IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-2327
[2012] NZHC 3348

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	THE BOARD OF TRUSTEES OF SALISBURY RESIDENTIAL SCHOOL Applicant
AND	HER MAJESTY'S ATTORNEY-GENERAL First Respondent
AND	THE MINISTER OF EDUCATION Second Respondent

Hearing: 27 November 2012

Counsel: M Chen and N J Russell for applicant
U R Jagose and T M Bromwich for respondents

Judgment: 11 December 2012

RESERVED JUDGMENT OF DOBSON J

Contents

[1] Salisbury School was originally established in 1916 as the Richmond Special School for Girls of Feeble Mind. It has operated since then as a residential school for girls with special learning needs and intellectual impairments. The school provides special education within a residential setting for girls between years 7 to 10

at the time of their enrolment. Under current criteria, students may enrol for a period of up to two years.

[2] Historically, Salisbury School has had a maximum roll of 80 students, but because of a new admissions process introduced recently by the Ministry of Education (the Ministry), with effect from 1 February 2012, the roll this year has been 44 students. Of those, 22 will be completing their enrolment at Salisbury School at the end of the 2012 academic year, with the remaining 22 being eligible to continue at Salisbury School in 2013.

[3] By letter dated 29 October 2012, the second respondent (the Minister) confirmed a decision that had been conveyed at the end of August 2012 as a preliminary one, to close Salisbury School. The applicant sues in its capacity as the Board of Trustees of Salisbury School (the Trustees) and has commenced proceedings by way of judicial review, challenging the lawfulness of the Minister's decision to close the school. Initially, the Trustees made application under s 8 of the Judicature Amendment Act 1972 for an interim declaration that the Minister ought not to take any further action consequential on her exercise of the statutory power of decision to close Salisbury School. It was perceived as necessary to preserve the position of the school given that the decision to close Salisbury School is due to take effect at the end of the current academic year, so that alternative arrangements for all of the potential students at Salisbury School would need to be made before the commencement of the 2013 school year.

[4] The parties have sensibly co-operated in expedited preparation for the substantive hearing to obviate the need for an interim argument, and I scheduled a one day substantive hearing on the basis that it would be possible to produce a decision before the Court closes for the summer vacation. If more time had been available, I would likely be able to explain the reasons for my decision more succinctly. However, I am satisfied on the conclusions I have reached, and satisfied also that they would not change if I had more time to reflect on the issue.

Background to the challenged decision

[5] The definitions in s 2 of the Education Act 1964 (the 1964 Act) includes the following for "special education":

> means education for children who, because of physical or mental handicap or of some educational difficulty, require educational treatment beyond that normally obtained in an ordinary class in a school providing primary, secondary or continuing education.

[6] Consistently with that definition of a separate category of educational need, Part III of the 1964 Act, which provides for the establishment of various types of schools, includes provisions in ss 98 to 100 for the establishment (and disestablishment) of special schools and classes, the prospect of recognising other classes or services as providing special education, and for the making of regulations in relation to the provision of special education.

[7] A 2010 Ministry review signalled a change in policy from the previous forms in which the Ministry had provided special education for children with complex behavioural, social and educational needs, and those with some form of those needs as well as an intellectual impairment. In the recent past, the Ministry had operated four residential special schools. These have catered either for those with the first form of needs, or the second form, with residential schools for those with an intellectual impairment being operated on a single sex basis, one for each of boys and girls.

[8] Starting from the late 1990s, an evolution in the Ministry's thinking was reflected in a change towards supporting learners with special educational needs in their local schools, with greater support there, rather than removing them from their home and local environments to special residential schools. Mr Brian Coffey, the Group Manager, Special Education with the Ministry, deposed that over a period of time since the early 2000s, the Ministry has been working on a preferred alternative to residential schooling for children with such needs, namely an "intensive wraparound service" (IWS) which is intended to afford individualised support for each child identified as having a substantial level of need for special education.

[9] During 2009 and 2010, another special needs residential school, Waimokoia, was closed, with the children being dispersed to schools in their own localities, subject to support by IWS. Mr Coffey has deposed that the outcomes from that initiative were very positive.

[10] Both Mr Coffey's and the Minister's affidavits sworn in these proceedings repeatedly emphasised that the proposal to close special residential schools was not pursued as a cost-cutting mechanism, and that all funds allocated for the operation of such schools, if they were closed, would be "ring-fenced" and would be allocated to expanding the IWS to support those that would otherwise be in residential schools, but were able to have their special educational needs provided for at a local mainstream school.

[11] Mr Coffey also described the Ministry's experience with a temporary closure of another special school, Halswell Residential College in Christchurch, that was necessitated by damage caused during the February 2011 earthquake. Halswell is a boys' school catering for learners with significant learning, social and emotional needs associated with intellectual impairment. When those learners had to be dispersed, again the Ministry assessed the outcomes in alternative situations where the learners were supported by IWS to be positive.

[12] Accordingly, the current Minister inherited an initiative commenced by the previous Minister since at least 2010, of terminating the provision of special education in a residential setting, and instead addressing the needs of those who would previously have qualified for admissions at special education schools, in mainstream schools. As the policy options were researched, the Ministry provided alternative scenarios for either closing all four residential schools for special needs students, or closing two of them and leaving two such schools open to continue residential learning facilities, with the aim that fewer students would be enrolled at them, and that they would stay in such facilities for shorter periods.

[13] On 4 May 2012, the Minister wrote to each of the four residential special schools, outlining a proposal to support the learners with complex needs through

IWS, and acknowledging that that initiative would likely have an impact on the future of their schools.

[14] The Minister invited submissions and each of the schools responded. Then, on 27 August 2012, the Minister advised the Chair of the Trustees of her preliminary decision that Salisbury School should be disestablished as a special school under s 98(2) of the 1964 Act, and that the school would be closed under s 154 of the Education Act 1989 (the 1989 Act). The former provision sets out the considerations involved in a ministerial decision to disestablish a special school, and the latter provision describes the processes involved in dealing with the assets and liabilities of a school, once closed.

[15] The Minister advised that her intention was to have two co-educational schools, one focused on learners with complex educational, social and behavioural needs, and the other for learners with those needs and who also have an intellectual impairment. The letter indicated that Halswell Residential College would be redeveloped to enable female students to reside and attend there, and for that school to become co-educational.

[16] As required by the s 154 of the 1989 Act, the Minister gave the Trustees 28 days to respond to the preliminary decision she had conveyed. On 21 September 2012, the Trustees provided a response, setting out arguments against closure of Salisbury School, and subsequently the Minister met with representatives of the Trustees on 16 October 2012.

[17] On 29 October 2012, the Minister confirmed her decision to close Salisbury School. On the basis of all the materials provided to her, the Minister has since deposed that not only is she satisfied that the new alternative arrangements represent sufficient provision for those with relevant special education needs, but that the alternatives will make better provision for them than the existing arrangements.

Grounds for challenge

[18] Establishment and disestablishment of special schools is governed by s 98 of the 1964 Act. It provides:

> **98 Special schools and classes**
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> (1) Having regard to the provision of special education in any locality or localities, the Minister may—
>
> (a) Establish any special school:
>
> (b) Establish, or authorise the establishment of, any special class, clinic, or service, either as a separate unit or in connection with any State primary school, secondary school, technical institute, community college or integrated school, or in connection with any public institution approved for the purpose by him:
>
> (c) Make provision for special educational facilities to be provided by any correspondence school established under section 105 of this Act:
>
> Provided that any special school established under paragraph (a) of this subsection may be placed under the control of the Education Board of the district and shall, where so placed, be deemed to be a State primary school, save that it may, on the recommendation of the Education Board and with the approval of the Minister, be placed under the control of any person or persons appointed by the Education Board for the purpose instead of a School Committee.
>
> (2) The Minister may likewise disestablish any special school, class, clinic, or service established under subsection (1) of this section, if he is dissatisfied with the manner in which the school, class, clinic, or service is being conducted, or if he considers that sufficient provision is made by another similarly established special school, class, clinic, or service, or by any other school or class in or reasonably near to the same locality:
>
> Provided that in the last-mentioned case he shall, if the controlling authority of the school, class, clinic, or service so requires, give 3 months' notice of his intention to disestablish the same.

[19] The Trustees have alleged that the Minister's decision to close Salisbury School was ultra vires s 98(2) of the 1964 Act, and was therefore unlawful. They alleged that the Minister failed to satisfy the requirements of s 98(2) of the 1964 Act, as her assessment could not enable her to be satisfied of the sufficiency of alternative provision of special needs education for those enrolled, or likely to qualify for enrolment, at Salisbury School.

[20] In particular, the Trustees argued that an assessment of the sufficiency of alternative provisions required a case-by-case consideration of the alternatives for those girls who would be enrolled at Salisbury School in 2013 if it was not closed. The Trustees also argued that the Minister could not treat Halswell School as a lawful alternative for any significant number of the girls who would otherwise be catered for at Salisbury School because Halswell is a single sex boys' school and provisions in the 1989 Act constrain the Minister's ability to transform it into a co-educational school, or to alter its character so as to compromise its character as a single sex school.

[21] The third head of criticism of the decision under s 98 was that the Minister failed to have regard to, or had wrongly dismissed, the heightened risk of abuse of girls who would otherwise continue at Salisbury School, if they were transferred into a co-educational environment at Halswell.

[22] The Minister denies that any of these criticisms can be made out, and it was argued on her behalf that the process of consideration and criteria for the decision were entirely lawful and in compliance with the requirements of s 98 of the 1964 Act.

[23] It is common ground that the Ministry had not raised any dissatisfaction with the manner in which Salisbury School was being conducted, so the first ground provided in s 98(2) for a decision to disestablish a special school is irrelevant in this case.

[24] The Trustees for their part accepted that it was valid for the Minister to pursue initiatives intended to ensure that the Ministry achieves the best possible outcomes with the budgetary allocation it has to spend.[1] The essence of the Trustees' claim was that the basis on which the Minister had made her decision under s 98 was not lawful.

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[1] As Ms Chen put it: "you can't criticise the Minister for wanting to get the maximum bang for her bucks".

First ground of challenge: inadequate analysis of "sufficient provision" test

[25] The first criticism for the Trustees was that the Minister could not make a lawful decision on the basis that there were sufficient alternative provisions for educating the girls who would otherwise return to Salisbury School, without identifying what their particular needs were, and how they would be addressed in the absence of the residential support and educational environment provided by Salisbury School.

[26] Ms Chen relied on the approach of the Court of Appeal in an earlier decision that analysed the process for deciding on the disestablishment of special education facilities, namely *Attorney-General v Daniels*.[2] That case involved a more wide-ranging challenge to the then government's initiatives to effect change in the way in which special education needs were delivered. A ministerial review of special education services (Special Education 2000) had replaced the then structure of special classes, units and services for children with special education needs with a variety of programmes and funding systems that devolved greater responsibility to individual schools. The changes had nationwide effect. A group of parents of children with special education needs had sought judicial review of the implementation of such changes, including on the ground that the Minister had not complied with the process required by s 98(2) of the 1964 Act in his decision to disestablish special facilities.

[27] In the High Court, that challenge was upheld by Baragwanath J on the basis that the analysis on which the Minister relied had not attempted to match the disestablished facilities against a list of substitutes "in or reasonably near to the same locality". The Minister's reliance on assurances that autonomous elected boards might choose to set up alternative facilities was an insufficient basis on which to be satisfied in terms of s 98(2) that there *is* sufficient provision to substitute for those disestablished facilities. Whether the alternative provisions were in existence at the time of the Minister's decision was treated as relevant to the analysis.

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2 *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA).

[28] The Court of Appeal did not uphold all of the High Court's criticisms of the Minister's approach to his decision under s 98. However, it did uphold the approach to the requirements under s 98(2) of the 1964 Act for an examination, locality-by-locality, to determine that sufficient provision had been made in each locality that would be affected by the disestablishment of services and facilities.[3] The Court of Appeal was also concerned that the "matching examination" required by s 98(2) was in that case being left for others and for future action. The Court of Appeal criticised a process under which the Ministry would assess the impact of disestablishment in a short period after the decision was made, when those were steps that the Court considered ought to have been carried out before any disestablishment decision was made.

[29] The appellate analysis led to the following observations:[4]

> Section 98(2) does impose a high standard on the Minister. It was of course written in a time when education administration was more centralised. This provision was not amended when the reforms involved in Tomorrow's Schools were the subject of legislation and the government has recognised that the special education legislation requires review. It was probably never contemplated that it would be used to implement one aspect of a country-wide comprehensive reform such as that carried out over recent years. It is, however, the source of the power invoked by the Minister to disestablish the special classes, units, and services across the country and we conclude that he has not undertaken the locality by locality task which the legislation required of him.

[30] I note that the review of legislation for special education, anticipated in 2003, has not occurred nine years later.

[31] The Trustees accept that the services provided by Salisbury School are effectively on a national basis when it is the only residential school of its type in New Zealand for girls with complex behavioural, social and educational needs and intellectual impairment, so that the "locality-by-locality" analysis that should have been undertaken in *Daniels* is not appropriate here. However, Ms Chen argued that the sufficiency of alternative provision could not be assessed when the Minister did not know the nature and extent of the needs of those attending Salisbury School. She therefore argued that in a parallel way, as a matching of the sufficiency of

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3 At [109].
4 At [112].

alternative provisions in each locality was required in *Daniels*, then so, in the present case, a matching of the sufficiency of alternative provisions for each of the girls currently at Salisbury School had to be undertaken before a lawful decision could be made under s 98(2) of the 1964 Act.

[32] Ms Chen also argued that the Minister's decision-making was temporally constrained because of the use of the present tense in the phrase requiring the Minister to form the view that "…sufficient provision is made by another similarly established special school … or service, …". Ms Chen argued that the analysis in *Daniels* required the alternative to be one that presently existed when the Minister's decision was made. It followed that the Minister could not be satisfied if she or he relied on a prospective scoping of alternative services that were not in existence and therefore could not be tested as to their current capacities.

[33] Here, the Ministry's analysis projected the expansion of the IWS with the recruitment (on one analysis) of 14 additional staff including psychologists and special needs education experts,[5] to address the individual needs of all of the learners who might otherwise be candidates for entry to special needs residential schools, and to provide on-going support for their learning programmes in a non-residential setting.

[34] It was argued for the Trustees that Ministry projections of what they hoped might be achievable were not a sufficient basis for a decision under s 98(2) because the Minister could not be satisfied that such provisions existed so as to constitute provision that "*is*" made.

[35] In resisting the application of the Court of Appeal approach in *Daniels* in this way, Ms Jagose disputed that the requirement for an assessment on a locality-by-locality basis in that case could be equated with a need in the present case to assess the sufficiency of the alternative provisions at an individual student level. She argued that where the school being considered for disestablishment did not serve a particular locality, but was rather a national facility, then the consequences of its disestablishment were indeed to be considered at a national

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5 Affidavit of P H Parata sworn 14 November 2012, exhibit 12 at [31].

level, and it was pointless to attempt to assess the impact of it, either for any particular locality, or in respect of the needs of any particular individual learners.

[36] Further, Ms Jagose disputed that the temporal constraint suggested in s 98(2) could possibly require the Minister to confine her evaluation to alternatives that were already in existence. It would be highly impractical to require all of the educational specialists that the Ministry anticipates recruiting to operate an expanded IWS, to already be recruited so that their numbers, location and capabilities could be assessed in detail by the Minister when addressing disestablishment under s 98(2).

[37] In addition to these specific rejoinders to the arguments for the Trustees, Ms Jagose also argued that the relevant decision by the Minister reflects a relatively high level policy consideration distanced from operational matters and that the status of this decision rendered it inappropriate to be the subject of supervisory consideration on judicial review. The more distanced from operational considerations the decision was, arguably the more difficult it is for the Court to consider whether any criteria required by the statute to be taken into account have indeed been considered.

[38] On this last point, the Court of Appeal has recognised that the Court should be more cautious in exercising its judicial review functions where a challenged decision reflects wider public policy issues.[6] However, I do not accept that this particular decision can be characterised in that way. Certainly, the decision to disestablish Salisbury School is a component of a wider review of the preferable means of providing services for those with identified types of special educational needs. The Minister is pursuing a policy of changing the manner in which those services are provided by significantly reducing their provision in discrete residential settings. Instead, education will be provided for as many of those with special needs as possible in the mainstream education service, but with a much enhanced and individualised focus on what each student's needs are, with the intention of meeting those needs as much as possible in the communities in which the students live.

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[6] Examples in various contexts include *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546, *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160 at [127] and *Conley v Hamilton City Council* [2007] NZCA 543, [2008] 1 NZLR 789 at [75].

[39] The decision to disestablish Salisbury School is a reflection of that policy and the Minister might argue that the achievement of the policy outcome would be frustrated if the proposed disestablishment does not occur. However, recognition of a policy initiative that calls for disestablishment of a special school does not meet the requirements of s 98(2) of the 1964 Act. The particular decision here is made under that section and has to comply with its requirements.[7] The requirements of the section reflect an operational analysis, irrespective of the policy driver that triggers the prospect of disestablishment. The Court should therefore not be deflected from analysing whether the Minister complied with the pre-requisites for exercise of the power in s 98(2) of the 1964 Act, by any characterisation of the rationale as being a reflection of high level policy.

[40] As to whether s 98(2) requires the Minister to undertake an individual assessment of the impact on each student that would be directly affected, I do not consider the present context is sufficiently similar to that in *Daniels* to justify applying the analogy between the locality-by-locality analysis required in that case, and a student-by-student analysis in the present one. If, for example, the Minister was required to be satisfied that no students were materially worse off under the alternative provisions proposed, then the constraint on disestablishment could have been expressed in different terms in the legislation to make that clear. The relative level of detail or abstraction in a Minister's consideration under s 98(2) of the 1964 Act will fluctuate depending on context. In the present situation, I consider it sufficient for the Minister to have regard to the range of needs of the categories of girl that have previously been accepted at Salisbury School, to enable an evaluation of that range of needs with the sufficiency of the alternative provisions in servicing those types of needs.

[41] I also consider it is an unduly literal approach to the wording of s 98(2) to require the Ministry to have the alternative provisions all in place before the Minister could evaluate their sufficiency for the purposes of a decision under s 98(2). When contemplating disestablishment in a context such as the present, that is unrealistic as a matter of sequence, and it will commonly be a practical aspect of change in

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7 *Attorney-General v Daniels* at [112], as quoted at [29] above.

provision of special educational needs that a decision on disestablishment sensibly precedes making the alternative services or facilities operationally available.

[42] However, if a decision is based on projections of the intended extent and nature of alternative provisions, rather than on the measurable performance or capacity of existing services that are able to be tested in light of actual experience, a measure of reasonableness in projecting what can be achieved would necessarily have to exist. If, for example, an alternative service depended on the Ministry recruiting 100 clinical psychologists, and there was no reasonable basis for a belief that the Ministry could recruit that number of psychologists, then the Minister could not lawfully be satisfied of the sufficiency of the services they would provide.

[43] The extent to which the present decision relied on projections is illustrated by the comment in a 24 July 2012 report to the Minister on options for the future of residential special schools, which observed:[8]

> There is a risk that the intensive wraparound service which has been shown to work very well with learners who have behavioural problems, might not work so well with learners who have intellectual impairment. A number of responses to our consultation earlier in the year raised this possibility. To address this concern we have developed a specific practice model to meet the needs of these learners.

[44] Overall, on this first head of challenge, I am not persuaded that the decision was unlawful by virtue of the absence of any consideration of the adequacy of alternative services for particular girls. Nor is the decision unlawful because the Minister's consideration depends on the projection of how alternative services will perform, when those services were not fully in place at the time the decision was made. However, where the Minister elects to make a disestablishment decision that depends on projections as to the sufficiency of alternatives, then that will import a requirement for reasonableness that may give rise to a challenge on grounds of administrative law unreasonableness that has not been raised here. That requirement for reasonableness could also impact on other grounds for challenging the lawfulness of the decision.

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8 Affidavit of P H Parata sworn 14 November 2012, exhibit 8 at [34].

Second ground of challenge: wrongful reliance on the capacity of Halswell School to take girls

[45] The Minister's decision was made on the premise that a substantial portion of the girls who would otherwise continue at Salisbury School will, with the support of the expanded IWS, be sufficiently provided for in mainstream schools. However, it was recognised throughout the decision-making process that there would be an on-going need for residential capacity.[9] The alternative for those who could not be provided for in mainstream schools would be to go to the Halswell Residential Special School in Christchurch. No precise projection of the number of girls who would attend Halswell in 2013 was calculated on behalf of the Ministry, as a component of the information available to the Minister when making her decision.

[46] The Trustees argued that it was unlawful for the Minister to make her decision on disestablishment of Salisbury School in reliance on the availability of alternative residential special needs places at Halswell for any significant number of girls.

[47] This argument depended on the Minister's obligations to maintain the status of a single sex school, and statutory constraints on the ability to change that. These provisions are in the 1989 Act, s 145 of which defines "single sex school" as meaning:

> … a school maintained wholly or principally for students of one sex; and includes a school declared by notice under s 146A to be a boys' school or a girls' school.

[48] Section 146A provides as follows:

> **146A Single sex schools**
>
> (1) Subject to section 157 of this Act, the Minister may, by notice in the Gazette, declare any … school to be a boys' school, a girls' school, or a co-educational school.
>
> (2) The declaration shall come into effect on the day 5 months after the 1st day of August after the notice is published.

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[9] For example, affidavit of P H Parata sworn 14 November 2012, exhibit 8 at [4]; exhibit 13 at [7].

> (3) Subject to section 157(2), the Minister may, by notice in the Gazette, limit, in relation to a specified single sex school,—
>
> (a) in the case of a boys' school, the number of girls who may enrol at it, or the proportion of the total roll of the school that may be girls:
>
> (b) in the case of a girls' school, the number of boys who may enrol at it, or the proportion of the total roll of the school that may be boys.
>
> (4) In setting limits on a school under subsection (3), the Minister must have regard to the necessity of safeguarding the single-sex nature of the school.

[49] Ms Chen argued that current information suggests instead of an "intended notional roll" of 60, there have been only 22 boys at Halswell in 2012, and information gathered by Ms McDonnell, Chair of the Trustees, suggests that Halswell will have between 12 and 15 boys returning in 2013.

[50] Compared to that number, at the time the Minister made her decision to disestablish Salisbury School, no assessments had been undertaken of the 22 existing pupils at Salisbury School who would have been expected to return there in 2013, nor had a decision been made on any new students who might have been accepted for Salisbury School in 2013, but for the presently proposed changes.

[51] In these circumstances, Ms Chen argued that the decision relying in part on the alternative availability of Halswell School to take girls in 2013 was made in a context where Halswell could be enrolling up to equal numbers, more or less, of boys and girls. As a single sex school that has to be maintained in terms of the definition in s 145 of the 1989 Act as "wholly or principally" for boys, it was argued for the Trustees that girls could only lawfully be enrolled there if their number or proportion was authorised by a notice in the Gazette by the Minister issued under s 146A(3). Further, given the constraint on the Minister's power to issue such a Gazette notice in s 146A(4) which requires the Minister to have regard to the necessity of safeguarding the single sex nature of the school, then it was unlawful for the Minister to rely on up to half the 2013 roll at Halswell comprising girls when she could not lawfully set a limit, either in numbers or proportionate terms, reflecting that split.

[52] The Trustees also raised a concern that the Minister wrongfully failed to have regard to the practical situation in which physical works to alter the facilities at Halswell School to accommodate girls may not be completed in time for the start of the 2013 academic year. Ms Chen argued that this prospect is now implicit in what she described as the Minister's concession at the end of her affidavit in the following terms:[10]

> 2013 will be a transition year for all of these arrangements and we will get them in place as soon as we possibly can. However, if for whatever reason it no longer is possible to close the School effective from 27 January 2013, I am open to considering a different effective date of closure to ensure transition can be effected with the learners' best interests at heart.

[53] In addressing the logistics of implementing the decision, Mr Coffey has deposed:[11]

> If separate villas are not available in time for girls to commence residence in 2013 [ie at Halswell], the residential facilities at McKenzie Residential School, which is being closed, will be used to accommodate Halswell boys safely, with the Halswell bus transporting boys to and from school each day.

[54] For the Minister, Ms Jagose rejected the criticisms that the Minister should not have assumed Halswell could lawfully take any significant number of girls in 2013. The first aspect of her rejoinder was that the availability of residential places at Halswell for girls in 2013 was irrelevant because the essence of the Minister's decision was that the expanded facilities that would be available under IWS were the critical component of the Minister's consideration as to whether there would be "sufficient provision" for the purposes of s 98(2) of the 1964 Act. The sufficiency of the alternatives was made out without relying on residential places at Halswell.

[55] Alternatively, to the extent that the Minister's decision is characterised as depending on the expectation that a number of girls may be enrolled at Halswell in 2013, then, so Ms Jagose argued, it was lawful for the Minister to authorise up to 22 girls to attend there. The issue would only arise on a transitional basis for 2013 because the Board of Halswell has agreed to the Minister's proposal that it be declared a co-educational school and the time periods required for that process mean

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[10] Affidavit of P H Parata sworn 14 November 2012 at [78].
[11] Affidavit of B R Coffey sworn 14 November 2012 at [40].

that any declaration made in the near future would come into effect from 1 January 2014.[12]

[56] Ms Jagose argued that, in the meantime, the Minister can lawfully issue a Gazette notice that would authorise enrolment at Halswell of either a specific number of girls, or a proportion of the total roll for Halswell in 2013 that could be girls. She argued that near to, or even up to, one half as the proportion of girls to boys could lawfully be gazetted by the Minister in light of the single sex nature of Halswell. This would take into account the context of a special needs school where the single sex nature of the school could still be safeguarded notwithstanding the presence in the closely supervised environment of a significant proportion of girls.

[57] Ms Jagose argued that references in s 146A(3) to the "total roll of the school" are to be equated not with the actual number of students there on the first day of the academic year, or thereafter, but by reference to the notional roll recognised by the Ministry for the purposes of calculating financial support and for other reasons. In Halswell's case, its notional roll is 60. So even if all 22 of the girls from Salisbury School who the Trustees identify as potentially needing residential facilities in 2013 were to go to Halswell, this would be a proportion less than one half and would represent a proportion that the Minister could lawfully gazette as being able to attend Halswell without compromising the single sex nature of the school that needs to be safeguarded.

[58] The documents reflecting the decision-making process do not include any consideration of how many girls, relative to numbers of boys, could be enrolled at Halswell before compromising its single sex character. Rather, the analyses appear to have proceeded on the assumption that it would be lawful for the Minister to approve enrolment of female learners so long as they were in the minority until the school became co-educational in 2014.[13] These assumptions appear to be made on the basis that the single sex character of Halswell would not be compromised if up to one half of the students were girls. There is no suggestion that steps would be taken

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12 See Education Act 1989, s 146A(2).

13 See, for example, the Ministry report on feedback of consultation dated 18 October 2012: affidavit of P H Parata sworn 14 November 2012, exhibit 16 at 13.

to preserve its single sex character, or that the school would be operated any differently in 2013 than it would be in 2014 when it would be co-educational.

[59] As to Ms Jagose's initial argument that reliance on the availability of residential facilities for as many girls as need it at Halswell was not a material component of the Minister's decision on the sufficiency of alternative provisions, that proposition is not sustainable in light of the evidence. As the issues were considered and refined towards the final decision, the documents record reliance on the availability of places at Halswell as a residential option. For instance, the Ministry's report on feedback from the consultation period provided, as one of the rejoinders to criticisms that there would not be sufficient provision under the Act if Salisbury School closed, the following:[14]

> - Under the proposal, provision for girls needing a residential option will still be available at Halswell.

[60] There are numerous consistent references to this component being a material part of the analysis of the sufficiency of alternatives.

[61] As to the scope of the Minister's power to direct girls to a single sex boys' school, I am not persuaded that the approach adopted conformed to the statutory requirements. Although special needs education is delivered through specialised facilities with closer individual supervision of pupils, the single sex character of any school is likely to be in jeopardy when any of the features that are distinctive of its single sex character need to be compromised by the presence of a significant number of students of the opposite sex for any significant period. That character is likely to be jeopardised even where girls are in the minority, if they constitute a significant proportion of pupils at any given time. The school's previous character is certainly lost once the Minister provides for anything approaching equal numbers of children of both sexes. The Minister's discretion under s 146A(3) therefore cannot be used to anticipate what would, in reality, be a transformation into a co-educational school to cover a transitional period before the school's status is officially changed.

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[14] 18 October 2012 report, exhibit 16 to first affidavit of P H Parata at 12.

[62] I have real doubts that the Minister can lawfully issue a Gazette notice authorising the enrolment at a boys' school of a proportion of the total roll of, say, 25 to 40 per cent girls, if the Minister was on notice that the number treated as the "total roll" by reference to a school's notional roll was unlikely in the foreseeable future to be achieved, and that the actual numbers enrolled were likely to be materially lower. To approach the assessment on that basis would be to frustrate the aim of s 146A(4), because the Minister could not realistically be safeguarding the single sex nature of the school if the impact of the projected number of girls was assessed relative to a notional number of boys which, on the actual state of the facts at the time, was misleading and with no assurance that anything like the proportions reflected by taking into account the "total" or "notional" roll would be achieved.

[63] The Ministry's approach to continued reliance on notional rolls for the purposes of calculating funding is instructive. As part of the work being undertaken in progressing changes in the manner of provision of special schooling, the Ministry abandoned its former reliance on calculating funding needs for special schools on notional rolls and undertook projections for the consequences of the changes being mooted on then estimates of actual rolls.[15]

[64] Just as it was more meaningful to provide for funding special schools on the Ministry's best projection of actual numbers of learners, so too ought the Minister to have approached any consideration of the respective numbers of girls and boys likely to be at Halswell on the best projections then available. As the factual situation was evolving, it ought to have been apparent that it was unrealistic for the Minister to discharge the obligation of maintaining the single sex character of Halswell by ignoring those projections and instead adopting an artificial stance that reflected notional rolls.

[65] It may be that the Minister's analysis did not traverse this reasoning, and rather it was a conceptual analysis which, for the purposes of the judicial review, was advanced as an approach that would have justified the outcome. In those circumstances, the Ministry has to fall back on the simpler proposition that the

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[15] For example, report of 24 July 2012 on the future of residential special schools, affidavit of P H Parata sworn 14 November 2012, exhibit 8 at [31]-[32].

Minister could lawfully send girls to Halswell provided that they remained in a minority. That approach is not permitted in light of the constraints in s 146A(4) of the 1989 Act.

[66] Accordingly, to the extent that the Minister's decision that sufficient provision is made depended on any substantial number of girls being enrolled at Halswell, that component of the decision involves a misapprehension as to the scope of her own powers to take the steps necessary for their enrolment to occur lawfully.

[67] I do not consider that any practical difficulties in having facilities at Halswell ready for girls at the beginning of the 2013 academic year raise the same sort of issue as to the lawfulness of the Minister's decision. I note that there is a contingency for residential facilities for boys to be provided at another site. In essence, the acknowledgement of uncertainties over the adaptation of facilities is a matter going to the reasonableness of the Minister's decision, and not its lawfulness. Here, there is no challenge on this ground to the decision as being unreasonable in the administrative law sense.

Third ground of challenge: failure to acknowledge increased risk to girls at Halswell

[68] The particulars of the errors of law alleged in relation to the Minister's decision include one that the Minister failed to take into account the vulnerability of Salisbury School's students if they were to be placed in a co-educational setting, and in particular at Halswell. This concern had been raised by the Trustees during the consultation about a proposed closure. It was also raised in response to the Minister's preliminary decision, and at the meeting the Trustees had with the Minister in Wellington on 16 October 2012.

[69] The Minister described her consideration of this issue in the following terms:[16]

> I do not accept the challenge made by the Salisbury Board that I failed to take account of the vulnerability of the School's learners. I considered the

[16] Affidavit of P H Parata sworn 14 November 2012 at [70].

> Salisbury submission about the safety of young girls with intellectual impairment being put at risk in a co-educational school, and I took that seriously. I specifically asked the Ministry about the issues raised by Salisbury as to the risks and benefits of co-educational special education provision and single-sex provision. The Ministry has advised me that it has looked for, but been unable to find, any research or evidence that has identified undue safety risks for girls with intellectual impairment in a co-educational setting, as opposed to in a single sex setting. I do not accept that co-educational schools are necessarily unsafe for such learners.

[70] Those comments have been addressed by an affidavit in reply completed by Professor Freda Briggs, who is an emeritus professor in child development at the University of South Australia. Among Professor Briggs' research into the safety of children with disabilities is research conducted in 2004 involving a series of interviews with such students. The results of that research were published in a report for the New Zealand Police and the Ministry of Education, and in a conference paper delivered in 2006. Professor Briggs interviewed 61 girls at Salisbury School and 55 boys at Halswell, aged between 11 and 17. Her work published at the time did not identify the interviewees as students at those schools. However, this and earlier published work made very clear that Professor Briggs considered intellectually impaired children substantially more vulnerable than others to sexual and physical abuse.[17]

[71] The letter written by solicitors for the Trustees to the Minister in response to the preliminary decision to disestablish Salisbury School, dated 21 September 2012, cited Professor Briggs' 2004 work in support of its arguments about the extent of vulnerability of girls at Salisbury School to sexual abuse.

[72] In addition to confirming the state of published research that would have been available to the Ministry at the time it made its decision, Professor Briggs went on in her affidavit to firmly reject the Minister's opinion that there was no evidence that girls like those at Salisbury School would be any more vulnerable to abuse in a co-educational environment.

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[17] See, for example, her article in the Journal of Child Centred Practice, Dublin 1997 (at 125), exhibit FB4 to her affidavit sworn 20 November 2012, and the article resulting from the 2005 research "Safety Issues in the Lives of Children with Learning Disabilities", (2006) 29 Social Policy Journal of New Zealand 43, exhibit FB2 to that affidavit.

[73] The effect of Ms McDonnell's evidence is that this was among the matters traversed in their meeting with the Minister on 16 October 2012. More specifically, another of the Trustees, Peter Campbell, has deposed that he traversed his concerns about the risks to safety of girls from Salisbury School in a co-educational environment at the 16 October 2012 meeting. Mr Campbell deposed to having spoken in light of his experience as chief executive of a residential facility for young people and adults with intellectual disabilities. He referred to a brief period in which that facility operated a mixed sex residential facility for teenagers with intellectual disabilities and found the incidence of abuse increased markedly. Having raised these matters with the Ministry, Mr Campbell would have been available for further dialogue with the Ministry but deposed that despite the information he gave the Minister, no one from the Ministry made any enquiries of him about the experience at the facility he operates.

[74] I raised at the outset of the hearing whether the Minister would seek a right of reply to the forthright views expressed in Professor Briggs' affidavit. Ms Jagose sought to reserve her position on the point, but having heard argument from her at the conclusion of the hearing, I did not consider that an opportunity should be given for further evidence. However, after the conclusion of the hearing, Ms Jagose filed a memorandum seeking leave to file additional evidence in rebuttal of the opinions expressed by Professor Briggs. In fairness to her, that initiative may have been influenced by the manner in which I tested her during the hearing on the opinions Professor Briggs had expressed in her affidavit contradicting the Minister's view that there was no evidence of greater risk to girls such as those at Salisbury School, in a co-educational residential environment.

[75] Ms Chen opposed leave being granted, and I convened a telephone conference with counsel on the point on 30 November 2012 to determine the respondents' application. Ms Jagose was concerned that the submissions on behalf of the Trustees had overstated the evidence they claimed would have been available to the Ministry at the time the decision was made. In particular, she argued that it was wrong for Ms Chen to have argued that the unidentified subjects of Professor Briggs' interviews could clearly be inferred to be students at Salisbury School and Halswell. Ms Jagose was also concerned that no reliance should be placed on any

fresh or more focused opinions Professor Briggs has expressed in her affidavit, when those were not reflected in published works that would have been available to the Minister at the time she made her decision.

[76] I declined the respondents' application for leave to adduce further evidence. I accept that the "fresh" opinions expressed only in the affidavit could not reasonably have been available to the Minister at the time her decision was made and are therefore irrelevant in assessing the lawfulness of the decision. The extent to which relevant concerns could have been available to the Ministry at the time the decision was being considered (ie from materials published before that time) is a matter for analysis of the documents already in evidence, and does not warrant a grant of leave to add to that evidence after the hearing has concluded.

[77] It is of concern that the issue of the relative safety of girls in a co-educational special education facility raised by the Minister with her officials did not produce any reference to the work previously undertaken by Professor Briggs. Instead, Mr Coffey confirmed in his affidavit that the Ministry was unable to find any research or evidence that identified undue safety risks for girls with intellectual impairment in a co-educational setting.[18] Mr Coffey described one aspect of the literature review he directed being in relation to any evidence on the effects of mixed residential arrangements for adolescents with intellectual disabilities.

[78] Ms Jagose argued that the opinions expressed by Professor Briggs are not precisely on the point that had been raised by the Trustees with the Minister, and that questions on the subtly different question of whether adolescent girls with intellectual impairment would be *relatively more* at risk in a co-educational than single sex residential environment should not necessarily have alerted those considering the point to Professor Briggs' 2004 work for the Ministry. Further, that the concerns conveyed by Mr Campbell could also be disregarded because his experience related to difficulties with co-educational residential facilities, when the present proposal was for separate residential, and only shared learning, facilities. Those are, with respect, inappropriately technical distinctions to apply in assessing so important an issue.

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[18] Affidavit of B R Coffey at [34].

[79] There is no issue that the earlier reports of Professor Briggs' research, and the opinions of Mr Campbell as to his experience in a residential facility, were available to the Ministry. They were not considered because of the narrowness of the questions posed in response to the concerns raised over the safety of girls from Salisbury School.

[80] Ms Jagose accepted that the general proposition that children with intellectual impairment are at greater risk of physical and sexual abuse is not in dispute. Once that is recognised in the context of whether alternatives to Salisbury School constituted sufficient provision for the needs of the learners there, it was not a consideration that could lawfully be resolved on the narrow or technical grounds that the Ministry adopted.

[81] As a matter of common sense, the risk of sexual abuse for girls with impaired intellect is likely to increase, the more they are in the company of potential abusers. Intellectually impaired boys are potential abusers, as Mr Campbell's experience demonstrates. No great leap in logic is required to recognise the validity of concerns over having boys and girls together for the educational aspects of residential special needs education, even if completely effective separation of the residential aspects of schooling in a co-educational setting is achieved. Those changes introduce a risk that would not be present in the single sex environment at Salisbury School.

[82] The obligations imposed on the Minister under s 98(2) require a more robust approach to the substance of the concerns over girls' safety. Different risks are created, and in this context it is an abrogation of the responsibilities involved in making a decision under s 98(2) of the 1964 Act to treat the safety of students as a matter for which the Trustees would be responsible.[19]

[83] In administrative law terms, the protection of girls from physical and sexual abuse if placed in a co-educational special school setting at Halswell, was a mandatory relevant consideration in assessing the sufficiency of that solution as an alternative to providing for girls at Salisbury School. The Minister's decision failed

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[19] Ministry report on feedback on consultation dated 18 October 2012 at 11, exhibit 16 to affidavit of P H Parata sworn 14 November 2012.

to have regard to available warning signals raised by and on behalf of the Trustees about greater levels of risk of abuse in a co-educational setting. Alternatively, this component of the Minister's decision was influenced by the irrelevant proposition that there is an absence of research which confirms that girls would be exposed to a relatively greater level of risk in a co-educational setting, which caused an otherwise relevant concern to be dismissed.

[84] On either basis, the decision is flawed in a respect that renders it unlawful.

Impact of errors

[85] Ms Jagose argued that the Minister's decision to disestablish could be justified on the basis of the adequacy of expanded IWS as sufficient of itself to justify disestablishment of Salisbury School. If that proposition were correct, any errors made out in relation to the Minister's reliance on the availability of Halswell, should it be needed for residential placements for girls who would otherwise have gone to Salisbury School, would be irrelevant.

[86] Assessing the Minister's decision in the round, I am not satisfied that her reliance on the availability of Halswell can be ring-fenced in that way for the purposes of ignoring any errors in it. The analysis of what would be available from the expanded IWS involved to a substantial degree untested components and depended, for instance, on timely recruitment of appropriate personnel, and their being able to perform a new range of tasks adequately.[20] Given that reliance, I am not satisfied that the Minister could have justified a stand-alone reliance on the expanded IWS, without availability of places at Halswell representing at the very least a fallback position.

[87] Once the availability of places for any significant number of girls at Halswell in 2013 becomes a material component of the rationale for the decision, then errors

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[20] For example, the 24 July 2012 ministerial report on the options for future of residential schools recognised, among the risks involved, that the IWS might not work so well with learners who have intellectual impairment (in which context it was untested), exhibit 8 to affidavit of P H Parata sworn 14 November 2012 at [34].

of law in assessing its suitability as an alternative render the overall decision vulnerable to a declaration of illegality.

[88] Accordingly, the Trustees are entitled to a declaration that the Minister's decision made under s 98(2) of the Act to disestablish Salisbury School was unlawful in the following respects:

(a) in assuming a lawful power to authorise, by Gazette notice or otherwise, enrolment of girls at Halswell in numbers up to a half of the total number enrolled in 2013 whilst it remains a single sex boys' school;

(b) in disregarding the prospect of greater risk of sexual or physical abuse to girls who would otherwise reside in a single sex girls' special needs school, if they were enrolled at a co-educational residential special needs school.

[89] The Trustees also sought an order setting aside any Gazette notice published that purported to close Salisbury School. However, my attention was not drawn to any such Gazette notice in evidence. If it has occurred, and the Trustees consider that protection of their position requires additional relief, they may apply.

Costs

[90] I invite memoranda on costs, if necessary.

Dobson J

Solicitors:
Chen Palmer, Wellington for applicant
Crown Law, Wellington for respondents