

# TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

## Complaints Assessment Committee (CAC) v Teacher A NZ Teachers Disciplinary Tribunal Decision 2018/27

Teachers are required to engage in ethical and professional relationships with learners that respect professional boundaries.

Teacher A was referred to the Teaching Council Complaints Assessment Committee (CAC) on a number of allegations of breaching professional boundaries with students. The CAC investigated and referred a charge of serious misconduct to the New Zealand Teachers Disciplinary Tribunal (Tribunal).

The incidents include Teacher A making inappropriate physical contact with Student C (aged 12) on two occasions: in September 2016 by picking up Student C and threatening to throw her in the kayaking pond; and in November 2016 by throwing Student C (dressed in PE gear and carrying her bag) into the swimming pool.

Teacher A also made inappropriate physical contact with Student B on two occasions: in September 2016 by grabbing him by his hand, wrapping his arm around his neck and chest and removing him from the classroom; and in November 2016 by physically ushering Student B from the classroom (Student B resisted) and continuing to usher him out of the door and then held Student B on the ground, with his knee on Student B's leg and his hands on Student B's shoulder.

Teacher A also made inappropriate comments to Student C (while she was crossing the school pedestrian crossing) by calling out and saying, "Stop. You need to come back. This is serious. Why aren't you talking to me? I thought we were friends".

The Tribunal considered that all three of the incidents concerning Student C amounted to a breach of professional boundaries and serious misconduct. The Tribunal found that the combination of events would very likely have adversely affected Student C's wellbeing or learning.

The Tribunal considered the conduct concerning Student B amounted to physical abuse. In relation to the inappropriate comments, the Tribunal questioned Teacher A's professional judgement and found that his actions brought into question his fitness to be a teacher and may bring discredit to the profession.

Teacher A was censured, had conditions imposed on his practising certificate (further training and mentoring, and a copy of the Tribunal decision to be shown to any prospective employer) for a period of two years from the date he resumes teaching.

Teacher A applied for a permanent name suppression on the basis of his mental health. The Tribunal made an order for non-publication of Teacher A's name, including names of towns and districts (and the name of school and staff).

Teacher A was ordered to pay 40 percent of the CAC's costs and 40 percent of the Tribunal's costs.



**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2018-27**

**IN THE MATTER** of the Education Act 1989

**AND**

**IN THE MATTER** of a charge referred by the Complaints Assessment  
Committee to the New Zealand Teachers  
Disciplinary Tribunal

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**

**AND** **TEACHER A**

**Respondent**

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**TRIBUNAL DECISION**

**28 March 2019**

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**HEARING:** Held at Wellington on 13 November 2018 (on the papers)

**TRIBUNAL:** Theo Baker (Chair)  
Sue Ngarimu and Sheila Grainger (members)

**REPRESENTATION:** Mr D Moore for the CAC  
Ms J Andrews for the respondent

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge is that on various occasions the respondent breached professional boundaries, as detailed in the Notice of Charge set out below.
2. It is alleged that the conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and rr 9(1)(a), (c) and/or (o) of the Education Rules 2016 or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers under s 404 of the Act.
3. The parties conferred and agreed on the facts, that the conduct amounts to serious misconduct, and agreed on an appropriate penalty. We must still consider the evidence and satisfy ourselves of those matters.

### **Summary of decision**

4. This charge contained multiple allegations. At times there was a lack of alignment between the allegation in the charge and the agreed facts. Because the respondent was not contesting the facts or that they amounted to serious misconduct, we have not dismissed the particulars, but have amended some particulars to reflect the facts that are admitted. We have done this on the basis that the amendments do not significantly affect the essence of the charge and that the respondent is not prejudiced by these amendments.
5. We found that the respondent:
  - made inappropriate physical contact with Student C by threatening to throw her in the pool in September 2016 and by throwing her into the pool in November 2016, and that together these two particulars amounted to serious misconduct;
  - made inappropriate physical contact with Student B in September 2016 by grabbing him by his hand, wrapping his arm around his neck and chest and removing him from the classroom; and in November by physically ushering him from the classroom, while Student B resisted him, and continuing to usher him out of the door, and then holding Student B on the ground, with his knee on Student B's leg and his hands on Student B's shoulders; and that each of these incidents amounted to serious misconduct.
  - made inappropriate comments to Student C by saying, "Stop. You need to come back. This is serious. Why aren't you talking to me? I thought we were friends".

We found that cumulatively with the other conduct concerning Student C, this amounted to serious misconduct;

- did not maintain appropriate professional boundaries by not following school protocols on having students in his office and class during breaks, and engaging with students on social media. Together these two behaviours amounted to serious misconduct.
6. Although the evidence showed that the respondent was found in a tent with female students, we did not find that the respondent was in a female student's tent or that there were protocols against this or that he knew of them.
  7. We did not find that the respondent misled the school in the completion of his job application.
  8. We censured the respondent and imposed conditions on his practice, as outlined in paragraph 75 of this decision. We also directed that he pay 40% of the CAC and Tribunal costs.
  9. We made an order for non-publication of the name of the respondent, and any towns or districts referred to in the evidence before us.

### **Charge**

10. The general charge against the respondent is that on various occasions during the 2016 and 2017 school years, he breached professional boundaries. The particulars of the charge are:
  - a. *Making inappropriate physical contact with Student C, namely:*
    - i. *In early September 2016 picking up a female student (Student C) and threatening to throw her into the pool;*
    - ii. *On 22 November 2016 picking up the same female student (Student C) and throwing her into the pool whilst in her clothes;*
  - b. *Making inappropriate physical contact with Student B, namely:*
    - i. *On 21 September 2016 grabbing Student B by his hand, wrapping his arm around Student B's neck and check [sic] and removing him from the classroom out into the cloak bay;*
    - ii. *On 11 November 2016 physically ushering Student B from the classroom, while Student B resisted him, and continuing to usher him out of the door,*

*tripping and falling together on the floor, and then holding Student B on the ground, with his knee on Student B's leg and his hands on Student B's shoulders.*

- c. *Making inappropriate comments to student C, namely:
 
  - i. *To Student C at the school pedestrian crossing, including, "stop. You need to come back this is serious" and "why aren't you talking to me" and "I thought we were friends, why aren't we talking?"*;*
- d. *Not maintaining appropriate professional boundaries, namely:
 
  - i. *Not following school protocols on having students in his office and class during breaks;*
  - ii. *Being in a female student's tent when he knew this was against school policy;*
  - iii. *Engaging with students on social media;*
  - iv. *Making misleading statement to the school on his job application by not disclosing his medical condition.**

## **Evidence**

11. Before the hearing the parties conferred and filed an Agreed Statement of Facts (ASF), which is set out in full:

### **Background**

1. *The respondent, M is a registered teacher. At relevant times [the respondent] was employed by [Town X] Intermediate (the School).*

### **Incident One (Throwing Student C into pool)**

#### September 2016 incident

- 2. *In early September 2016, [the respondent] was with a school group at a kayaking pond.*
- 3. *He picked up a student ('Student C') and threatened to throw her into the pond.*
- 4. *Student C was not and has never been in [the respondent]'s class.*
- 5. *After carrying Student C to the edge of the pond, he held Student C by her arms and asked another student ('Student J') to grab Student C's legs, and swung her as though they were going to throw her into the water. Student J slipped, and [the*

respondent] released Student C to help her. Student C then ran away from [the respondent]. Student J was not hurt during this incident, but did fall into the pond.

6. Following this, [the respondent] made several comments to Student C at different times that he was going to throw her into water.

November 2016 incident

7. On 22 November 2016, [the respondent]'s class was at the school pool. Student C's class then came into the pool area for their swimming session.
8. Student C was dressed in PE gear, and carrying her bag.
9. [The respondent] approached Student C, picked her up, carried her to the edge of the pool, and then threw her in. While [the respondent] was carrying her, Student C was screaming, as she did not want to be thrown in the pool.
10. [The respondent] subsequently filled out an incident report, noting that he thought it was ok at the time, but that in hindsight throwing Student C into the pool was a serious lack of judgement.
11. Following the event, [the respondent] apologised to Student C, and asked her to tell him what her favourite type of chocolate was so that he could give her some.

**Incident Two (physical contact with Student B)**

12. [The respondent] made physical contact with a male student in his class ('Student B') on two occasions.

September 2016 incident

13. On 21 September 2016, Student B was being disruptive in class. [the respondent] asked him to work on an individual project that he had given to the class.
14. Student B reacted angrily, and said he was going to take a swing at [the respondent]. [the respondent] replied that he could try if he wanted to, but that it would be a silly thing to do.
15. Student B approached [the respondent] and swung his fist at him and kicked him. [the respondent] grabbed Student B to stop him from throwing further punches, and wrapped his arms around his neck and chest and removed him from the classroom. Student B refused to calm down and headbutted [the respondent] in the chest.
16. [The respondent] then released Student B, who went into the boys' toilets. [the respondent] returned to his class.

17. *Student B was stood down from school for 2 days following this incident.*

*November 2016 incident*

18. *On 11 November 2016, Student B was bouncing a table tennis ball in class. [the respondent] asked him to stop, but Student B ignored this request.*
19. *[The respondent] walked over to Student B and grabbed the ball. Student B swore at him and became aggressive. Due to this reaction, [the respondent] physically ushered Student B out of the classroom.*
20. *As they were moving down the corridor towards the door to the learning centre, [the respondent] tripped and both he and Student B bumped into the door. They went through the door to the learning centre, and [the respondent] then asked another student to get help.*
21. *Student B became more aggressive, and tried to punch [the respondent]. He then bit [the respondent] on the arm. [the respondent] took Student B to the ground, and held him down with his knee on Student B's leg and his hands on Student B's shoulders. He spoke to Student B and tried to calm him down. Student B was swearing and asking [the respondent] to get off him. During the altercation, Student B also soiled himself.*
22. *One of the school's deputy principals, Ms V, then arrived and looked after Student B, while [the respondent] returned to the classroom. When Ms V entered the room, she saw [the respondent] remove his knee from Student B's leg.*

***Incident Three (Inappropriate comments to Student C at pedestrian crossing)***

23. *In May 2017, [the respondent] was at the school pedestrian crossing doing crossing duty one morning.*
24. *Student C was riding her scooter to school. She arrived at the crossing, got off her scooter and crossed the road at the pedestrian crossing.*
25. *As Student C was crossing the road, [the respondent] called out for Student C to come and speak to him.*
26. *Student C pretended that she could not hear him, and continued walking.*
27. *[The respondent] then called out louder and said "stop, you need to come back, this is serious."*
28. *Student C turned around and walked back to [the respondent], as she thought she would get in trouble if she did not.*

29. *[The respondent] asked Student C why she was not talking to him. Student C said that she did not need to talk to him, and that she did not speak to all the teachers. [the respondent] then said that he thought they were friends.*
30. *Student C and another student ('Student N') reported this interaction with [the respondent] to their teacher, who passed this on to the School's principal.*

***Incident Four (Having students in office and classroom at lunchtime and after school)***

31. *The school had a policy that students were not permitted in offices.*
32. *On multiple occasions, students were found in [the respondent]'s office when he was present, at times when they should not have been there.*
33. *In particular:*
- a. *On 28 March 2017, one of the school's deputy principals, Ms Y, saw [the respondent] in his office during lunchtime, along with two students. Ms Y told the students to leave the office.*
- b. *On another occasion, Ms V saw [the respondent] in his office after school along with two students. The students missed their school bus, and Ms V was required to drive them to another bus stop.*
34. *[The respondent] was reminded on multiple occasions that students were not permitted in offices:*
- a. *After telling the girls that they were to leave the office, Ms Y subsequently reminded [the respondent] that no students were allowed in the offices, or in classrooms during lunchtimes.*
- b. *The day after Ms V saw the students in [the respondent]'s office after school, she similarly reminded [the respondent] that students were not allowed in the offices.*
- c. *Ms Z, Principal of the School, also spoke to [the respondent] around this time about not having students in his room during lunchtime and after school.*

***Incident Five (Going into girls' tent at school camp)***

35. *In February 2017, [the respondent] was on camp with a school group.*
36. *During this camp, groups of students were sleeping in tents.*

37. *During the evening, Ms Z was checking on the students, to tell them they were to go to sleep shortly. She noticed that one student was not in her assigned tent. When Ms Z asked where this student was, other students told her she was in another tent.*
38. *Ms Z went to the tent that the students had pointed out, and found [the respondent] sitting in the tent talking to a group of girls, one of whom was feeling homesick and upset.*
39. *Ms Z spoke to [the respondent] afterwards and told him that it was not appropriate for him to be in a tent with female students.*

***Incident Six (Social media interaction with students)***

40. *In around May 2017, Student C's parents became aware that [the respondent] had requested to follow her on the social media platform Instagram.*
41. *The School subsequently became aware that [the respondent] had followed 9 accounts of students from the School. He had also accepted requests to follow his account from 8 accounts of students from the School.*
42. *The School were also made aware that [the respondent] had contacted Student N on Instagram during school holidays, asking if she wanted to help him set up computers at the School.*

***Incident Seven (Failing to disclose medical condition on job application)***

43. *[The respondent] applied for his position at the School in an application dated 17 May 2016. During this application, he answered 'no' to the following question:*
10. Have you had any injury or medical condition caused by gradual process, disease or infection, such as occupational overuse syndrome, repetitive strain injuries or stress, which the demands of this classroom teaching position may aggravate or contribute to?
44. *In March 2017, [the respondent] was required to renew his practising certificate. In his Applicant Declaration, he stated "for the last two years I have been suffering from high stress, anxiety and clinical depression. A diagnosis has been made and I was put on medication. In 2015 I was put on sick leave for 4 weeks when I was at Town B Intermediate due to the stress caused by my marriage break up and increasing anxiety around my teaching."*

45. *He did not fully disclose this information to the School during his interview. Instead, he stated that he had taken time off due to stress created by his marriage break up.*

**Teacher's response**

46. *[The respondent] provided the following responses to the above incidents:*
- 46.1 *Incident One: [The respondent] stated that throwing Student C into the pool was the result of ongoing joking between the two, and that they would regularly taunt each other. He stated that when he picked Student C up, she did not appear scared or concerned, and that other students were telling him to do it. He accepted that she had said 'no', but that her tone and manner did not make it seem like she was serious or unwilling to be thrown in. He stated that he thought she would have a change of clothes, and was unaware that she had her bag with her when she was thrown in.*
- 46.2 *Incident Two: In response to the September incident, [the respondent] advised that he had used physical force to restrain Student B as he was being attacked, and thought it was his only option to protect himself and his students. In response to the November incident, [the respondent] stated that after Student B started becoming aggressive in response to [the respondent] taking his ball, [the respondent] caught Student B's arms as they were coming toward him, and moved Student B towards the door. When they entered the learning centre, [the respondent] asked Student C to lie down and take some deep breaths to calm down. [The respondent] then knelt down beside him and placed his hands on his chest in a calming manner to get him to relax. He stated that he disagreed with Ms [O's] recollection that he was forcing Student B down.*
- 46.3 *Incident Three: [The respondent] stated that Student C had never told him that she did not want to talk to him. He also stated "I have never sought [Student C] out. Any interaction I have had with her has been opportunistic."*
- 46.4 *Incident Four: [The respondent] stated that he was an open and approachable person for his students, and that it was their own decision*

to come see him in his office. He also stated that he had been doing this for 16 years, and that it had only been raised as a problem now.

- 46.5 *Incident Five: [The respondent] stated that he understood the usual protocol in this situation would be to ask the student who was upset to come out of the tent to talk, or to send a female parent or staff member in. However, he stated that he had not thought of this, as he believed she would have been in a panic, and his only thoughts were for her welfare.*
- 46.6 *Incident Six: [The respondent] stated that he had initially accepted requests on Instagram from students that he was concerned about, and viewed it as a way that they could get in touch if they needed support. This developed into friends of these students also sending requests to [the respondent], which he accepted. He denied sending Student C a request, and stated that “as with all the others they sent the requests and I followed.” [the respondent] advised that he had only recently opened an Instagram account, and was inexperienced about how it worked.*
- 46.7 *Incident Seven: [The respondent] confirmed he had not disclosed his medical conditions, and advised that he had misread the question. He believed the question was asking whether there was anything currently affecting his ability to teach, which at that time he did not think there was.*

## **Factual findings**

12. We must be satisfied that the agreed facts support the allegations contained in the charge. We have therefore considered each particular:

*Particular a. i: In early September 2016 picking up a female student (Student C) and threatening to throw her into the pool;*

13. The evidence in support of particular a. 1. is set out clearly in paragraphs 2 to 6 of the ASF. Although the evidence refers to a “kayaking pond”, rather than a pool, we accept that the terms pond and pool might be synonymous. This particular is therefore proved.

*Particular a. ii: On 22 November 2016 picking up the same female student (Student C) and throwing her into the pool whilst in her clothes;*

14. The respondent has agreed, in paragraph 9 of the ASF, that he threw Student C into the pool on 22 November 2016. Particular a.ii. is therefore also proved.

*Particular b. i: On 1 September 2016 grabbing Student B by his hand, wrapping his arm around Student B's neck and check [sic] and removing him from the classroom out into the cloak bay;*

15. The evidence in paragraph 15 of the ASF is that the respondent “grabbed Student B to stop him from throwing further punches, and wrapped his arms around his neck and chest and removed him from the classroom”. We have therefore assumed that there is a typographical error in particular b. i. and that the word “check” should read “chest”.
16. The ASF does not specify that the boy was removed to the cloak bay – only that he was removed from the classroom. We do not consider that anything turns on this distinction and given that the respondent has not made any arguments that this point is relevant, we have, of our own motion, amended particular b.i. to remove those words. It now reads:

*On 1 September 2016 grabbing Student B by his hand, wrapping his arm around Student B's neck and **chest** and removing him from the classroom.*

17. We find the amended factual allegation proved.

*Particular b. ii: On 11 November 2016 physically ushering Student B from the classroom, while Student B resisted him, and continuing to usher him out of the door, tripping and falling together on the floor, and then holding Student B on the ground, with his knee on Student B's leg and his hands on Student B's shoulders.*

18. In paragraphs 18 to 22 of the ASF, we are told that following an altercation after Student B ignored the respondent's request to stop bouncing a table tennis ball in class, the respondent physically ushered Student B out of the classroom and as they were moving down the corridor the respondent tripped and both he and Student B bumped into the door.
19. We are told that later Student B became more aggressive, tried to punch the respondent and bit him on the arm, the respondent took Student B to the ground, and held him down with his knee on Student B's leg and his hands on Student B's shoulders. There is no mention in the ASF of the tripping and falling together. Rather, according to the ASF, the respondent “took Student B to the ground”.
20. Again, because the respondent has admitted the charge, we do not consider the respondent is prejudiced if we amend the charge by removing the words “tripping and falling together on the floor”. Particular b. ii now reads:

*On 11 November 2016 physically ushering Student B from the classroom, while Student B resisted him, and continuing to usher him out of the door, and then holding*

*Student B on the ground, with his knee on Student B's leg and his hands on Student B's shoulders.*

21. The evidence in the ASF supports this particular and we find it proved.

*Particular 1. c. Making inappropriate comments to student C, namely:*

- i. To Student C at the school pedestrian crossing, including, "stop. You need to come back this is serious" and "why aren't you talking to me" and "I thought we were friends, why aren't we talking?"*
22. The evidence found in paragraphs 18 to 25 of the ASF, is that while doing crossing duty one morning in May 2017, the respondent called out for Student C to come and speak to him. When she did not respond, he called out louder and said "stop, you need to come back, this is serious." The respondent asked Student C why she was not talking to him. Student C said that she did not need to talk to him, and that she did not speak to all the teachers. The respondent then said that he thought they were friends.
23. Again, the evidence in the ASF does not completely match the allegation in the charge. The final statement in the charge is speech marks, which indicates that this is a direct quote. The words, "Why aren't we talking?" are alleged but not contained in the ASF. We have therefore amended the charge by deleting the last four words. The respondent is not prejudiced by this amendment which reflects the facts he has agreed to. It now reads:

*To Student C at the school pedestrian crossing, including, "Stop. You need to come back. This is serious" and "Why aren't you talking to me?" and "I thought we were friends"*

24. On the basis of that amendment, particular c.i. is proved.
- i. Not following school protocols on having students in his office and class during breaks;*

25. According to paragraphs 31 to 34, the school had a policy that students were not permitted in offices and on multiple occasions students were found in his office when he was present. This particular is therefore proved.

- ii. Being in a female student's tent when he knew this was against school policy;*
26. There is evidence in paragraphs 35 to 39 of the ASF that during a school camp in February 2017, the respondent was found in a tent talking to a group of girls, one of whom was feeling homesick and upset. There is no evidence that he was in the tent of

a single female student. If the apostrophe in the charge is moved so that it reads that he was in a “female students’ tent”, then the allegation is that he was found in the tent of female students, which is in accordance with the ASF. However, there is no evidence in the ASF that there was a school policy that this was not allowed or that the respondent was aware of this. This particular is therefore not proved.

*iii. Engaging with students on social media;*

27. According to paragraphs 40 and 41 the respondent asked Student C to follow her on Instagram. He had followed nine student accounts and had accepted eight requests from students to follow his account. This particular is therefore proved.

*iv. Making misleading statement to the school on his job application by not disclosing his medical condition.*

28. The evidence in paragraphs 43 to 45 of the ASF is that during his application for a position at the school, the respondent answered ‘No’ when asked if he had any injury or medical condition caused by gradual process, disease or infection, such as OOS, RSI or stress, which the demands of the position may aggravate or contribute to, but eight months later, in March 2017, when completing his applicant declaration in renewing his practising certificate, he stated that he had been suffering from high stress, anxiety and clinical depression for the past two years.
29. In paragraph 46.7 of the ASF, the respondent has said that he had not disclosed his medical conditions, and advised that he had misread the question. He believed the question was asking him whether there was anything currently affecting his ability to teach, which at that time he did not think there was.
30. It is not clear to us that the respondent has misled the school. The question is whether the respondent had an injury or medical condition **caused by gradual process, disease or infection**. We do not know what the cause of the respondent’s mental health issues is. It appears that question 10 is aimed at the disclosure of conditions that have arisen as a result of exposure to tasks or situations in previous jobs and which may be exacerbated by the current role. This is particularly relevant to later claims of work-related illness.
31. Even if we are wrong about that, we have some sympathy for the respondent’s misunderstanding of the question being asked, as it does require some careful reading. He may have answered it incorrectly (and we do not find that he has), but the

term “mislead” implies an intention to lead someone to have incorrect information.

32. We are not satisfied that in answering this question ‘No’, the respondent made a misleading statement to the school. Furthermore, this allegation is part of the last particular, which is an allegation of not maintaining professional boundaries. Even if we were satisfied that he misled the school, this cannot be classified as a failure to maintain professional boundaries. This particular is therefore not proved.

### **Serious misconduct**

33. We must now decide whether the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers). The respondent has conceded that the respondent’s use of physical force in particular 1.b. and his breach of boundaries each constitute serious misconduct. We must make our own determinations on all particulars based on the information before us.
34. Section 378 of the Act provides:

***serious misconduct*** means conduct by a teacher—

(a) *that—*

*(i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or*

*(ii) reflects adversely on the teacher’s fitness to be a teacher; or*

*(iii) may bring the teaching profession into disrepute; and*

(b) *that is of a character or severity that meets the Education Council’s criteria for reporting serious misconduct.*

35. The criteria for reporting serious misconduct are found in r 9 of the in the Education Council Rules 2016 (**the Rules**).<sup>1</sup> The CAC relies on rr (a), (c) and (o):

#### ***Criteria for reporting serious misconduct***

(1) *The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*

*(a) the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher):*

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<sup>1</sup> The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

*(c) the psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment:*

*(o) any act or omission that brings, or is likely to bring, discredit to the profession.*

36. In paragraph 2 of the Notice of Charge, the CAC alleges that the conduct in paragraph 1, cumulatively or individually, amounts to serious misconduct pursuant to s 378 and r 9(1)(a), (c) and/or (o) of the Education Council Rules (**the Rules**). Therefore we must consider each allegation individually and decide whether or not it reaches the threshold for a finding of serious misconduct. If we do not find that on its own, an allegation reaches that threshold, we may still find that together two or more allegations amount to serious misconduct.
37. The Notice of Charge also invites us to make a finding that the respondent breached the Code of Professional Responsibility. In the CAC submissions there is some discussion of this Code, which was introduced in June 2017 and its predecessor, the Code of Ethics for Registered Teachers. We have not made a formal finding that this conduct was a breach of the Code of Professional Responsibility for the reasons outlined below.
38. First, we accept Ms Andrews' submission that the Code of Professional Responsibility, which was introduced in June 2017 should not have retrospective effect. Based on the ASF, all of the conduct occurred before that date.
39. The CAC argues that this later Code is still instructive in an assessment of professional standards. This argument has some merit, particularly if we were being required to make a finding on a novel or uncommon matter, which had not previously been considered under the relevant law. Examples might be conduct involving obligations towards a teacher's colleagues or the whānau of a student. Those cases do not always fall neatly into most of the criteria under r 9. Even then, we would usually refer to the Code as guidance on a standard, rather than making a finding as part of a charge. The subject matter of this charge bears similarities to many other decisions this Tribunal has made.
40. This ties in with the second reason for not making such a finding. The test for serious misconduct involves a combination of s 378 and r 9.

41. Although reference to codes of ethics and standards may be useful in reaching or explaining a decision, a finding of serious misconduct does not require us to find there has been a breach of the Code of Professional Responsibility. At the same time, if we find that there has been such a breach, it does not automatically allow us to exercise our powers under s 404. Any consideration of the Code of Professional responsibility or its predecessor would ordinarily be in the context of making a finding under s 378 and r 9.

42. As we said in *CAC v Northwood*:

*High standards of conduct are expected of teachers, but it is accepted that even where it is found that a teacher's conduct falls below expected standards, not every single shortcoming or breach of the Education Council Code of Ethics necessarily constitutes serious misconduct.*<sup>2</sup>

43. We acknowledge that the Tribunal's jurisdiction is not limited to allegations of serious misconduct. The Disciplinary Tribunal is established under r 53 of the Education Council Rules 2016. Section 377<sup>3</sup> of the Act stipulated that among other things, the Teaching Council<sup>4</sup> was to create:

*a Disciplinary Tribunal to conduct hearings relating to misconduct by, and convictions of, individual teachers, and to exercise the powers given under this Act;*

44. Under s 401 of the Act, a CAC must refer to the Tribunal any matter that it "considers may possibly constitute serious misconduct".<sup>5</sup> It may also refer a "matter" at any time to the Tribunal.<sup>6</sup> Section 404 provides that the Tribunal may "*do 1 or more*" of a series of actions "following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee". In practice, referrals that are not serious misconduct tend to be convictions of serious offences or where there have been prior convictions, or matters where a respondent or school has not

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<sup>2</sup> CAC v Northwood 2016-32, 18 January 2017, paragraph 200. The Code of Professional Responsibility had not been developed at that time.

<sup>3</sup> inserted on 1 July 2015 by s 40 of the Education Amendment Act 2015

<sup>4</sup> The Education Council of Aotearoa New Zealand was renamed the Teaching Council of Aotearoa New Zealand by a replacement s 379 created by s 5(2) of the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018

<sup>5</sup> Section 401(4)

<sup>6</sup> Section 401(3)

agreed with the CAC's proposed outcome.<sup>7</sup>

45. We do not want to encourage referrals of alleged breaches of the Code of Professional Responsibility or any other code of ethics in the absence of allegations of serious misconduct or other compelling reason, when the CAC has adequate disciplinary powers to dispose of the matter. We also caution against using the Code of Professional Responsibility as a quasi-disciplinary code or a substitute for the statutory framework.

46. Turning now to the established particulars:

*Particulars a. i. and ii: picking up Student C and threatening to throw her into the pool; picking up Student C and throwing her into the pool whilst in her clothes*

*Particular c: making inappropriate comments to Student C*

47. The following discussion concerns particulars 1. a. and c. because all three sub-particulars relate to Student C.

48. The CAC referred to *CAC v Elms NZTDT 2015-35*,<sup>8</sup> which we agree has some similarities but covered a range of inappropriate behaviours, and there was no discussion or findings of the particulars separately.

49. Although not mentioned in the ASF, according to the CAC's submissions, the respondent's interactions with Student C caused her distress. Her mother told the CAC investigation that the day that the respondent threw Student C into the pool, she was upset. Ms Andrews has not taken exception to this factual allegation, which is relevant to our assessment of whether the respondent's conduct "adversely affected or was likely to adversely affect the well-being or learning of 1 or more students" as contemplated by the first definition of serious misconduct in s 378.

50. We note that according to paragraph 46, [the respondent]'s response was that:

*...when he picked Student C up, she did not appear scared or concerned, and that other students were telling him to do it. He accepted that she had said 'no', but that her tone and manner did not make it seem like she was serious or unwilling to be thrown in. He stated that he thought she would have a change of clothes, and was unaware that she had her bag with her when she was thrown in.*

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<sup>7</sup> Under s 401 the CAC may not impose any penalty without "agreement with the teacher and the person who made the complaint or report or referred the matter"

<sup>8</sup> *CAC v Elms NZTDT 2015-35*, 7 July 2016

51. Actual harm or adverse effect is not required. In fact, the first thing that strikes us about particular 1.a., (picking up and threatening to throw Student C in the pool) is simply how inappropriate such conduct was. It shows a lack of judgement and/or a lack of awareness of the respondent's professional boundaries. Although there might have been a risk of physical harm, the way in which we find that the conduct was likely to harm Student C's well-being was through a sense of embarrassment and disempowerment. The respondent might have thought that they were having fun. There should be no assumption that children enjoy being picked up by adults. Teachers are expected to respect the physical space of any student, and not to take advantage of their own physical size. We would have expected a male teacher to be more circumspect when deciding to physically handle an intermediate-aged girl.
52. That said, we doubt that on its own the established conduct in particular a. i. amounts to serious misconduct. Although it might have adversely affected Student C's well-being, we do not consider it is serious enough to meet any of the criteria in r 9. We do not think that it amounts to physical abuse or psychological abuse or that in isolation it amounts to conduct likely to bring discredit to the profession. That is because based on the facts presented to us, and applying the test in *Collie v Nursing Council of New Zealand*<sup>9</sup> we do not find that reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner. That does not mean that we condone the behaviour and we make an adverse finding.
53. The second occasion that the respondent picked Student C up, he threw her into the pool. She was fully-clothed and was holding her bag. We find that this was conduct likely to adversely affect Student C's well-being and reflects adversely on the respondent's fitness to be a teacher as provided in paragraphs (a) and (b) of the definition of serious misconduct. The respondent seems to have forgotten what his role as a teacher was.
54. There are circumstances in which such an action might amount to physical abuse. In this instance we have not made that finding. We think that the best description for this is that it was unintelligent behaviour and that it is likely to bring discredit to the

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<sup>9</sup> [2001] NZAR 74 at [28]

profession. The test in *Collie*<sup>10</sup> is met.

55. The third inappropriate interaction with Student C was the respondent's conversation with her at the pedestrian crossing. Again, on its own, this interaction would unlikely have been the subject of a referral to the Tribunal. We do find that it might have made the student feel uncomfortable and therefore might adversely affect her wellbeing, but we do not find that it meets any of the criteria in r 9. However, we have no doubt that cumulatively all three of the particulars concerning Student C amount to serious misconduct for the following reasons:
- a) The combination of these events would very likely have adversely affected Student C's wellbeing or learning as contemplated by paragraph (a) of the definition under s 378. We can see that she would have felt uncomfortable with the attention he gave her, or even picked on.
  - b) We find that the conduct reflects adversely on the respondent's fitness to be a teacher. We do not see that any of his activities or comments form part of an ordinary teacher-student relationship. Teachers can build rapport with students through conversations and activities that put the student first. We do not consider that he put Student C's needs above his own. We find that the definition of serious misconduct in paragraph (b) is also met.
  - c) We also find that this conduct may bring the teaching profession into disrepute under paragraph (c).
56. Therefore we also find that r 9(1)(o) is met. We find that the criterion in r 9(1)(c) is also met when we view particulars a.i., a.ii. and c. together.
57. We agree with the charge that the respondent made inappropriate physical contact in the case of particulars a.i. and a.ii. We also agree that the comments made in particular c. were inappropriate. Overall we find that the respondent's conduct towards Student C was a breach of professional boundaries. The respondent said to Student C "I thought we were friends". Friendship implies that there may be mutual expectations of the relationship. The teacher/student relationship may require some mutual expectations such as respect, but the teacher is in authority over the student. A teacher can exploit that power.

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<sup>10</sup> Above n 9

58. As we said in Huggard<sup>11</sup>

*As the adult and a teacher, the respondent had a responsibility to maintain professional boundaries. The two were not contemporaries. They could not be friends. He was in a position of power and responsibility, where he should role model appropriate behaviour. His actions should attract esteem, not discomfort or fear. Students and parents should be able to trust that when a student seeks mentorship, counsel or comfort from a teacher, the teacher will respond in a way that has the student's wellbeing as paramount.*

*Particular 1.d.*<sup>12</sup> *Not maintaining appropriate professional boundaries, namely:*

*Particular b. i: On 1 September 2016 grabbing Student B by his hand, wrapping his arm around Student B's neck and chest and removing him from the classroom;*

*Particular b. ii: On 11 November 2016 physically ushering Student B from the classroom, while Student B resisted him, and continuing to usher him out of the door, and then holding Student B on the ground, with his knee on Student B's leg and his hands on Student B's shoulders.*

59. The conduct concerning Student B is of a different nature. On both of the occasions outlined in particular b., the respondent used physical force to manage challenging behaviour. We accept that Student B's behaviour posed particular difficulties and we have sympathy for teachers placed in this position. But, as accepted by Ms Andrews, the respondent did not manage the situation well, putting into question his fitness to teach. She notes that as in *Karklins*,<sup>13</sup> trying to restrain and move a student while they were acting out did nothing to calm the student, and in fact in the present case, the respondent was also harmed.

60. The conduct on 1 September 2016 was not as serious as the latter occasion, but not that it was still unwarranted. In the decision of *CAC v R* 2017-26<sup>14</sup> we considered when there is a need to use restraint, and they types of restraint that are approved and safe. Students in a school have the same rights to be free from assault (including restraint) as any citizen. There are limited circumstances where the safety of a student or those around him might mean that an approved form of restraint is required, if de-escalation techniques have failed. The respondent appropriately did not attempt to argue that he

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<sup>11</sup> NZTDT 2016-33

<sup>12</sup> In the charge, this particular begins with the letter 'b', but there is already a particular 1.b. and logically this is particular 1.d.

<sup>13</sup> *CAC v Karklins* NZTDT 2016-38, 3 October 2016. The appropriate and safe use of restraint was considered in *CAC v R* NZTDT 2017-26, 5 May 2018.

<sup>14</sup> *CAC v R* NZTDT 2017-26, 8 May 2018

had followed such processes.

61. This conduct meets the definitions in all three paragraphs of the definition of serious misconduct under s 378. We also find that it amounts to physical abuse under r 9(1)(a) and conduct likely to bring discredit to the teaching profession under r 9(1)(o).

*Particular 1.d.*<sup>15</sup> *Not maintaining appropriate professional boundaries, namely:*

*i. Not following school protocols on having students in his office and class during breaks;*

*iii. Engaging with students on social media;*

62. The CAC submits that allowing students in his office and classroom reflects adversely on the respondent's fitness to teach and has the potential to bring the profession into disrepute. He was warned on multiple occasions that this was not permitted under the school's policies, but he persisted. According to the CAC, teachers should be seen to be complying with school policies, particularly where they are designed to protect students and teachers from the risk of inappropriate behaviour.
63. For the respondent, Ms Andrews advocates for caution when assessing the seriousness of the breaches. She submits that there may be occasions when students feel the need to talk to a teacher in private, and encourages the Tribunal to consider why the teacher was alone with the student and who initiated it.
64. While we accept that a failure to follow a school protocol is not necessarily of itself an example of serious misconduct and that on rare occasions there might be a reason to depart from a policy, we are not given any explanations for the events in question and so we cannot speculate as to possible justifications. Although not specified in this way in the charge, the cause for disquiet in the present case is that, having been reminded of the protocol, the respondent did not comply. On their own, the two examples outlined in the ASF are not of great concern. It is when considered in the context of the other allegations that they are more worrying.
65. On the matter of social media contact, the CAC submits that it is self-evident that maintaining appropriate boundaries is of fundamental importance in the professional teacher-student relationships. Ms Andrews accepts that the respondent was over-familiar with students.

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<sup>15</sup> In the charge, this particular begins with the letter 'b', but there is already a particular 1.b. and logically this is particular 1.d.

66. We have considered why engaging in social media with students is a breach of professional boundaries, and note:
- It is not based on any advancement of learning;
  - It is not based on the interests of the students;
  - It creates an overly familiar relationship which lead to other unprofessional conduct.
67. Again, we are not sure that the facts in support of particular 1.d.iii. on their own would have led to a referral to the Tribunal. We do make an adverse finding, but there is insufficient evidence to find that it meets the test for serious misconduct. The combination of particulars 1.d i. and iii. start to raise alarm bells. We find that together the respondent's actions in having students in his office, contrary to school policy and connecting with students on social media amounts to conduct that calls into question his fitness to be a teacher under paragraph (b) and is likely to bring the teaching profession into disrepute under paragraph (c) and bring discredit to the profession under r 9(1)(o).
68. In summary, overall, the respondent's conduct amounts to a clear case of serious misconduct, and we acknowledge the his recognition of this.

### **Penalty**

69. In *CAC v McMillan*<sup>16</sup> we summarised the role of disciplinary proceedings against teachers as:

*... to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.*

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<sup>16</sup> NZTDT 2016/52, 23 January 2017, paragraph 23.

70. Section 404 of the Act provides:

**404 Powers of Disciplinary Tribunal**

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
  - (b) *censure the teacher:*
  - (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*
  - (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
  - (e) *annotate the register or the list of authorised persons in a specified manner:*
  - (f) *impose a fine on the teacher not exceeding \$3,000:*
  - (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
  - (h) *require any party to the hearing to pay costs to any other party:*
  - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
  - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*

71. The respondent has indicated that he does not wish to return to teaching. The CAC submits that cancellation is not warranted and that an appropriate penalty would be censure and conditions that the respondent undergo further training and mentoring should he return to teaching. Ms Andrews supports this response on the basis that it will allow the respondent's practising certificate to lapse which will be easier for him in his personal circumstances which are discussed below under the application for non-publication.

72. We have previously said that the use of physical force, even at a lower level, is unacceptable in New Zealand schools,<sup>17</sup> and that any teacher who uses physical force

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<sup>17</sup> NZTDT 2014-49, 20 May 2016

contrary to the prohibition in the Act<sup>18</sup> puts his or her status as a teacher in peril. We consider the respondent's use of force in relation to Student B on 11 November 2016 to be very serious. He held Student B down on the ground with his knee on the boy's leg and his hands on his shoulders and during the altercation the boy soiled himself.

73. There are many cases involving physical force where the Tribunal has not cancelled registration,<sup>19</sup> but we must say that in the present case, if the respondent intended to remain in the teaching profession, we would have significant concerns. This is based on the combination of his use of force against Student B and the various examples of his breach of professional boundaries. Where a teacher has remained in the teaching profession despite serious misconduct of this severity, it has often been on the basis of the rehabilitative steps the teacher has already started. Because the respondent does not intend to return to teaching, he has not taken those steps.
74. We must impose a penalty that is consistent with the Teaching Council's purpose of ensuring "safe and high quality leadership, teaching, and learning for children and young people in early childhood, primary, secondary, and senior secondary schooling" as found in s 377 of the Act.
75. Therefore in order to protect the safety of children and young people in the education system, we impose the following penalties:
- 75.1 The respondent is censured under s 404(1)(b);
- 75.2 Under s 404(1)(c), it is a condition of the respondent's practising certificate for a period of two years that if he intends to take up any teaching role (including as a relief teacher), he:
- (a) shows any prospective employer a copy of this decision, and prior to commencing a teaching role he provides evidence to the Teaching Council that the employer has seen it.
  - (b) prior to commencing a teaching role has in place a mentor, such person to be approved by the Manager, Professional Responsibility, Teaching Council, and:
    - (i) shows the mentor a copy of this decision;

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<sup>18</sup> The decision refers to s 149, but we take it to mean s139A

<sup>19</sup> For example, *CAC v Haycock* NZTDT 2016-2; *CAC v Rowlingson* NZTDT 2015-24; *CAC v Mackey* NZTDT 2016-90; *CAC v Davies* 2016-28; *CAC v Teacher* NZTDT 2016-26; *CAC v Papuni* 2016-30

(ii) meets in person with the mentor at least 5 times during the first 12 months of this condition.

(iii) works with the mentor on:

- behaviour management, including the use of restraint
- professional boundaries

(c) at any stage during the two years of this condition if requested by the Council provides evidence of the mentoring relationship and any learning that has taken place.

76. We note that the effect of these conditions is that it is unlikely the respondent would be able to undertake relief teaching.

77. We also confirm that fulfilling the condition imposed in paragraph 75.2 (a) does not amount to a breach of any orders for non-publication that may be in place.

### **Costs**

78. The parties agree that costs of 40% are appropriate.

79. The Tribunal orders the respondent to pay 40% of the costs of conducting the hearing, under section 404(1)(h) and (i), that is 40% of the Tribunal's costs and 40% of the CAC's actual and reasonable costs. The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:

a) Within 10 working days of the date of this decision:

- i. The Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs
- ii. CAC to file and serve on the respondent a schedule of its costs

b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions she wishes to make in relation to the costs of the Tribunal or CAC.

80. The Chairperson will then determine the total costs to be paid.

### **Non-publication**

81. The respondent has applied for permanent name suppression on the basis of his mental health. The CAC opposes this.

82. Section 405(3) of the Act provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

*(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*

...

*(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

83. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the interests of the applicants, as well as the public interest. If we think it is proper, we may make such an order.

84. In an affidavit in support of his application, the respondent says that before he finished working as a teacher, he had started to go downhill mentally and looking back he sees that he was burnt out. His GP referred him to Mental Health Services in [Town A]. He also refers to having been on anti-depressants for a long time. As noted above, in the ASF, when the respondent was renewing his practising certificate in March 2017, he stated in his declaration that he had been suffering from stress, anxiety and clinical depression for two years.

85. The respondent also described his reaction when the accusations (which we presume means the matters before the Tribunal) were presented to him. As a result of his emotional response, he immediately consulted his GP who put him on the phone to a helpline and the respondent saw the Mental Health team the next day. His medications were altered.

86. Since then the respondent and his family have moved to [Town B] and so he was no longer under the care of that Mental Health team. He had no support for a long time until his suicidal intentions became clear and he was given some support by the [TownB] mental health services. He was seen by a psychiatrist who prescribed more medication. He then managed to build a positive relationship with his new GP.

87. The respondent says that since resigning from his teaching role he tried unsuccessfully to find work as a reliever. In the middle of last year he started a role as a Customer Support Advocate which he was particularly enjoying.
88. The respondent is a husband and father of two. His wife works part-time and so his unemployment made a significant impact on the household finances and on his mental wellbeing. He became depressed and suicidal.
89. The respondent has provided a letter from his GP setting out some of his history with depression and suicidal thoughts. It is evident that this has been an ongoing problem for the respondent over several years.
90. We were assisted by the CAC's reference to similar cases involving evidence of impact on mental wellbeing. As we said in NZTDT 2016-27, "anxiety (and associated mental health conditions) is not an unexpected consequence of a proceeding involving allegations of serious misconduct".
91. The CAC submitted that the evidence put forward does not provide a sufficient basis for granting permanent name suppression, and that the GP letter provides little detail about the respondent's medical history and treatment. There is also no supporting information from the respondent's psychiatrist.
92. For the respondent, Ms Andrews submitted that this further information was not needed; that it is irrelevant what medication the respondent is receiving as unless the Tribunal has their own clinical understanding this will be meaningless. She said that the Tribunal does not need to be told by a psychiatrist as well as a GP that the respondent is a suicide risk.
93. The CAC referred to our comments in NZTDT 2016-69 when we were faced with a letter from a GP who felt that releasing the teacher's name to the public would have detrimental effects on her recovery (from alcohol dependency). We commented that the letter was more an expression of advocacy rather than an expert medical opinion.
94. On the other hand, in NZTDT 2015-20, we granted name suppression on the basis of a psychologist's opinion that publication of the respondent's name would impair his recovery.
95. It is up to the respondent what information he puts before us in support of an application for name suppression, and we appreciate that the respondent's GP has

provided a useful history of the respondent's mental health, but also find some merit in the CAC's arguments. Where an applicant is alleging risk of suicide as a ground for non-publication of his name and he has been referred to a Mental Health Team and a psychiatrist, we would have thought that confirmation from those sources would provide stronger evidence of the risk at hand.

96. However, unlike cases where the mental distress arises in response to a disciplinary process, this respondent has a history of mental illness and suicidal ideation. The GP's evidence is a summary of the respondent's history which is useful in our determination. We would have welcomed the information referred to by the CAC, but we have decided that based on the information before us, the public interest is outweighed by the respondent's personal interests. It is proper to make an order for non-publication of the respondent's name. That also means that the names of any towns or districts are suppressed. Because the name of the town features in the school's name, the name of the school and staff are suppressed.



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Theo Baker  
Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).