

# **National Programme of Training for Boards of Management**

***Legal Issues***

**2013**

# Objectives

- Learn to recognise an issue before it becomes a problem
- Identify the main activities and functions of a Board of Management
- Identify areas in which issues are likely to arise.
- Take steps to reduce risk and avoid problems arising in the first place.

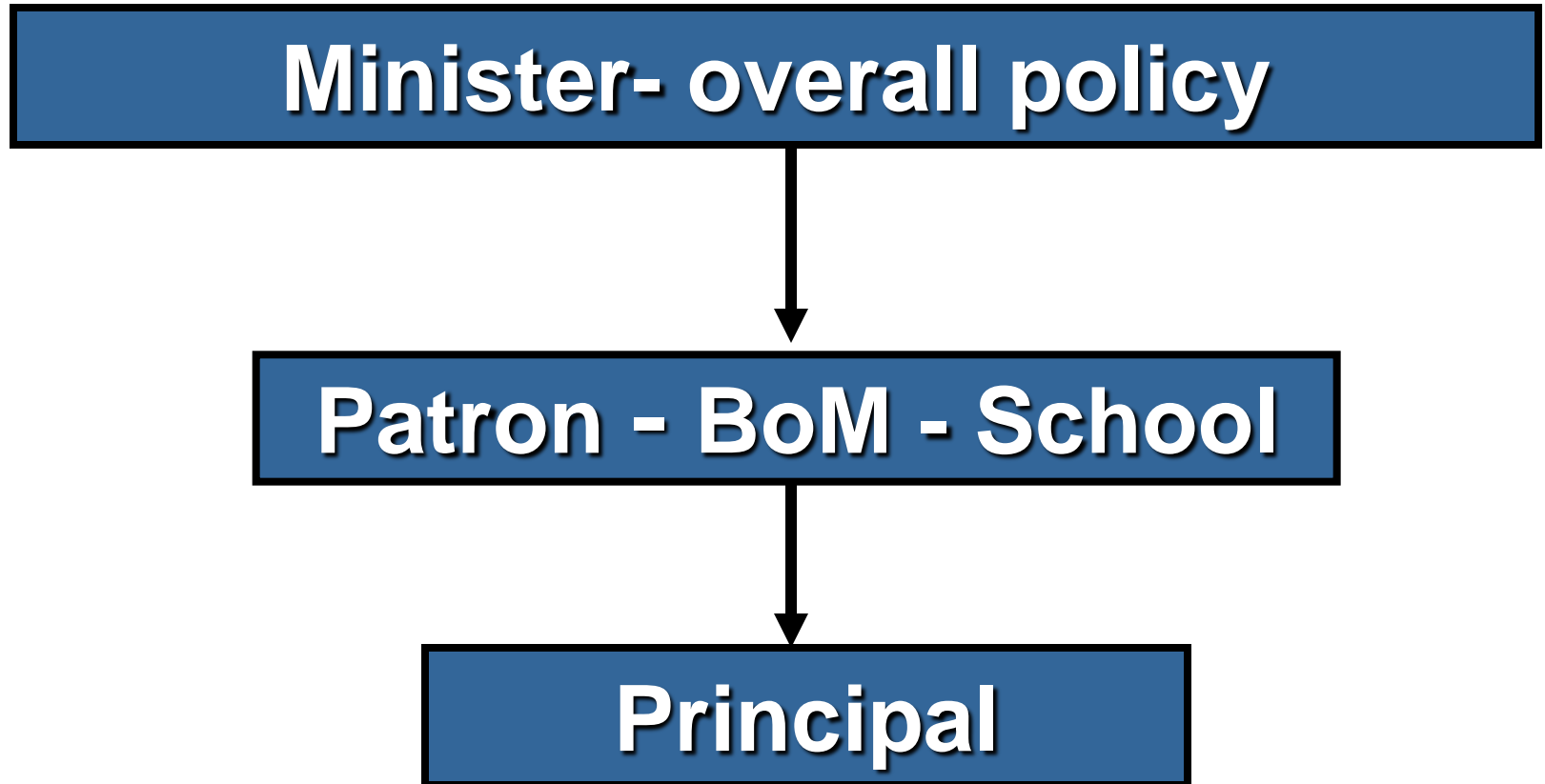
# Topics to be covered:

1. Overview of sources of relevant legal considerations
2. Duties and responsibilities of Board of Management
3. Record Keeping and Data Protection
4. Special Education Needs
5. School Policies & Section 29 Appeals

# Overview

- Overview of Education Structure in Ireland
- Source of Board's role, duties and obligations
- Dealing with issues and problems

# Overview of Structure of Education



# Sources of a Board's Duties

## ■ **Education related Legislation**

- Education Act 1998
- Education (Miscellaneous Provisions) Act (2007)
- Education for Persons with Special Educational Needs Act (2004)
- Education (Welfare) Act (2000)
- Education (Amendment) Act 2012
- Teaching Council Acts (2001, 2006) & amendments in Education (Amendment) Act 2012

## ■ **Employment Related**

- Protection of Employees (Fixed-Term Work) Act 2003
- Safety, Health & Welfare at Work Act (2005, 2007)

## ■ **Equality Related Legislation**

- Employment Equality Act 1998
- Equal Status Acts 2000 - 2008

# Sources of a Board's Duties contd.

- General Legislation
  - Defamation Act 2009
  - Occupier's Liability Act 1995
  - Data Protection Acts 1988 and 2003
- Case law of the Courts and Tribunals
- Department Circulars and Rules:
  - Rules for National Schools 1965 (in so far as they currently apply)
  - DES *Constitution of Boards & Rules of Procedure 2011*
  - DES Circulars (DES, Management Bodies' & INTO websites)



# When an issue arises...

- If situation warrants it, seek competent legal advice
- Check whether the school has a policy already in place
  - Are you confident that the policy conforms with legislation, guidelines etc?
  - Were the procedures followed?
- Gather detailed information
- Give parties an opportunity to present their case(s)
- Having considered the matter, make an informed decision
- Communicate decision
- Keep accurate records

# When something comes up

- Check circulars/Department of Education & Skills website
- Constitution of Boards and Rules of Procedure DES – 2011
- If appropriate consult the school's management body
- Patron/Diocesan Secretary
- Get professional advice e.g. on receipt of a solicitor's letter.

# Some websites...

- [www.cpsma.ie](http://www.cpsma.ie)
- [www.education.ie](http://www.education.ie)
- [www.nabmse.ie](http://www.nabmse.ie)
- [www.gaelSCOILEanna.ie](http://www.gaelSCOILEanna.ie)
- [www.foras.ie](http://www.foras.ie)
- [www.educatetogether.ie](http://www.educatetogether.ie)
- [www.into.ie](http://www.into.ie)
- [www.equality.ie](http://www.equality.ie)
- [www.npc.ie](http://www.npc.ie)
- [www.hsa.ie](http://www.hsa.ie)

# **BoM Duties**

# Duties & Responsibilities of BoM in Specific Areas

- Education
- School Plan
- School Management
- Employer of School Staff
- Occupier of the School Premises
- Equality Legislation
- Health and Safety
- Mandatory Reporting (Child Protection & Theft/Fraud)

# BoM Duties – Education

## Section 15 Education Act 1998

- Manage the school on behalf of the Patron
- Provide or cause to be provided an appropriate education for each student in the school
- Uphold the characteristic spirit of the school
- Consult with & keep the Patron informed
- Publish policies relating to admissions, expulsions, suspensions, and participation by students with disabilities.

# BoM Duties – Education contd.

## ■ Section 9 Education Act 1998

- Identifying and providing for the educational needs of all students including those with a disability
- Promoting moral, spiritual, social and personal development of students *in accordance with the characteristic spirit of the school*
- Promoting development of the Irish language
- Promoting equality of opportunity for male and female staff and students
- Ensuring access by students over 18 and parents to the pupil's educational progress records
- Setting up systems to monitor the efficiency of school operations including academic standards
- Ensuring education in the school is in accordance with the curriculum and ministerial policies.

# BoM Duties – School Plan

## School Plan - Education Act 1998 S. 21

- School Plan must be prepared, reviewed and updated by the Board
- It must state the school's objectives in relation to equality of access and participation in the school by those with disabilities or SEN and proposed measures for achieving these objectives.
- Plan must be circulated to staff, pupils, parents etc.
- The school plan shall be prepared in accordance with such directions, including directions relating to consultation with the parents, the patron, staff and students of the school, as may be given from time to time by the Minister in relation to school plans



## **School Plan: Contents**

**General School Details....**

**Vision and Aims.....**

**Organisational Policies....**

**Curriculum Plans.....**

**Procedures & Practices...**

**Development Section.....**

# BoM Duties – School Management

- Day to day management of staff and the school is delegated to the Principal under S. 23(2) Education Act 1998
- Board remains responsible for oversight of school's financial affairs and for keeping proper accounts
- Board must ensure appropriate insurance policies are maintained.

# **BoM Duties - Board as Employer**

- While teaching staff are paid directly by the DES, BoM is the employer of all staff
- BoM is legally liable for the actions of school employees – even if the staff are paid by the DES
- Board is the employer for the purposes of Equality and Health & Safety legislation.

# BoM Duties – Board as Employer

## Terms of Employment (Information) Act 1994

- Every employee must be given a Statement of his/her Terms of Employment within 2 months of beginning employment
- The Statement must be in writing but no form is prescribed – it can be a signed contract or a bare statement
- It must include details of the identity of the employer, the manner, amount and frequency of salary payment, details of the employee and his/her role, sick and annual leave details etc.
- Non-compliance can result in an award of up to 4 weeks' pay being made by a Rights Commissioner against an employer.

# BoM Duties – Board as Employer

## Protection of Employees (Fixed Term Work) Act 2003

- Fixed term workers are entitled to information at the time of renewal of their contract as to why they are not receiving a permanent contract
- Fixed term workers employed on a series of fixed term contracts amounting to over 48 months may be legally entitled to a permanent contract
- Fixed Term workers cannot be treated less favourably than comparable permanent staff and are also entitled to the same information about vacancies and promotions etc.

# BoM Duties – Board as Employer

## Duty of Board to manage Staff

- Issues of misconduct or underperformance by teachers or Principals are dealt with under the procedures set out in Circular 60/2009
- Issues of misconduct or underperformance by SNAs are dealt with under the procedures set out in Circular 72/2011

# BoM Duties – Occupier's Liability Act

- The Board is the legal occupier of the school premises
- The Board owes all entrants to the school premises (buildings and grounds) a duty of care
- The level of duty of care will vary depending on whether the entrants are there with /without permission & what their purpose for being there is
- Visitors, Recreational Users and Trespassers are all treated differently.

## BoM Duties – Occupier's Liability Act contd.

- The Board should be mindful of who uses the school grounds, for what purpose and what, if any, dangers exist on the grounds
- The Board must take steps to protect entrants from these dangers
- Section 5 of the Occupier's Liability Act allows occupiers to reduce, by means of a prominently displayed notice at the main entrance of the premises, the duty owed to visitors.



# BoM Duties – Equality Legislation

- Employment Equality Acts 1998 and 2004
  - Prohibits discrimination in the workplace, in recruitment, promotion and terms and conditions
- Equal Status Acts 2000 to 2011
  - Prohibits discrimination in relation to provision of services (including the provision of education by schools).

# BoM Duties – Equality Legislation

Grounds on which discrimination is outlawed

- Gender
- Marital / Civil status
- Family status
- Sexual orientation
- Religion
- Age
- Disability
- Race
- Membership of the traveller community.

# BoM Duties – Equality Legislation

- Exemptions for schools – enrolment
  - Single sex schools can refuse to admit pupils of the other gender
  - Religious schools can prioritise the enrolment of pupils of a particular religious denomination where the refusal is “essential to maintain the ethos of the school”
  - NB – if a school is relying on either exception, it must be clearly set out in the school’s admission policy
- Exemptions for schools – employment
  - Favours staff of a particular religious denomination to maintain the religious ethos of the school

# BoM Duties – Health and Safety

- Employer must ensure the safety, health and welfare at work of its employees
- Employer must provide adequate information, training, instruction and supervision for all employees
- The systems of work in the workplace must be safe
- Employer must prevent improper or unsafe employee conduct
- Safe plant, equipment and machinery

# BoM Duties – Health and Safety

- Employer must conduct a risk assessment and have a safety statement in place detailing risks identified, protective procedures/measures, emergency plans etc.
- Employees may elect Safety Representative to represent employees in dealing with H&S issues and problems
- Written safety statement
- Record all accidents and incidents
- Report to Health & Safety Authority any accident or incident which results in an employee being absent for 3 days from the workplace.

# BoM Duties – General Duty of Care

- In addition to statutory duties, a BoM has a general duty of care to all its staff, all pupils and all persons on school property or involved with the school
- Common areas in which this is of relevance are:
  - Playground and sports supervision
  - After hours use of the premises (in particular unauthorised use)
  - Liability for broken/obsolete school equipment
  - Failure to deal with issues of which the school was aware which later cause injury (e.g. on-going bullying problems, child protection issues etc.)

# BoM Duties – Mandatory Reporting

- *Criminal Justice Act 2011*

- Information about theft and fraud related offences must be reported to the Gardaí. It is now an offence to fail to do so
- The Act covers information which might assist the Gardaí in preventing a crime or prosecuting the person responsible
- It covers theft, crimes of obtaining goods or services by deception, certain computer hacking offences, fraud offences etc.

# BoM Duties – Mandatory Reporting

*Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012*

- Provisions of Act are in addition to the DES Child Protection Procedures
- Applies to all sexual and violent offences against children and vulnerable adults
- It is now an offence to fail to report information to the Gardaí which would be of “material assistance” in apprehending or prosecuting someone who committed such an offence
- Reporting to the Gardaí may be necessary in certain cases (in addition to reporting to the HSE under DES Child Protection Procedures)
- Very limited (and complex) exceptions.



# **Record Keeping, Data Protection & FoI**

# Issues...

- Data Protection Guidance Website
- Principles of Data Protection
- Record Keeping Obligations
- Access to Information and Data
- Disclosing Data to Third Parties
- Taking Photos of Children
- Freedom of Information Act

# **Records - Data Protection Guidelines for Schools**

Management Bodies are preparing extensive data protection guidelines for schools. The project is at an advanced stage. As soon as the guidelines have been approved by the Office of the Data Protection Commissioner, they will be made available on a special purpose website which can be accessed by schools.

# Records/Principles of Data Protection

Personal data must be:

1. Obtained and processed fairly
2. Kept only for one or more specified and lawful purpose
3. Used and disclosed only in ways that are compatible with the purpose for which the data was obtained
4. Appropriate security measures should be taken to keep the data safe and secure
5. Complete, accurate, up to date
6. Adequate, relevant and not excessive
7. Kept for no longer than is necessary
8. Provided to the person involved on request.

# What is Personal Data?

The Data Protection Acts apply to both

- Personal Data
  - which is any information relating to identifiable living persons
- Sensitive Personal Data which includes
  - Racial/ethnic origin
  - Political opinion
  - Religious or other beliefs
  - Physical/mental health
  - Sexual life
  - Information relating to criminal activity

# Access to Information

A number of other pieces of legislation govern the keeping of records and disclosure of information by schools.

- Section 4 Data Protection Act 1988
- Section 9(g) Education Act 1998
- Section 28 Education Welfare Act 2000
- Freedom of Information Act 1997

## Access to Records S. 9 (g) Education Act

*"A recognised school shall....use its available resources to...ensure that parents of a student, or in the case of a student who has reached the age of 18 years, the student, have access in the prescribed manner to records kept by that school relating to the progress of that student in his/her education"*

*'Definition of Parent in Education Act 1998 – " 'parent' includes a foster parent, a guardian appointed under the Guardianship of Children Acts, 1964 to 1997, or other person acting in loco parentis who has a child in his or her care subject to any statutory power or order of a court and, in the case of a child who has been adopted under the Adoption Acts, 1952 to 1998, or, where the child has been adopted outside the State, means the adopter or adopters or the surviving adopter;*

# Access to Records – S.4 Data Protection Act

- A Data Subject can request copies of all personal data held by a data controller in manual or automated format
- Information sought must be furnished to the Data Subject within 40 days
- All references to third parties must be redacted (blacked out or removed)
- A number of exemptions exist – e.g. legally privileged documents should not be furnished.



# **Disclosing Data (to other Schools)**

## **Section 20 Education (Welfare) Act 2000**

Principal shall notify principal of a receiving school of...

- any problems relating to attendance
- other matters relating to child's educational progress as s/he considers appropriate

## **Section 28 Education (Welfare) Act 2000**

- Data controller may supply data... to data controller of another prescribed body
- Used for relevant purpose only
- Relevant purpose means the purpose of recording a person's educational... history or progress... to ascertain how s/he may be assisted in developing educational potential.

# Records - Disclosing Data (to third parties)

- The Data Protection Acts forbid disclosure of all personal data without the express consent of the Data Subject apart from disclosure in some very narrow situations, including:
  - Where the disclosure is required by rule of law or Court order
  - Where the disclosure is urgently required to prevent injury to a person or serious damage to property
  - Where the disclosure is required for getting legal advice.

# Records- Taking Photos of Children

- If the school is taking/using pictures of pupils (e.g. for school annual, concert video, website etc.), written parental consent must be obtained in advance
- Photos taken by student or parents at school events for personal, family or recreational reasons do not come under the Data Protection Acts.

## Freedom of Information Act 1997

- Primary schools are not yet subject to the Freedom of Information Act but may be in the future
- Where the school writes to an agency which is subject to the Act (*e.g. HSE, DES*), the school's correspondence may well be released as part of an FOI request made to that agency.

# **Special Education Needs**

# Issues...

- Education of Persons with Special Educational Needs Act 2004
- Mainstreaming
- Assessing Needs – Individual Education Plans
- Admissions Policies
- Arranging for additional resources

# **Education for Persons with Special Educational Needs Act (2004)**

## **The BoM shall ensure....**

- That a child with SEN shall be educated in an inclusive environment with children who do not have such needs
- That parents of a student with special educational needs are informed of their child's needs being met
- That parents are consulted with regard to, and invited to participate in, the making of all decisions of a significant nature concerning their child's education.

# **Enrolment of children with SEN...**

## **Presumption of mainstreaming...**

Schools can treat students with disabilities differently (apart from the nominal cost exemption) only if the disability is making the effective provision of educational services to other students impossible or is having a seriously detrimental effect on the provision of education to the disabled pupils themselves

If the State provides grants or aids for assisting in providing special treatment or facilities, there may be an onus on the service provider (school) to avail of these grants.



# SEN – Assessing a Child's Needs

- Individual Education Plan – not compulsory (yet) under EPSEN but may be required to avail of resources to allow school discharge its obligations under equality legislation
- IEP sets out needs of child, teaching programmes and structures, targets, records progress etc.
- Circular 09/2009 set out the DES requirements for assessment by the SENO (Special Educational Needs Organiser) of the individual needs of a child in relation to medical need, physical/sensory impairments or dangerous behaviour – normally done by means of assessment and IEP.

# Arranging for Additional Resources

- Psychological/other reports assist school in establishing the education & training needs of the pupil and to profile the support services required
- BoM can request a pupil to be assessed immediately if no assessment is available
- BoM evaluates how school can meet pupil's needs as specified in the report
- If extra resources are required, BoM should, prior to enrolment, request the Dept. of Education to provide such resources i.e. resource teacher, special needs assistant, specialised equipment furniture, transport services etc.
- Enrol child and seek resources.

# Special Needs - Admission Policies

- If school caters for special needs, the school's enrolment policy should clarify any priorities i.e. that the school caters for children with hearing difficulties but not severe autism
- Enrolment of SEN pupils cannot be made conditional on the school obtaining the requisite DES or clinical resources.

# **School Policies**

# Issues ...

- Enrolment/Admissions Policy
- Code of Behaviour & Expulsions & Suspensions
- Section 29 Appeals Procedure

# **Policies – Mandatory School policies**

- Section 15(2)(d) Education Act 1998
  - Admission and Participation in the school
  - Expulsion and Suspension
  - Participation by pupils with Special Needs / Disability
- Section 23(1) Education (Welfare) Act 2000
  - Code of Behaviour

# **Admissions Policy – Guiding Principles**

## **Principles outlined in Education Act**

### **Inclusiveness**

- Particularly with reference to the enrolment of children with disability or other special educational needs

### **Equality**

- 9 grounds

### **Parental Choice**

- In relation to choice of school and characteristic spirit of the school

### **Respect**

- Diversity of values, beliefs, traditions, languages and ways of life

# Admissions Policy - Power to refuse Admission

- A school can only refuse enrolment/admission on the basis of what is stated in its enrolment policy - Section 19(1) of the Education (Welfare) Act 2000:

***19.—(1) The board of management of a recognised school shall not refuse to admit as a student in such school a child, in respect of whom an application to be so admitted has been made, except where such refusal is in accordance with the policy of the recognised school concerned published under section 15(2)(d) of the Act of 1998.***
- A school cannot refuse enrolment for any reason other than that set out in the school's enrolment policy (or in legislation)



# What must be in an Admissions Policy

- Details of the steps of the process – timeline, procedure, application dates, interview, forms etc.
- Details of enrolment criteria in the event of applications exceeding places available – ethos, catchment area, siblings already in the school etc.
- While it is not contrary to Equality Legislation to have single sex schools, such schools must have set out in in their admissions policy that they will only take boys or girls.
- Appeals can be brought under Section 29 (Education Act 1998)

# Code of Behaviour – Necessary Ingredients

## **Education (Welfare) Act 2000 - Section (21) (2)**

A code of behaviour shall specify—

- (a) the standards of behaviour that shall be observed by each student attending the school;
- (b) the measures that may be taken when a student fails or refuses to observe those standards;
- (c) the procedures to be followed before a student may be suspended or expelled from the school concerned;
- (d) the grounds for removing a suspension imposed in relation to a student; and
- (e) the procedures to be followed relating to notification of a child's absence from school.

# **Code of Behaviour – Notification Requirements**

## **Section 24 – Education (Welfare) Act**

Education Welfare Officer must be informed in writing by the principal if a pupil is going to be expelled.

## **Section 21**

Education Welfare Officer must be informed in writing by the principal if a pupil is suspended for 6 days or more.

## **Section 18**

School must be notified by parents if the child is absent for a day or part thereof in accordance with procedure set down in Code of Behaviour.

# Code of Behaviour and Enrolment

- Code of Behaviour must be furnished to parents on enrolment of their child.
- Legally, parents may be required by the Principal to accept in writing the Code of Behaviour before a child may be enrolled.
  - The position of a school which relies on the strict letter of this provision is not clear and schools are advised to have an on-going engagement with parents about disciplinary matters and the Code of Behaviour.

# Code of Behaviour – General Principles

- Enforcement of discipline in a school is a matter for the teachers, the principal teacher, chairperson of the BoM and the Board itself.
- Disciplinary matters will only be reviewed by the courts on the grounds of procedures i.e. lack of fairness
- Power to suspend must be formally delegated to the Principal by the BoM and this should be recorded in writing in the minutes of the relevant board meeting.

# **Section 29 Appeals**

## **S. 29 Appeals – Overview**

- Section 29 Education Act provides for appeals to Secretary General, DES against certain decisions made by a Board of Management.
- Decisions which can currently be appealed using the S. 29 procedure:
  - Expulsion
  - Suspension for a period which would bring the cumulative suspension to 20 days or more in any school year
  - Refusal to enrol

## S. 29 - Appeals Procedure

- When BoM communicates its decision to parents, it should notify them of their entitlement to appeal under Section 29
- Appeals to be made in writing on standard application form available on *www.education.ie* (Forms)
- Appeals should be lodged to Appeals Administration Unit, DES, within 42 days of receipt of BoM's decision
- Person appealing should also notify Board of Management
- Appeals Form will include details such a date of the decision, the decision being appealed, the school, child and parents' names and copies of all correspondence.



## S.29 – Steps in Procedure

- Engagement at local level between school and parents
- In some cases, Appeals Committee will appoint facilitator to assist in that engagement
- If local engagement (and, where it is used, facilitation) fails, a three person Appeals Committee will be appointed by the Minister to hear the Appeal and make a decision.

## S. 29 - Appeal Hearing

- A date, time and venue for the hearing will be arranged in consultation with all concerned.
- Informed of right to submit any additional documentation in support of their case
- BoM representation – may nominate two members or one member and the Principal
- Representation from NEWB, if involved
- Any party may be accompanied by up to two others by prior arrangement with the Committee.
- At the hearing both sides will have the opportunity to make submissions and to question each other through the Chair on points raised.

## **S. 29 Appeals - factors considered by the Appeals Committee**

- Established practices within the school (in light of legislation, guidelines etc.)
- Educational interests of individual student and of other students in school
- The effective operation and management of the school
- The policy of the Patron/BoM re ethos
- Such other matters as Committee considers relevant.

## **S. 29 Appeals - factors considered by the Appeals Committee contd.**

- Behaviour (nature, scale and extent)
- Reasonableness of school's efforts to assist the students
- Maintenance of school environment supportive of learning
- Ensuring continuity of instruction in classroom
- Safety, health and welfare of teachers and other staff
- Safety, health and welfare of students
- School admission policy, code of behaviour and other policies

## **S. 29 - Appeals Committee Decision**

- Appeals will be determined in the light of facts presented and taking into account a wide range of issues
- Appeal will generally be concluded within 30 days from date of completed application
- Provision for extending this period by 14 days
- Decision notified to Secretary General
- Secretary General notifies appellant, school and NEWB, if party to the appeal
- Secretary General may issue binding directions to BoM