. The appeal committee had overturned that decision and the direction issued by the first respondent pursuant to s.29(7) of the 1998 Act, had been entirely consistent with that determination and had dealt with the matter under appeal. However, the first respondent had specifically stated that any of the other measures recommended by the appeal committee, in particular the issue of suspension, was a matter for consideration by the applicant and/or the school principal. Thus, in reality, there was no question of the school being directed to readmit C without further supports and interventions being put in place. In these circumstances it was submitted that the direction of the first respondent was entirely logical and lawful.

Submissions on behalf of the Notice Parties

90. Mr. Brady BL on behalf of the notice parties adopted the submissions that had been made on behalf of the respondents. He made a number of other salient submissions. He pointed out that under the *SC* decision, the appeal committee must make their determination wholly independently from the reasoning of the board of management. He further referred to the decision in *Board of Management of B. National School v. Secretary General of the Department of Education* [2019] IEHC 738, where Humphreys J. held that the appeal committee had to consider the conduct in question through the prism of the

school's own code of behaviour. Whether the school's handling of the behaviour of the pupil was good, bad, or indifferent, was irrelevant to the substantive issue which Humphreys J identified as being "*whether the child's behaviour warrants expulsion in light of the school's code of behaviour or policy*".

91. Counsel pointed out that the school's code of behaviour expressly contemplated the imposition of lengthy suspensions to achieve a stated purpose. Thus, it was submitted that it was entirely within jurisdiction for the committee to overturn the decision to expel C, but at the same time to point out that the school could impose a suspension for a reasonable period, so as to enable it to carry out exhaustive inquiries in relation to whether there were other supports and interventions available, which might enable C to remain on as a student in the school. Counsel pointed out that this was a matter of the utmost importance to C and his parents. C had a complex diagnosis. He had been a student in the school since 2014 and having regard to the content of the school reports that had been exhibited, he had got on reasonably well in his early years in the school.
92. Counsel pointed to the fact that all children had a constitutional right to receive free primary education. It was of the utmost importance to C and his parents, that C should be enabled to exercise that constitutional right by remaining in the applicant's school. While it was accepted that C's right to a free primary education was not an absolute right, it was submitted that it was a right which had to be held in high regard, which meant that the school authorities had to exhaust all possible avenues before reaching the decision to expel C from the school.
93. It was further submitted that the appeal committee had been correct to take into account the extremely unusual, if not unique situation, whereby the school had been closed for a period of six months due to the Covid-19 pandemic. It was well known that a change of environment for people suffering with ASD, particularly after a prolonged period, was likely to prove particularly unsettling to them. In such circumstances, it was open to the committee to find that challenging behaviours on the part of C could have been anticipated upon his return to school in September 2020 and that it would be necessary to allow a reasonably long period to put supports and interventions in place to deal with these challenging behaviours upon his return to school.
94. It was submitted that the committee had acted within jurisdiction in finding that the school had not allowed sufficient time to enable interventions, such as DRO, to take proper effect. Instead, the school had rushed to the decision to expel C. It was submitted that the appeal committee had acted within jurisdiction in finding that the school had not complied with its own code of conduct in carrying out exhaustive inquiries prior to reaching that stage.
95. Counsel further pointed out that there was unchallenged evidence that C had got on well in the school when Mr. Maher had been present on 2nd, 3rd, and 4th September, 2020. Thus, it was apparent that there was an intervention which would be entirely successful in removing the risk caused to others by any challenging behaviours, due to the fact that such challenging behaviours were not apparently manifested during those three days. It

was submitted that in these circumstances, it was open to the committee to find that there was a support or intervention available which would provide a solution to the problem, if the necessary support and intervention could be put in place.

96. It was submitted that the school's code of behaviour had dictated that engagement with outside bodies was something that must be done before the threshold for expulsion was reached. The appeal committee had acted within jurisdiction and reasonably in finding that all necessary inquiries had not in fact been carried out. It was submitted that the first respondent had also acted within jurisdiction and rationally when issuing the direction that she did following receipt of the decision of the appeal committee.

The Law

97. The law on s.29 appeals is reasonably well settled. An appeal to the appeal committee under s.29 is a full appeal *de novo*. It is not a review by the committee of the decision previously reached by the board of management. The appeal committee must deal with the matter afresh. To that end they are entitled to receive fresh evidence, both in the form of further written submissions and documentation and they are entitled to hold a hearing in the matter: see *Board of Management of St. Molaga's National School v. Secretary General of the Department of Education and Science & Ors.* [2011] 1 I.R. 362.
98. The test that is to be applied when considering the validity of an expulsion, was set out by Charleton J in *City of Waterford VEC v. Department of Education and Science* [2011] IEHC 278 at paras. 16 – 17:-

"[16.] The function of a school board in deciding on the expulsion of a pupil is to consider what is relevant to that decision. This does not include whether other placements may be available in the immediate area should the expulsion take place. Instead, the decision focuses on the behaviour of the pupil and the context within which that behaviour occurred. The appeals committee is in precisely the same position. The issue before it, therefore, is whether the behaviour of the pupil, taken within the proper context, warrants the expulsion. In the course of this judicial review, an affidavit was sworn by a member of the appeals committee giving a reason for the decision to overturn the expulsion of Delta Beta, which was otherwise absent from the decision. This reason was that the behaviour of the pupil did not warrant expulsion. It is clear that the law on administrative and judicial tribunals does not encompass the addition of reasons beyond the document wherein the decision is officially set out. Were such a procedure to be allowed, afterthoughts would replace the reliability which the parties to a tribunal are entitled to expect that the decisions of any judicial or administrative tribunal will encompass.

[17.] As this is the first case of its kind to come before the High Court, it is therefore appropriate to indicate what factors can be taken into account by a board of management in considering an expulsion. These factors will be the same for the appeals committee. In considering whether to require a student to leave a school, it is appropriate to focus on the behaviour of the pupil and the effect of that behaviour on the school; the track record of the pupil up to the point of the

precipitating issue or issues; the attempts by the school at diverting, correcting or checking the behaviour; the merits of whatever mitigation is offered for the behaviour (by which I mean contrition, any explanation that is offered for behaviour, and any response of the pupil to the school's efforts); and the demerits of mitigation (by which I mean a lack of contrition, wilfulness, spite or an unwillingness to accept help). What a schoolboard, and thus what an appeals committee, cannot take into account are the alternatives which the education welfare officer maybe in a position to offer; the resources of the school; and external resources. It is worth emphasising that on an appeal the appeals committee is concerned with whether or not the expulsion was warranted. This has nothing to do with whether there is an alternative place. The responsibility for that function is elsewhere. These are separate and distinct statutory functions. It would be wrong for an appeals committee not to grant an appeal where, in the first instance, the expulsion of the pupil was not warranted, simply because the pupil has an alternative place in education available to him or her and thus does not want to go back to the school. Equally, the appeals committee cannot grant an appeal because the pupil does not have an alternative place."

99. The *City of Waterford VEC* case concerned an expulsion from a mainstream school. The issues that can arise where the student, the subject of the expulsion, is under a disability, was considered by Allen J in *FD v. Minister for Education and Skills* where he stated as follows at paras. 63 – 65:-

"[63.] The issue before a s. 29 appeals committee, as identified by Charleton J. in City of Waterford VEC is whether the behaviour of the pupil, taken within the proper context, warrants the expulsion. Among the factors to be taken into account are the attempts by the school at diverting, correcting or checking the behaviour. In a case such as this, where the cause of the challenging behaviour is disability, there may be a tension between the requirement to take these factors into account and the requirement to disregard the resources of the school.

[64.] In fighting her son's proposed exclusion from school, the case made by the mother was very critical of the school, the management and the staff. The thrust of the mother's case was that more could and should have been done. The school engaged with the mother's case, arguing that all that could have been done had been done. On the authority of City of Waterford VEC, the focus is to be on the behaviour of the student and the effect of that behaviour on the school. Certainly, the behaviour is to be looked at in the proper context, which in the case of a child with a disability will include the disability and the capacity of the child to control or modify the behaviour. A consideration of the context does not, however, extend to an enquiry into the quality of the services available in the school or any alleged responsibility of the school for the behaviour, or any alleged contribution to the problem by reference to any alleged deficiency in the services provided. The focus on the enquiry must be on the behaviour of the pupil, the effect of that behaviour on the school, and the likelihood of repetition. In the case of a child with a

significant disability, there will be no issue as to the responsibility of the child. Neither, in my view, it is relevant to consider the cause of behaviour that is assessed to be a risk to health and safety in the school.

[65.]While the focus of the mother's case was, mistakenly, on whether more could or should have been done for her son, I think that it also raised the issue as to whether there was anything that might be done to divert, correct or anticipate the applicant's aggressive outbursts. That this was an issue which the committee should have looked at."

100. In *Board of Management of B National School v. Secretary General of the Department of Education*, Humphreys J. had to consider the issue of the expulsion of an eight year old child with ASD. His comments in relation to the applicable test were referred to earlier in the judgment in the course of the summary of the argument put forward by Mr. Brady BL: see paras. 12 and 13 of the judgment of Humphreys J.
101. From the foregoing, it is clear that the appeal committee stands in the shoes of the BOM in considering whether expulsion is justified in the circumstances. However, it is not confined to the evidence and submissions that were placed before the BOM, in that the parties are free to submit further documentation and to call witnesses and give evidence at the hearing before the appeal committee. Those options were availed of by the parties in the present case.
102. In reaching its decision as to whether expulsion is justified in the circumstances, the appeal committee must have regard to all the circumstances of the case and to the terms of the school's policy on expulsion as contained in its code of behaviour.
103. On this application, this court is not sitting as a further appeal from the decision of the appeal committee, or from the direction of the Secretary General. This is an application for relief by way of judicial review. This court is not concerned with whether or not it agrees with the findings of the appeal committee, or whether it would have reached the same findings on the evidence before the committee; instead, the court is solely concerned with whether the appeal committee acted within jurisdiction and whether its conclusions could be supported by the evidence before it. The court must also be satisfied that the determination of the appeal committee is not irrational, meaning that it must not fly in the face of reason and common sense.

The School's Code of Behaviour

104. The provisions relating to expulsion in the code of behaviour that had been adopted by the school and which was in force at the relevant time, was in the following terms: -

"Expulsion

Expulsion may be considered in an extreme case, in accordance with the Rules for National Schools and the Education Welfare Act 2000. Before suspending or expelling a student, the board shall notify the local welfare education officer in writing in accordance with s.24 of the Education Welfare Act. The school will take

significant steps to address the behaviour and to avoid expulsion of a student including, as appropriate:

- *Meeting with parents/guardians to try to find ways of helping the student to change their behaviour.*
- *Ensuring that all other possible options have been tried.*
- *Seeking the assistance of support agencies (e.g. National Educational Psychological Service, Health Service Executive Community Services, The National Behavioural Support Service, Child and Adolescence Mental Health Services, National Council for Special Education).*

Exceptional circumstances that may result in the expulsion process such as:

- *The student's behaviour is a persistent cause of significant disruption to the learning of others or of the teaching process.*
- *The student's continued presence in the school constitutes a real and significant threat to safety.*
- *The student is responsible for serious damage to property.*

The grounds for expulsion may be similar to the grounds for suspension. In addition to factors such as the degree of seriousness and the persistence of the behaviour, a key difference is that, where expulsion is considered, the school authorities have tried a series of other interventions, and believe they have exhausted all possibilities for changing the student's behaviour.

The chairperson and principal will consider the following factors when considering expulsion (taken from CH12. Expulsion will be in accordance with the Rules for National Schools and the Education Welfare Act 2000):

[...] has the intervention of NEPS or other psychological assessment or counselling been sought, where appropriate?

[...]

- *Is the board satisfied that no other intervention can be tried or is likely to help the student to change their behaviour?"*

Conclusions

105. In looking at the evidence that was before the appeal committee, its finding that the behaviour of C in the weeks leading up to his expulsion constituted serious misbehaviour, which posed a risk to the health and safety of other students and staff and to himself and to school property, is based firmly on the evidence that was placed before it. That evidence was set out in the extensive report of the principal and in the appendices thereto, including the extensive minutes of the meetings that she held with various

people in the weeks and months prior to C's expulsion. There were also a number of photographs showing the damage to the school property.

106. The evidence in relation to the frequency and extent of the challenging behaviours exhibited by C during his time in the school, and in particular in September 2020, was not challenged by the notice parties. Nobody challenged the fact that the behaviour had occurred in the manner described by the principal, or that it constituted a serious risk to the health and safety of staff and pupils alike, including a risk of injury to C himself.
107. Given the level of risk that the behaviour posed to C and to others, it cannot be doubted that the behaviour was within the definition of behaviour which would warrant expulsion, as contained in the school's code of behaviour.
108. In saying that, all parties emphasised that in making such a finding, there was no blameworthy conduct on the part of C. His challenging behaviours, which constituted a risk to others and to himself, were due to his medical condition.
109. The key issue between the parties in this case, was whether the appeal committee was entitled to inquire into whether the principal had adequately investigated the availability of alternative supports and interventions, prior to making the decision to recommend C's expulsion. The court is of the view that the board of management, and therefore, by extension the appeal committee, could look into that aspect when considering the proposal from the principal to expel the student.
110. The code of conduct provides that the school will take significant steps to address the behaviour of the student and to avoid expulsion of a student including, as appropriate, seeking the assistance of support agencies. The code goes on to name a number of these by way of example. The code provides that the grounds of expulsion may be similar to the grounds for suspension. However, it provides that a key difference is that where expulsion is considered, the school authorities shall have tried a series of other interventions and believe that they have exhausted all possibilities for changing the student's behaviour.
111. The fact that such issues can be considered by the board of management is put beyond doubt in the code of behaviour, where it provides that the chairperson and the principal will consider a number of factors, the most salient of which for the present case is in the following terms:-

"Is the board satisfied that no other intervention can be tried or is likely to help the student to change their behaviour?"

112. As the appeal committee stands in the shoes of the board of management for the purposes of its consideration of the appeal, it is entitled to examine this aspect as well. Accordingly, I find that having regard to the content of the code of behaviour adopted by the applicant, the appeal committee was acting within jurisdiction when it considered the issue of whether the principal had adequately examined the availability of alternative

supports and interventions, prior to recommending expulsion and prior to the board of management making the decision to expel the notice party's son.

113. The next question is whether the appeal committee acted within jurisdiction and rationally in its examination of this issue. In this regard, the court must look at the evidence that was before the appeal committee at its hearing on 9th December, 2020. The court must disregard the affidavits filed subsequent to that hearing, which seek to elaborate upon, or question the evidence which was put before the appeal committee and upon which it reached its decision. It is well settled that when a court is reviewing the decision of a decision maker, it can only have regard to the material that was before the decision maker at the time that he or she made his decision: *see R. v. Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302.
114. However, there is one important exception to that principle that is applicable in this case. Where subsequent to a decision by a decision maker, it is acknowledged by one of the parties that evidence that was led at the hearing was mistaken, or factually incorrect, it is appropriate for the court to have regard to that concession when examining the legality of the decision reached by the decision maker. Much will depend on the materiality of such evidence to the issues that were being considered by the decision maker.
115. In this case, it has been accepted by the respondents and the notice parties, that the report which was furnished by the SENO, Ms. Carmel Carey dated 19th November, 2020, contained a material misstatement of fact, when she stated that on 16th November, 2020 a new request for support had been received by Ms. Fidelma Taaffe on the NCSE online support request portal, from the school. Ms. Carey stated that Ms. Taaffe responded to that request offering support as a matter of urgency when consent forms would be in place. A visit to the school was scheduled for the week beginning 30th December, 2020. It was accepted that that statement was materially misleading, insofar as that request, which had been made by the school on 16th November, 2020, in fact related to a different student altogether.
116. The court is satisfied that that portion of the evidence of Ms. Carey, was material to the decision reached by the appeal committee. While it was not the only evidence on which they concluded that inadequate inquiries had been made of the state agencies for support and intervention, it was significant evidence on that aspect, because it tended to suggest that the school had sought assistance belatedly from the NCSE, notwithstanding that they had already expelled C. It was acknowledged that that impression, or statement of fact, was completely incorrect.
117. Turning to the remainder of the evidence that was before the appeal committee in relation to whether adequate or exhaustive inquiries had been made of other state agencies, the court is of the view that the conclusion reached by the appeal committee was irrational.

118. While there was some evidence that some inquiries could perhaps have yielded a solution to the problem of C's challenging behaviour and the risks it posed to other students and to staff and indeed to himself; the evidence supporting that finding was thread bare.
119. When one looks at the state of the evidence that was actually before the appeal committee, there was very cogent evidence on behalf of the applicant that extensive inquiries had been made by Ms. Cullinane in the months and weeks prior to the end of September 2020; but such inquiries had not yielded any realistic solution to the problem. Everyone was agreed that the presence of Mr. Maher, from the home support team, had been very beneficial during the first three days that C was back at school in September 2020. There were no episodes of challenging behaviour recorded during those days. The appeal committee based much of its finding as to the adequacy of inquiries that had been carried out by the school in relation to whether further supports might be available, on the evidence of Ms. Connery who told the committee that "*I figured out how to get more hours, but there was no request for me to get more hours. When suspension came there was no request to me*".
120. That evidence from Ms. Connery was particularly vague. She did not say that she had obtained sanction for more hours from the HSE, but rather that she had figured out some strategy for getting sanction for such hours from the HSE. She did not say that she had been given any formal, or even informal, assurance from anyone in the HSE in that regard. She did not say how many hours might be obtained; nor when they might commence; nor for how long they would last.
121. The evidence of Ms. Connery, had to be seen in the context of the meeting held on 20th August, 2020 where Ms. Connery had said that the notice party had a banked forty hours of home support from the HSE, but C's mother was very keen to keep those hours for use within the home, as her father was living with her and was terminally ill; so she needed all the hours for support within the home. In addition, C's father suffers with MS.
122. That evidence had to be seen in the context of the meeting held on 9th September, 2020, where the issue of Mr. Maher providing extra support in the school was discussed. At that meeting, the issue arose as to whether there could be sanction for extra hours, to which Ms. Haastrup, the social worker, had stated that more hours would not be a possibility, as the family were already receiving the maximum level of support from the HSE. Nobody disagreed with that statement.
123. It is also noteworthy that in the report furnished by Ms. Connery dated 28th September, 2020 for the purpose of the expulsion hearing, she did not say that she could get extra hours which would allow Mr. Maher work at the school. The furthest she had ever gone was to say that she could possibly make Mr. Maher available for one hour at the end of the school day on Mondays and Wednesdays. However, the school did not think that that would be sufficient, given that C's challenging behaviour was being exhibited throughout the course of the school day.

124. Even by the time of the hearing before the appeal committee on 9th December, 2020, Ms. Connery had not obtained a firm commitment from the HSE in this regard, nor had she even obtained an informal indication that further hours would be made available. Her assertion that she had not sought such further hours because no request had been made of her, is difficult to understand in light of the crisis meetings that were held throughout September 2020.
125. When one looks at the totality of the evidence that was before the appeal committee, it has to be seen as irrational to reach the conclusion on the basis of the very vague aspirational assertion made by Ms. Connery, that there was a possibility that Mr. Maher would be available to provide ongoing support of sufficient extent to remove the risk posed by C's challenging behaviour to other staff and students; when all the concrete evidence was to the effect that more hours would not be sanctioned by the HSE. When one has regard to the fact that the HSE had already sanctioned forty hours home support for the notice parties, it is difficult to see how they would be prepared to sanction any further hours for use within the school.
126. The other area in which there may be some issue as to whether there were further supports or interventions available was in relation to the use of DRO. That had been tried for two days in March and again on C's return to school in September 2020, but it had been discontinued, as it was found to be unsuccessful in the school setting. Effectively that had arisen due to the fact that, while DRO had been found to be successful within the home, the behaviour of "*barging*" was not one of the prohibited behaviours within the home setting, but it was a prohibited activity within the school, and as such, it was difficult to incorporate it within the DRO intervention that had been trialled successfully at home. The clear evidence before the committee was that the school had trialled it, but had found it unsuccessful.
127. Having regard to the very large number of interventions that had been trialled by the school with C, which were set out *in extenso* in the report prepared by Ms. Cullinane and which number thirty-five in total (not including alterations that had been made to the school premises for his benefit), it is hard to see what other interventions could be tried. There was no evidence of any such specific intervention before the appeal committee.
128. Insofar as the appeal committee found that the principal had not exhausted inquiries with other agencies, that finding was not supported by the evidence contained in the minutes of the various meetings that were held during 2020, commencing with the meeting on 6th March, 2020 and in particular in the minutes of the meetings held in September 2020.
129. In particular, the minutes of the crisis meeting held on 18th September, 2020, recorded that Ms. Rodden, the NEPS psychologist, had stated that it sounded like the school had tried everything and that at that point the school needed to make a decision about invoking the code of behaviour. That is a very significant matter recorded in the minutes. It stated that the NEPS psychologist acknowledged that the school had exhausted all relevant inquiries and that it would have to invoke the provisions of the code of behaviour to deal with the matter.

130. Ms. Rodden received the minutes of that meeting shortly thereafter, in early October 2020. While she states in a later affidavit that she did not accept the accuracy of the minutes, she did not do anything about it at the time. When she did write a letter detailing her concerns about the accuracy of the minutes, which she did by letter dated 8th December, 2020, it is significant that she did not challenge that particular statement ascribed to her in the minutes. That she subsequently challenged the accuracy of the minutes in that regard, in an affidavit sworn subsequent to the date of the hearing before the appeal committee, is not relevant to the issue that this court has to consider in relation to the rationality of the decision reached by the appeal committee. Accordingly, the only evidence that was before the appeal committee was that contact had been made with NEPS and that that had yielded no concrete solution and that the NEPS's representative was of the view that the school could do nothing further in relation to the problem.
131. The court is also concerned that in reaching its decision in the appeal, the appeal committee had had regard to a number of irrelevant matters. Firstly, it had regard to the evidence of Mr. Harris, who is a person who runs a charity which looks after the interests of people suffering with autism. The court was told that Mr. Harris himself suffers from ASD. He has given talks at various places, including a talk to the applicant's staff, for which he was paid €500. However, while he is obviously a person who has first-hand experience of ASD and who is undoubtedly knowledgeable about aspects regarding its treatment, there was no evidence before the appeal committee that he held any specific qualifications or knowledge in relation to the education of persons with complex disorders.
132. The appeal committee appears to have acted on the evidence given by Mr. Harris that the school had in some way acted inappropriately in two aspects of its operations. Firstly, he criticised the level of communication and the consistency of the communications passing between the school and the notice parties in relation to C's behaviours. Secondly, he appeared to criticise the school for the incident that occurred on 17th September, 2020, in particular, for their failure to ensure that the birthday cake remained out of sight, which he regarded as a trigger for that incident.
133. It was not the function of the appeal committee to evaluate the day to day activities in the school; nor whether such activities may in some way have caused the challenging behaviours on the part of the student: see dicta of Allen J. in the *FD* case at para. 64.
134. As noted earlier, the appeal committee had evidence in relation to the alleged interaction between the school and the NCSE in November 2020, which was factually incorrect. That evidence was significant because it would have led any rational person to conclude that either (a) the school authorities did not know what they were doing when they sought help for a student whom they had already expelled, or (b) they were attempting to make inquiries *ex post facto*, that ought to have been made prior to the expulsion. Neither of those conclusions were correct, as the contact between the school and the NCSE in November 2020 related to a different student.

135. Even leaving aside that mistake in the report furnished by Ms. Carey, it is difficult to see how the appeal committee could have acted on the remainder of her evidence to the effect that no additional resources had been sought by the school, when she had been present at the meetings in September 2020, where it was abundantly clear that the school principal was anxious to obtain any possible support or intervention that may produce a solution, that would enable C to return to school in safety, both for himself and for others. In those circumstances, it is just not credible to say that the SENO did not act because no specific request had been made for additional resources by the school.
136. It is abundantly clear from the minutes of the meetings held on 18th and 21st September, 2020, that the school was trying very hard to find any available solution. If the SENO could have seen a solution by the provision of additional supports, it is reasonable to assume that she would have provided such supports, or at the very least, would have informed the principal that such supports were available upon request. However, that did not happen.
137. Insofar as the appeal committee had regard to the evidence of Ms. Georgina Traynor, the EWO, her evidence that the school appeared to have made up its mind that supports would not be forthcoming, was a statement of opinion that was totally unsupported by any evidence from Ms. Traynor. Indeed, that assertion runs counter to the entirety of the evidence that was placed before the committee in relation to all the efforts that had been made by Ms. Cullinane in the months and weeks prior to the end of September 2020. In this regard, it is noteworthy that Ms. Cullinane had arranged for padding to be put in place in the room used by C and had also ensured that alterations were made to the interior of the building so as to provide him with direct access to a toilet, upon his return in September 2020. Those are not the actions of a person who had made up her mind that other supports would not be available.
138. The appeal committee also appears to have accepted the evidence, or submission from Ms. Campbell, the EWO, that there were external agencies which could have been asked for help. However, that comment was made in the context of the reference to the NCSE and in particular to Ms. Carey's report which contained the factually incorrect statement that contact had in fact been made, but not until November 2020.
139. In contrast to that somewhat vague opinion evidence given by the various witnesses who were opposed to the decision, there was the firm evidence from the principal that she had made strenuous efforts to get all available supports and interventions by arranging meetings with all relevant stakeholders to see what could be done, as C's behaviour deteriorated. This was not a flash in the pan incident. The problem of C's challenging behaviour had been addressed as far back as the end of 2018 and had continued on an incremental basis during 2019 and into 2020 with the meeting of 6th March, 2020 and continued during the summer months, when plans were made for his return to school. One has to look at the picture in its entirety. This demonstrates that the school authorities and in particular, Ms. Cullinane, had made very extensive efforts to accommodate C within the school.

140. It is very hard to see how the appeal committee could rationally have come to the conclusion that the school authorities, or the principal, could have sought more supports and intervention to support C, when all the evidence was that she had made strenuous efforts in that regard, but had exhausted all available options by the end of September 2020. In reaching the findings which it did, the appeal committee had regard to vague evidence that there may have been some unspecified supports available from some unspecified entities. There was no concrete supports or interventions identified at the hearing on 9th December, 2020, as actually being available to enable C to return to the school in safety. No agency was identified which could provide any particular concrete support. There were just aspirational statements that possibly there would be something forthcoming if requests were made to various agencies.
141. That vague evidence has to be set against the statement made by Ms. Haastrup at the meeting on 9th September, 2020 that there were no more hours available for the notice parties for home support and the statement of Ms. Rodden as contained in the minutes, that it appeared that the school had tried everything and that they would have to look to the code of behaviour. It has to be seen as irrational that that strong evidence was rejected in favour of the vague sentiments expressed by other witnesses, which provided no concrete solution to the issue of C's challenging behaviour.
142. The court is satisfied that in making its findings based on such flimsy evidence, which included some evidence that is now accepted as being factually incorrect, the court can only find that the appeal committee acted irrationally in reaching the conclusions that it did.
143. In addition, the court is satisfied that the appeal committee acted in excess of jurisdiction in taking into account irrelevant matters, in particular, the criticisms of the day to day management of the school as made by Mr. Harris in his evidence.
144. Even if it were accepted that the principal and the BOM had laboured under the mistaken belief that C could only be suspended for three days, the court is satisfied that that did not have any impact on the level of enquiries that were made by Ms. Cullinane and her staff.
145. It was not a case of the principal scrambling to desperately find a solution to C's challenging behaviour within a three day window. It was clear from the documentation before the appeal committee that the issue of C's behaviour and the availability of supports and interventions to address same, had been examined on a continuous basis from in or about the end of 2018 or early 2019, onwards.
146. Insofar as it was submitted that the court must be mindful of the child's constitutional right to be provided with free primary education by the State, the court does not see this as being relevant. The issue before this court is whether the appeal committee acted lawfully and within jurisdiction when it allowed the notice parties' appeal against the expulsion of C from the applicant's school. His right to free primary education is not

affected. If he is expelled from the applicant's school, the State will have to provide him with free primary education in other ways.

147. Secondly, C's constitutional rights in this regard are not absolute. One must take into consideration the constitutional rights of other students to be provided with an education in a safe environment and the rights of staff not to be exposed to an unreasonable risk of injury when carrying out their work: see *Board of Management of B. National School v. Secretary General of the Department of Education and Skills* [2019] IEHC 738, at paras. 21 and 22.
148. Having regard to the infirmities in the determination of the appeal committee as outlined herein, the court must quash its decision and recommendation in this matter and remit the matter back to the Minister for the purpose of establishing a new appeal committee to determine the matter in accordance with law.
149. As the court has decided that it is necessary to quash the determination of the appeal committee, it follows that the direction of the first respondent must also be struck down. While there were grounds advanced as to why that determination should be struck down, even if the determination of the appeal committee was upheld, it is not necessary to adjudicate upon these submissions in light of the court's decision in respect of the determination of the appeal committee.
150. As this judgment will be delivered electronically, the parties will have two weeks within which to furnish written submissions on the form of the final order and on costs and on any other matters that may arise.