NZTDT 2019/90

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of a charge of serious misconduct referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**TEACHER D** Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Kiri Turketo and Megan Cassidy
Hearing:	On the papers
Decision:	20 November 2019
Counsel:	N Tahana for the referrer J Marinovich for the respondent

Introduction

[1] The Complaints Assessment Committee (the CAC) referred a charge against the respondent (Teacher D) of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC's notice of charge, which is dated 7 August 2019, alleges that the respondent:

> Between January 2018 and October 2018, entered into an inappropriate relationship with A, a student at her school (Student A).

[2] The respondent agreed to this matter being heard on the papers. Teacher D accepted that her relationship with Student A was inappropriate, and, accordingly, that she committed serious misconduct. Mr Marinovich, in comprehensive submissions, contended that a penalty short of cancellation of Teacher D's registration to teach is a proportionate response to the seriousness of the behaviour. As we explain at [46] to [53], we have concluded that de-registration is the commensurate outcome, as no penalty short of that will achieve the relevance disciplinary purposes given the gravity of the respondent's misconduct.

[3] We make an order, under s 405(6) of the Education Act 1989 and r 34 of the Teaching Council Rules 2016, for the suppression of Student A's name and identifying particulars. Teacher D also sought permanent name suppression, as did the school at which she taught Student A. We have reached the opinion that it is proper to order suppression of the respondent's name, and that of the school, for a single reason, which is to ensure that Student A is not identified. We explain out reasons for that order at [54] to [56]. We have anonymised this decision for that reason.

The evidence

[4] The parties filed an agreed statement of facts, which provides:

> The respondent was a registered teacher employed at the School between 2009 and October 2017.
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> In 2017 the respondent was the Year 12 Dean at the School.
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> Student A was a year 12 student. She was under the care of Oranga Tamariki and a foster whānau. Student A had ongoing behavioural and attachment issues. She was under the care of Child Adolescent Mental Health Service for an eating disorder.
>
> From February 2017 the respondent began mentoring Student A.

Because the relationship between Student A and her foster whānau had broken down, Student A began boarding at the School.

On 2 May 2017 Student A turned 17 years old.

In June 2017 the School's principal asked the respondent to support Student A to become more independent as she was then 17 years old and her foster care relationship had broken down.

In August 2017, the respondent and her husband offered to care for Student A and to provide her with a family environment. It was agreed that Student A would stay with the respondent during the weekends and school holidays with the support of Oranga Tamariki and Open Home Foundation. During the school week, Student A continue to board at the School. The School was aware of this foster care arrangement.

One night during the school holidays in January 2018, the respondent went into Student A's bedroom to say good night as she always did. When the respondent went to kiss Student A good night, Student A kissed her, not like a mother and daughter should. The respondent pulled away.

The next day the respondent spoke with Student A about what had happened the night before. They agreed that they cannot and should not kiss each other like that anymore.

Despite that conversation the respondent and Student A's relationship developed over the next eight months from an emotional connection into a loving sexual relationship.

The respondent discussed the inappropriateness of the relationship with Student A several times but the pair struggled to end the relationship. The respondent said it was difficult because they had deep feelings for each other and loved one another.

On 6 October 2018, the respondent spoke with Student A and they decided that their relationship had to stop.

On 13 October 2018, the respondent told her husband about her feelings for Student A and she sought his help to rectify the situation. The respondent was also concerned that Student A was not managing well at home. Together they decided to work through matters themselves which they all found very difficult. The respondent wanted assistance from outside agencies because they were all not coping. However Student A was concerned that she would be removed from the family so they attempted to resolve matters themselves.

On 1 November 2018, the respondent sent a text message to the School's principal saying she and her husband needed to speak with her urgently as they were concerned about Student A.

The respondent's husband then texted the principal the following message:

> Hi [Principal], this is [Teacher D's husband]. Thank you for your help. The reason for our urgent reaching out is because Student A and Teacher D's relationship got confused from mother and daughter, to now mother and lover. We tried to restore within house. Came to the realisation that we need HELP.

On the same evening, Student A was involved in a drinking incident at the boarding house. When she was talking with the manager of the boarding house, Student A disclosed that she and the respondent had kissed and that they had feelings for one another. She told the boarding house manager that her "life was fucked up and that it wasn't supposed to happen like this. It just happened between [Teacher D] and me".

The School submitted a mandatory report to the Teaching Council on 18 December 2018 and the Complaints Assessment Committee investigated the allegations.

The respondent acknowledged that:

- The relationship she had with Student A was inappropriate;
- She had not maintained professional teacher-student boundaries; and
- Her actions contravened the Professional Code of Responsibility.

The respondent was extremely apologetic and expressed remorse for her actions.

High standards of conduct are expected of teachers, as set out in the Code of Professional Responsibility (the Code). Under the Code, teachers will (among other responsibilities):

- Maintain public trust and confidence in the teaching profession by:
    - Demonstrating a high standard of professional behaviour in and integrity;[1] and
    - Contributing to a professional culture that supports and upholds the Code.[2]
- Will work in the best interests of learners by:
    - Promoting the well-being of learners and protecting them from harm;[3] and

[1] Rule 1.3
[2] Rule 1.5.
[3] Rule 2.1.

- Engaging in ethical and professional relationships with learners that respect professional boundaries.[4]

The relevant legal framework

[5] Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes; namely that which:

(a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or

(b) Reflects adversely on the teacher's fitness to be a teacher; and/or

(c) May bring the teaching profession into disrepute.

[6] The test under s 378 is conjunctive,[5] which means that as well as having one or more of the three adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The Education Council Rules 2016 (the Rules), as enacted, applied at the time of the respondent's inappropriate relationship with Student A. The Rules describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.[6]

[7] The CAC placed specific reliance on r 9(1)(e) of the Rules, which prohibits a practitioner from "being involved in an inappropriate relationship with a student with whom the teacher is, or was when the relationship commenced, in contact with as a result of his or her position as a teacher". If there was an inappropriate relationship in contravention of r 9(1)(e), then it almost inevitably follows that we can be satisfied that the respondent's behaviour both reflects adversely on her fitness to teach and brings the profession into disrepute.

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[4] Rule 2.2.
[5] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].
[6] Which came into force on 1 July 2016 and had a name change to the Teaching Council Rules 2016 in September 2018. Rule 9(1)(e) was amended in September 2018, but we will address the version in force during the time of the alleged inappropriate relationship.

[8] We recently canvassed the relevant principles behind r 9(1)(e) in full in *CAC v Teacher B*.[7] For convenience, we will repeat much of what we said in *Teacher B*, as well as what we have said in other decisions addressing the formation of inappropriate relationships.

[9] We described the purpose of r 9(1)(e) of the Rules in *Teacher B* in the following way:[8]

> It is important to emphasise that [the rule] is prophylactic in nature, and thus is concerned with the prevention of harm to a student that the formation of a personal relationship with a teacher might cause.

[10] In a case that preceded *Teacher B*, *CAC v Teacher C,* we said that:[9]

> (a) The long-settled position is that, for a teacher to have a sexual relationship with a student at the school at which he or she teaches, is serious misconduct at a high level.[10]
>
> (b) A relationship need not be sexual for it to be improper and to cross professional boundaries.[11]

[11] In *Teacher B*, we endorsed what we said earlier in *Teacher C* about the need for teachers to vigilantly maintain a professional boundary with students – both past and present. In our earlier decision we said:

> [192] [We] emphasise that whether a relationship is inappropriate is a context-specific enquiry and not amenable to prescriptive regulation. It is essential that practitioners exercise personal judgement and ask themselves whether their behaviour towards, or interactions with, a student or former student may risk blurring the teacher-student boundary. Teachers carry the responsibility to distance themselves from any potentially inappropriate situation.

[12] *Teacher C* was the first decision in which the Tribunal considered international guidelines. We looked at the approach taken in other jurisdictions because the CAC submitted that the Council's then-applicable

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[7] *CAC v Teacher B* NZTDT 2018/10, 8 July 2019 [*Teacher B*].
[8] We said this in NZTDT 2016/64, and endorsed it in *Teacher B*.
[9] *CAC v Teacher C* NZTDT 2016/40 at [183] [*Teacher C*].
[10] As the District Court said in *Scully v the Complaints Assessment Committee of the New Zealand Teachers Council*, Wgtn DC, CIV 2008 085 000117, 27 February 2009.
[11] See NZTDT 2016/64 and the decisions it discussed.

Code of Ethics for Certified Teachers did not "provide clear guidance" on the issue of relationships between teachers and students.[12] However, we subsequently said in *CAC v Teacher L*[13] that, "we consider that whatever opacity previously existed has been remedied by the [Teaching] Council's Code of Professional Responsibility (the Code), which came into effect in June 2017". As the agree summary of facts makes clear, the Code was in force at the time the respondent commenced her inappropriate relationship with Student A.

[13] The Code emphasises the need for practitioners to work in the best interests of learners by:

> 2.2 Engaging in ethical and professional relationships with learners that respect professional boundaries.

[14] The Code provides examples of behaviour that may breach the "boundaries of ethical and professional relationships with learners". These include:

> (a) Fostering online connections with a learner outside the teaching context (for example 'friending') or privately meeting with them outside the education setting without a valid context.
>
> (b) Communicating with them about very personal and/or sexual matters without a valid context.
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> (c) Engaging in a romantic relationship or having sexual or intimate contact with a learner or with a recent former learner.

[15] As we said in *Teacher L*, the standards expected of teachers, as described in the Code, are not new. While there may not have been prescriptive rules addressing the formation of relationships with students prior to the Code's introduction, the Tribunal has said many times that a teacher's professional obligations to his or her students do not end outside the classroom, and it is crucial that practitioners maintain and respect the

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[12] *Teacher C*, at [185].
[13] *CAC v Teacher L* NZTDT 2018/23, at [20].

boundary between them and those for whom they are responsible. The general expectation is encapsulated in the Tribunal's statement that:[14]

> As the adult and a teacher, [the teacher] has a responsibility to maintain professional boundaries. [The teacher and student] are not contemporaries. They could not be friends. [The teacher is] in a position of power and responsibility, where he [or she] should role model appropriate behaviour. [His or her] 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 being paramount*.
>
> [Our emphasis]

[16] In *Teacher B*, we endorsed the point that:[15]

> The teacher-student relationship is not equal. Teachers are in a unique position of trust, care, authority and influence with their students, which means that there is always an inherent power imbalance between teachers and students.

[17] Parents, and the public in general, place a very high degree of trust in teachers and rely upon those in the profession to interpret right from wrong. Regarding relationships with pupils, we emphasise what we said in *Teacher B* - that it is teachers, and not students, who bear the duty to distance themselves from any potentially inappropriate situation.[16]

Our findings

[18] In *Teacher B* we said that the CAC must satisfy the Tribunal of two matters under r 9(1)(e) of the Rules, which are that:[17]

> (a) The teacher and student were, when their relationship commenced, in contact as a result of the practitioner's position as a teacher; and
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> (b) The relationship was "inappropriate".

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[14] *CAC v Huggard* NZTDT 2016/33, at [21], which was a case where the teacher engaged in prolific text and phone communication with a student about personal matters.
[15] *Teacher B*, at [19].
[16] *Teacher B* at [23].
[17] The burden rested on the CAC to prove the charge to the balance of probabilities: per *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

[19] We accepted the CAC's submission made in *Teacher B* that a purposive approach should be taken to r 9(1)(e), "simply requiring that there be some form of causal nexus between the teacher–student relationship and the subsequent contact for the rule to be met".[18]

[20] In *Teacher B*, we agreed that it is sensible to employ the (non-exhaustive) list of factors described in a set of Australian guidelines when assessing whether a relationship was (or is) inappropriate.[19] These provide:

> The length of time between the conclusion of the teacher-student relationship and the beginning of an intimate relationship is only one of a number of critical factors that regulatory authorities may take into consideration when judging the appropriateness of a teacher's conduct in these circumstances. Other factors that teacher regulatory authorities may take into account include:
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> - The age difference between the student and the teacher;
> - The emotional/social maturity of the student;
> - The vulnerability of the student;
> - Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship at the school;
> - Any misconduct of the teacher during the professional relationship with the student.

[21] Turning to the instant case, there is no dispute that the respondent and Student A were in contact as a result of Teacher D's position as a teacher at the time their relationship began. We accept that there was a nexus of the kind we described in *Teacher B*. That is an irresistible conclusion. Teacher D's association with Student A in her professional capacity is what enabled the relationship to develop.

[22] Therefore, the first element of r 9(1)(e) is met.

[23] While the reasons might appear obvious, we will explain why we are satisfied that the relationship between the respondent and Student A was

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[18] *Teacher B* at [27].

[19] The Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries (the NT Guidelines) regarding relationships between teachers and current and former students.

inappropriate. We will do so by reference to the factors we have set out at [20].

The age difference between the respondent and Student A

[24] Student A was 17 when the relationship began, whereas Teacher D was 37. The difference in age is therefore significant - 20 years.

[25] In *Teacher C*, we said in relation to a 16-year age gap that:

> [197] The age difference between the respondent and Student A is a factor that weighs heavily in the mix, although we accept the point made by Ms King that "it cannot be that an age difference per se is a barrier to a consensual, non-exploitative relationship". Rather, it is the age difference in conjunction with other factors that makes the relationship inappropriate. The point is that the age difference tends to accentuate the power imbalance between the respondent and Student A.

[26] In *Teacher C* we said:

> [198] [We] have also considered the growing body of scientific evidence on adolescent brain development that demonstrates that young people are significantly different neurologically to adults, discussed by the Court of Appeal in *Churchward v R*.[20] In brief, the research shows that age-related neurological differences between young people and adults mean that young persons may be more vulnerable or susceptible to negative influences and outside pressures, and may be more impulsive than adults.[21]

[27] We added a proviso in *Teacher B* when we said that, "It would involve a degree of speculation for the Tribunal to find that a person – by virtue of his or her age alone, in reliance upon the research into adolescent brain development discussed in *Churchward* – lacked the autonomy to form a consensual relationship, and one on an equal footing, with a former teacher".[22] It is for this reason that it is necessary to closely scrutinise the way in which this factor interacts with others; not simply consider the age differential between the practitioner and student in isolation.

[28] Mr Marinovich emphasised the fact that Student A turned 18 soon after her relationship with the respondent commenced. He also submitted that it

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[20] *Churchward v R* (2011) 25 CRNZ 446.
[21] The Court in *Churchward* recognised that youth is seen as a larger concept than childhood and extends past 18 years of age.
[22] At [41].

is relevant to our enquiry that the relationship was consensual. However, that submission looks at the issue through a criminal law lens. Had the relationship not been consensual, then that would have undoubtedly resulted in the matter reaching the Tribunal on a different footing.

[29] We accept that this is a factor that supports the conclusion that the relationship between Teacher D and Student A was inappropriate.

The emotional and social maturity of Student A and why she was vulnerable

[30] Student A was extremely vulnerable and Teacher D knew that. There were a constellation of factors that ought to have raised a red flag for the respondent about the risks associated with blurring the teacher-student boundary. Student A was in the care of Oranga Tamariki and a foster whānau. The breakdown of the fostering arrangement explained why Teacher D was asked to mentor Student A. Student A had attachment and behavioural issues. Further, Student A had an eating disorder, which meant she was under the care of the Child Adolescent Mental Health Service.

[31] We hold serious concerns about the level of pastoral responsibility the respondent was asked to shoulder by the School. We know that Teacher D was Student A's dean, but we do not know why she "began mentoring" the latter in February 2017. What gave us pause was the statement in the agreed summary that:

> In June 2017 the School principal asked the Respondent to support Student A to become more independent as she was then 17 years old and her foster care relationship had broken down.

[32] Teacher D "offered to care for Student A and provide her with a family environment". We note that the summary records that, "It was agreed that Student A would stay with the Respondent during the weekends and school holidays with the support of Oranga Tamariki and Open Home Foundation. The School was aware of this foster care arrangement". This was, we consider, an unusual request by the respondent and one that required careful scrutiny. It required the School to agree to a member of staff taking on a responsibility - quasi-parental in nature – well outside the scope of her usual teaching duties. The proposed arrangement therefore required a careful evaluation of risk by the School to ensure that the respondent possessed the right skills and personal attributes to shoulder this

responsibility. In the respondent's case, based on the facts presented to us, we simply do not know whether the School deferred to Oranga Tamariki, or undertook its own assessment of the risks associated with the proposal. At a more general level, we consider that it is always necessary that schools carefully scrutinise whether an arrangement of this kind – involving a student living with a teacher – is appropriate.

[33] We do not mean our comments as a criticism of the School, given the gap in the information provided to us. Rather, we repeat what we said in *Teacher C* about the risks associated with teachers taking on the role of "mentor" or "counsellor":[23]

> [We] do not seek to lay down an invariable rule that teachers are precluded from having contact with, or providing assistance to, current or former students. In most instances, such contact is well intended. However, we revert to the point made in the NT Guidelines - that when teachers become confidants, friends or counsellors of students,[24] a dual relationship is created that *may* blur the teacher-student relationship, and thereby "help to foster inappropriate relationships with students".

[34] This is a factor that makes a finding that the relationship was inappropriate, irresistible.

Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship

[35] The agreed summary of facts did not disclose whether Teacher D taught Student A. However, she was Student A's dean in 2017. We accept Mr Marinovich's submission that the respondent did not teach Student A in 2018. However, we are unable to endorse counsel's associated submission that:

> [Nor] did she have involvement with her as a year 13 student over and above the fact she was a teacher at the same school. The occasions when sexual contact would occur were never at in or in the school environment.

[36] That submission does not take into account that the intimate relationship between Teacher D and Student A developed as a consequence

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[23] *Teacher C,* at [199]. We made a similar comment about the risks associated with teachers acting as "mentors" in *Huggard*, at [19] to [22].
[24] At [189] above.

of the former's professional role. In the circumstances of this case, it does not matter that the respondent was not actively teaching Student A in 2018. Nor does it make any difference whatsoever that the sexual activity took place in a private setting. From October 2017 onwards, the specific duty of care that Teacher D owed Student A was greater than that associated with an orthodox teacher-student relationship because of the "quasi-parental" role that she held.

[37] Teacher D bore the onus to distance herself from any potentially inappropriate situation. She was insightful enough to recognise that it would be wrong to pursue a relationship with Student A, but failed to put a stop to it. We do not suggest that Teacher D was predatory when she invited Student A into her home. We accept that she did so with the best interests of an extremely vulnerable young woman in mind. However, the removal of professional distance shifted the focus from Student A's best interests, to serving Teacher D's own needs.

[38] The length of time the relationship endured – about eight months – comprises a significant aggravating feature. This was not a one-off lapse of professional judgement.

[39] Given the heightened level of responsibility that the respondent had towards Student A, the power imbalance speaks for itself. There was an abuse of the trust placed in the respondent by the School, Oranga Tamariki and Student A herself. As the CAC submitted, the respondent's breach of her duty of care was "at the highest level", as she "remained in positions of 'trust, care, authority and influence' even after the intimate relationship began".

[40] This is a factor that weighs very strongly in favour of a finding that the respondent's relationship with Student A was inappropriate.

Conclusion on the charge

[41] We are satisfied that the CAC has met its burden by proving that it is more probable than not that the respondent formed an inappropriate relationship with Student A.

[42] The focus of the enquiry under r 9(1)(e) is on whether there was a persisting power imbalance between the teacher and student at the time the

relationship began. We are satisfied that there was, and that the power imbalance remained throughout what was a lengthy relationship between Teacher D and Student A.

[43] Returning to the first limb of the definition of serious misconduct, we readily accept that Teacher D's behaviour fulfils all three criteria in s 378 of the Education Act. In terms of the first criterion, the summary of facts leaves us satisfied that the respondent's conduct did, in fact, adversely affect Student A's well-being or learning.[25] However, the test that s 378(1)(a)(i) poses is whether the behaviour is "likely" to have had that effect.[26] Given Student A's particular vulnerabilities, we are satisfied the respondent's misconduct was likely to have been detrimental to Student A.

[44] We are satisfied that the respondent has exhibited a profound lack of professional judgement, which inevitably reflects adversely on her fitness to teach (s 378(1)(a)(ii)). The formation of an inappropriate relationship with a student is also behaviour of a type that brings the teaching profession as a whole into disrepute when considered against the objective yardstick that applies (s 378(1)(a)(iii)).[27]

[45] We are satisfied that the respondent committed serious misconduct.

Penalty

[46] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[28] We are required

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[25] It refers to the fact that the respondent decided to disclose the relationship because Student A "was not managing well at home". Also, the summary describes Student A being involved in a "drinking incident" at the boarding house, after which she disclosed the fact her life was "fucked up and that it wasn't supposed to happen like this. It just happened between Teacher D and me".

[26] In *Teacher B* we adopted adopt the meaning of "likely" used in the name suppression context - described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

[27] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

[28] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.

to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[29]

[47] As we said in *Teacher B*,[30] in cases engaging r 9(1)(e) our penalty assessment must bear in mind legislative developments that represent Parliament's commitment to reducing the harm to students posed by those employed or engaged in work that involves regular contact with them. It must also take into account the obligation on the Teaching Council to "ensure" that students are provided with a safe learning environment.[31] The specific focus of the Children's Act 2014 (the Act)[32] is on safety, which mirrors a key factor the Tribunal must consider whenever it decides if a teacher who has engaged in behaviour prohibited by the Rules – whether it took place inside or outside the work environment, and whether or not it attracted a criminal conviction – is fit to remain a member of the profession. The Act's introduction reinforces the importance of the Tribunal's obligation to closely scrutinise the fitness to teach of any practitioner who faces a disciplinary charge for behaviour of a type that may pose an ongoing risk to students.

[48] In *CAC v Fuli-Makaua,*[33] we said that cancellation is required in two overlapping situations, which are:

(a) Where the seriousness of the conduct is such that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession;[34] and

(b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. In this

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[29] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[30] *Teacher B*, at [64].
[31] Section 377 of Part 32 of the Education Act, which came into effect on 1 July 2015, which requires the Teaching Council to "ensure" that students are provided with a safe learning environment.
[32] Previously known as the Vulnerable Children's Act.
[33] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 at [27].
[34] Referring to the sixth of eight penalty factors described by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [50].

scenario, there is an apparent ongoing risk that leaves no alternative to deregistration.[35]

[49] In the majority of cases where a teacher has formed an inappropriate bond with a student with a sexual element, even where a physically intimate relationship did not develop, it will fall into the first category described in *Fuli-Makaua* - for which cancellation is virtually automatic.[36] However, we accept Mr Marinovich's submission that, each case must be assessed on its own merits – or as counsel put it, "The approach requires a more nuanced analysis rather than an indolent linkage that sexual relationship equates to automatic cancellation of registration".

[50] *Scully* is an example of a case where the District Court held that a penalty short of cancellation was justified.[37] Also, *Teacher L* was a case in which the practitioner's interest in a former student via social media was unreciprocated, which led us to say:

> [34] We do not consider this to be a case that unequivocally falls within the first category described in *Fuli-Makaua*. It is conceivable that the respondent might have been allowed to continue to teach, provided he could satisfy us that he will not pose an extant risk to students. However, since the respondent does not resist cancellation, he has chosen not to provide information that addresses "reflection and remedial steps taken since the event", which might enable the disciplinary purposes behind the Tribunal's powers to be met by a penalty short of cancellation.
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> [Footnote in original omitted]

[51] Despite Mr Marinovich's careful submissions, we cannot avoid the conclusion that this is a paradigm example in the first category of cases described in *Fuli-Makaua*. This is despite the combined mitigatory weight of the following factors:

(a) The respondent's decision to end the relationship with Student A. Instead of seeking to suppress the fact it had happened, the respondent then made disclosure to her husband and the School.

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[35] See *CAC v Teacher* NZTDT2013/46, 19 September 2013 at [36].
[36] See, for example, *CAC v X* NZTDT 2008/18, *CAC v X* NZTDT 2009/1, *CAC v B* NZTDT 2015/68.
[37] *Scully* above n 10.

(b) The way in which Teacher D prioritised Student A's needs by seeking professional assistance for her after the relationship ended. We commend the respondent for this.[38] Mr Marinovich described the respondent's decision to remain involved in Student A's life, following the conclusion of their intimate relationship, as "unique". We agree that the respondent exhibited genuine remorse through her efforts to address Student A's predicament.

(c) Teacher D was entirely cooperative with the Council's investigative process and acknowledged the fact that she and Student A formed an i inappropriate relationship.

(d) Teacher D is an experienced and well regarded practitioner. While we do not consider it right to label a decision to form an inappropriate relationship with a vulnerable student as a mere lapse in judgement, we accept it was otherwise out of character for the respondent. We accept Mr Marinovich's submission that the respondent is not so flawed to be "irredeemable".

[52] The respondent was entrusted with the welfare of a student who was extremely vulnerable. Knowing what we do about Student A – which were things also known to Teacher D at the time - the decision to commence a relationship with such a vulnerable student constituted a significant breach of trust. We acknowledge that we must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances. Given the gravity of Teacher D's serious misconduct, a penalty short of cancellation would be an outcome entirely out of step with comparable cases. We accept that the purpose of protecting learners is not a primary concern given that Teacher D appears to have insight into her behaviour. However, we are satisfied that cancellation is necessary to achieve the purposes of maintaining professional standards and the public's confidence in the teaching profession.

[53] Teacher D's registration to teach is cancelled.

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[38] We will not set out in detail the ways in which Teacher D assisted Student A but record that we accept that her efforts, as described in Mr Marinovich's submissions, were comprehensive.

Name suppression

[54] Rule 34(4) of the Teaching Council Rules 2016 obliges the Tribunal to consider making a suppression order whenever it receives evidence from anyone who falls into one of four specified categories of persons deemed to be vulnerable.[39] Rule 34(1) applies to Student A.[40]

[55] We make an order under s 405(6) of the Education Act for the permanent suppression of the name and identifying particulars of Student A.

[56] Having received submissions from the parties, we are satisfied that it is proper to order suppression of the respondent's name and the School.[41] It is a paramount concern to ensure that naming the respondent does not identify Student A. It is a question whether publication of the respondent's name risks defeating our order that Student A's name be suppressed. The purpose behind r 34 is to protect the welfare of young persons affected by practitioners' behaviour.[42] The identification of Student A, if publication occurs, must be a "likely" consequence, which simply means that there must be an "appreciable" or "real" risk. In light of the fact that the respondent remains closely associated with Student A, we accept that there is an appreciable risk she could be identified if we name the respondent.[43]

Costs

[57] The CAC seeks a contribution from the respondent towards its actual and reasonable costs incurred undertaking its investigative and prosecutorial functions – the first two categories of costs described in our 2010 Costs Practice Note. We must also consider whether to make an order that the

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[39] Rule 34(4) is headed "Special protection for certain witnesses and vulnerable people". It obliges the Tribunal to consider whether it is proper to make an order for suppression under s 405(6) of the Education Act whenever it has evidence before it that "includes details relating to a person described in subclause (1)".
[40] Student A is a person "who is, or was at the relevant time, a student at a school or an early childhood education service".
[41] The CAC took a neutral stance to the application.
[42] We recently described the relevant principles regarding name suppression in *CAC v Jenkinson* NZTDT 2018/14, 17 September 2018, at [32] to [36]. We will not repeat them here.
[43] It has not been necessary for us to consider the respondent's specific grounds in her application, or those advanced by the school for suppression of its name.

respondent contributes to the Tribunal's own costs, which is the third category described in our Practice Note.

[58] We have not been provided with a schedule of the CAC's costs. The Tribunal's costs are $1,145.

[59] In recent times, we have ordered a smaller contribution – 40 instead of the usual 50 per cent – where a practitioner has accepted responsibility for his or her misconduct and agreed to the matter being dealt with on the papers. That is the approach we take here.

[60] We order the respondent to make a 40 per cent contribution towards the actual and reasonable costs incurred by the CAC. The CAC is to provide a schedule of its costs on the respondent within 10 working days. The respondent will then have 10 working days to file a memorandum should she dispute the reasonableness of the CAC's costs.

[61] The final determination regarding costs is delegated to the Deputy Chair, should the respondent take issue with the CAC's schedule.

[62] We order the respondent to pay 40 per cent of the Tribunal's costs.

Orders

[63] The Tribunal's formal orders under the Education Act are as follows:

(a) The respondent is censured for her serious misconduct pursuant to s 404(1)(b).

(b) The respondent's registration is cancelled under s 404(1)(g).

(c) The register is annotated under s 404(1)(e).

(d) There is an order pursuant to s 405(6)(c) permanently suppressing the name of Student A and any details that might identify her.

(e) There is an order pursuant to s 405(6)(c) permanently suppressing the names and identifying particulars of the respondent, and the school at which she taught Student A.

(f) The respondent is to pay 40 per cent of the CAC's actual and reasonable investigative costs pursuant to s 404(1)(h).

(g) The respondent is to pay to the Tribunal costs in the amount of $458, under s 404(1)(i).

Nicholas Chisnall
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).