

JURISDICTION : EQUAL OPPORTUNITY TRIBUNAL OF
WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : KRENSKE-CARTER v MINISTER FOR
EDUCATION

CORAM : MRS N JOHNSON QC, PRESIDENT
DR C GILLGREN and MS L MCGRATH,
MEMBERS

HEARD : 12th and 13th NOVEMBER 2001

DELIVERED : 11th November 2002

FILE NO/S : ET/2000-000033

BETWEEN : ALISSA KRENSKE-CARTER
Complainant

AND

MINISTER FOR EDUCATION
Respondent

Catchwords:

Equal Opportunity - Discrimination on the ground of impairment in the area of education.

Legislation:

Sections 3, 4, 5, 66A, 66I, 161 Equal Opportunity Act 1984 (WA)
Section 18 Interpretation Act 1984

Representation:

Complainant: Ms G Marie
Respondent: Mr D Matthews, Crown Solicitor's Office

Case(s) referred to in determination:

West v AGC (Advances) Ltd (1986) 5 NSWLR 610
IW v City of Perth (1997) 146 ALR 697
Waters v Public Transport Corporation of Victoria (1991) 103 ALR 513
Boehringer Ingelheim Pty Ltd v Reddrop (1984) EOC 92-108
Byham v Preston City Council (1991) EOC 92-377
Jamal v Secretary Department of Health and Anor (1988) EOC 92-234
Australian Iron and Steel Pty Ltd v Banovic and Anor (1989) 168 CLR 165
Waters and Ors v Public Transport Corporation (1991) 103 ALR 513
Birmingham City Council v Equal Opportunities Commission [1989] AC 1155
Waterhouse v Bell (1991) 25 NSWLR 99 at 107 per Clarke JA.
Alone v State Housing Commission (1992) EOC 92-392 at 78,788.

Result:

Application allowed.

REASONS FOR DECISION

1. This Complaint is brought against the Respondent, the Minister for Education, by Mr Noel Carter on behalf of his daughter Alissa Krenske-Carter ("Alissa"). It is alleged that the staff of Warnboro Senior High School ("Warnboro") unlawfully discriminated against Alissa in the course of her education at Warnboro on the ground of impairment, contrary to section 66I of the Equal Opportunity Act 1984 ("the Act").
2. It is not in dispute between the parties that Alissa was enrolled at Warnboro in June 1997 for placement in Year 8 in 1998 and that she was withdrawn from the school by her parents prior to the end of the 1998 school year. Neither was it disputed that Alissa suffers from chronic lupus.
3. Whilst not specifically pleaded in the Complainant's Points of Claim it would appear that the allegation is that the Respondent acted in breach of section 66I(2)(c) by subjecting Alissa to various detriments as a result of conduct which was both directly and indirectly discriminatory.
4. The allegations contained in the Points of Claim fall into two broad categories:
 - (1) The general attitude and conduct of Warnboro staff in dealing with Alissa and her lupus; and
 - (2) Specific incidents of discriminatory conduct.
5. As to the first category, it is said that there was a lack of understanding on the part of staff as to Alissa's condition, a lack of communication between the staff and her parents, an intimidatory attitude towards Alissa, and involvement and acquiescence in harassment of Alissa by the staff. It is further alleged that, despite Alissa's vulnerability caused by her lupus and a prior history of being subjected to bullying, staff failed to take any or any adequate steps to protect her and to meet her needs.
6. As to the second category, it is alleged that Alissa was forced to role-play the part of the victim in an exercise designed to address the issue of bullying. It is further alleged that Alissa was forced to walk around a tennis court on a hot day as punishment for

forgetting her sports uniform. Both these incidents are said to have led to Alissa suffering a lupus attack.

7. The Respondent in its Points of Defence denies that it unlawfully discriminated against Alissa and claims that its staff were adequately informed as to the nature of lupus, did not allow Alissa to be bullied and did not engage in any intimidation or harassment of her. As to the specific allegations of discrimination, the Respondent states that Alissa was provided with a school pass that allowed her to excuse herself from physical education and to visit the school nurse whenever necessary. The Respondent acknowledges that Warnboro ran an anti-bullying program which involved a role-playing exercise but asserts that the students determined who would play what role.

Legal Principles

8. In considering and construing the relevant legislative framework it is important for the Tribunal to remain mindful that the Act is beneficial legislation and must be construed so as to promote its object or purpose: *section 18 Interpretation Act 1984; West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 631; *IW v City of Perth* (1997) 146 ALR 697 at 702; *Waters v Public Transport Corporation of Victoria* (1991) 103 ALR 513 at 520 per Mason CJ and Gaudron J and at 546-7 per Dawson and Toohey JJ. The objects of the Act include the elimination of discrimination against persons on the ground of impairment in the area of education and the promotion of recognition and acceptance within the community of the equality of persons regardless of their impairment: *s 3(a) and (d) of the Act.*
9. Part IVA of the Act prohibits discrimination on the ground of impairment. Division 3 of the Act addresses, inter alia, discrimination in education. Relevantly, section 66I(2) of the Act is in the following terms:

“It is unlawful for an educational authority to discriminate against a student on the ground of the student’s impairment –

 - (a) by denying the student access, or limiting the student’s access to any benefit provided by the educational authority;*
 - (b) by expelling the student; or*
 - (c) by subjecting the student to any other detriment.”*

10. Discrimination on the ground of impairment is relevantly defined in section 66A(1) to include treating the aggrieved person, on the ground of impairment, less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment. This section is usually understood to refer to direct discrimination or acts involving different treatment.
11. Section 66A(3) addresses, in the following terms, circumstances most commonly referred to as constituting indirect discrimination or acts having a disparate impact:

“For the purposes of this Act, a person (in this subsection referred to as the “discriminator”) discriminates against another person (in this subsection referred to as “aggrieved person”) on the ground of impairment if the discriminator requires the aggrieved person to comply with a requirement or condition –

- (a) with which a substantially higher proportion of persons who do not have the same impairment as the aggrieved person comply or are able to comply;*
- (b) which is not reasonable having regard to the circumstances of the case; and*
- (c) with which the aggrieved person does not or is not able to comply.”*

12. Impairment is relevantly defined in s 4(a) of the Act to mean any defect or disturbance in the normal structure or functioning of a person’s body. It was not disputed by the Respondent that lupus is an impairment for the purposes of the Act and the Tribunal so finds.
13. It can be seen that, relevant to the circumstances of this case, in order to succeed in a complaint of direct discrimination on the basis of impairment, the Complainant was prove the following matters:
- (a) that Alissa was treated less favourably by the Respondent than in the same circumstances or in circumstances which are not materially different, the respondent treated or would treat a person without lupus;
 - (b) that the less favourable treatment was on the grounds of Alissa’s lupus, a characteristic that appertains generally to persons suffering lupus or a characteristic that is generally imputed to persons suffering lupus;

- (c) that the less favourable treatment subjected Alissa to a detriment.
14. The words “less favourably” require that there be two sets of circumstances, the actual and the hypothesized, so that it can be determined by a comparison whether the treatment in the former is “less favourable” than in the latter: *Boehringer Ingelheim Pty Ltd v Reddrop* (1984) EOC 92-108 per Mahoney J at 76,052.
15. The definition of indirect discrimination contains four elements:
- (1) the discriminator must require the aggrieved person to comply with a requirement or condition;
 - (2) a substantially higher proportion of persons of a different status than the aggrieved person must be able to comply with the requirement or condition than persons of the same status as the aggrieved person;
 - (3) the aggrieved person must not be able to comply with the requirement or condition;
 - (4) the requirement or condition is unreasonable in the circumstances.
16. In keeping with the categorization of the Act as beneficial legislation, the third element is satisfied not only where there is a complete inability to comply but also where the person with the impairment is unable to comply in a similar manner to the way in which a person who does not suffer the impairment could comply: *Byham v Preston City Council* (1991) EOC 92-377. As to the fourth element, the meaning of “reasonable” in s 66A(3)(b) must be ascertained by reference to the notion of “discrimination” and by reference to the scope and purpose of the Act: *Waters v Public Transport Corporation of Victoria* (1991) 103 ALR 513 at 520 per Mason CJ and Gaudron J and at 523.
17. In determining a complaint of discrimination it is not necessary to show that the alleged discriminator intended to discriminate. However, the act which amounts to discrimination must be deliberate; that is, advertent and done with the knowledge of the characteristic of the complainant said to be the ground on which the discriminatory act is performed: *Jamal v Secretary Department of Health and Anor* (1988) EOC 92-234 at 77 196 per Kirby P, at 77 200 per Samuels JA; *Australian Iron and Steel Pty Ltd v Banovic and Anor* (1989) 168 CLR 165 at 176-7 per Gaudron and Deanne

JJ; *Waters and Ors v Public Transport Corporation* (1991) 103 ALR 513 at 520 per Mason CJ and Gaudron JJ, Deane J agreeing; *Birmingham City Council v Equal Opportunities Commission* [1989] AC 1155 at 1194 per Lord Goff; *Waterhouse v Bell* (1991) 25 NSWLR 99 at 107 per Clarke JA. Nor is it necessary to prove that the prohibited reason is the sole or even the dominant reason for the less favourable treatment. It is sufficient if it is a significant reason: *s 5 of the Act*.

18. In the circumstances of this case it should also be noted that an employer or principal is liable for the discriminatory acts of its employees or agents where those acts occur in connection with the employment of the employee or with the duties of the agent as an agent: *s 161 of the Act*.
19. The Complainant bears the onus of proof and must prove his or her case on the balance of probabilities: *Alone v State Housing Commission* (1992) EOC 92-392 at 78,788.
20. Where a complaint is ultimately established, section 127(b)(i) of the Act empowers the Tribunal to order damages to be paid by the Respondent by way of compensation for loss or damage suffered by the Complainant by reason of the Respondent's conduct.

The Evidence

21. In the course of the hearing the Tribunal was provided with significant oral and documentary evidence on lupus. Chronic lupus is a serious, potentially fatal, auto-immune disease. Stress, exercise and exposure to sunlight may trigger a lupus attack, the symptoms of which are severe and debilitating. In the Tribunal's view, the nature and severity of the condition is such as to require the relevant staff at a school attended by a student with lupus to take all reasonable steps to inform themselves about the condition. Symptoms vary between sufferers and the symptoms of an individual sufferer are not necessarily continuously present. For the purposes of these reasons it is necessary to detail only some of Alissa's symptoms: arthritis in all joints, high temperature, rash, red cheeks, dizziness, seizures, sore throat and short term memory loss. One specific manifestation of Alissa's illness was that she experienced difficulty seeing lighter coloured whiteboard markers.
22. Alissa's evidence as to her experience at Warnboro must be considered in light of her experiences at other schools. The uncontradicted evidence before this Tribunal was that Alissa suffered bullying at East Waikiki Primary School ("East Waikiki").

She stated that she was constantly bullied by students who would say that her lupus was AIDS. She said that the teachers didn't understand her condition and would tell her that she should sort her problems out herself. Consequently, she had no friends at the school and the Tribunal accepts that her experiences at the school were such as to leave a lasting and extremely negative impact. Alissa was removed from the school by her parents and sent to Koorana Primary School ("Koorana") where the students were more understanding and the staff more accommodating in meeting her needs. As a result, the last 2 years of Alissa primary schooling passed satisfactorily.

23. Since being withdrawn from Warnboro Alissa has attended Tranby College ("Tranby"). In her evidence Alissa said that she loves the school and described her experience there as "great". She also stated that the teachers are all willing to help and when they notice signs of a lupus attack they encourage Alissa to go outside and get some fresh air or a drink of water and do not wait for her to make a request. Before the teachers start a lesson they ask Alissa if the board marker colour is satisfactory. They also provide work for her to do during her absences from school due to ill health. Kerry Marshall, a friend of Alissa's who has been at school with her for three years, confirmed Alissa's evidence that she experienced no major problems at Tranby. She said that Alissa was "bubbly and happy around us".
24. Alissa's experiences at other schools are relevant to any assessment which the Tribunal makes of her evidence. A child who had not previously experienced the hurt and isolation of bullying related to impairment may well have reacted differently to the circumstances which she encountered at Warnboro. As the staff at Warnboro were, or at least should have been, aware of Alissa's previous experiences it would, in the Tribunal's view, be reasonable to expect that they would also take this factor into account in their dealings with her. Further, the earlier and subsequent positive school experiences militate against any conclusion of unjustified hypersensitivity and give Alissa a yardstick against which to compare her experiences at Warnboro.
25. Alissa was consistent in her account that on commencing at Warnboro she experienced difficulties with both students and teachers which she attributed to a lack of understanding of her condition. She did, however, concede that there were some children and teachers who were understanding of her condition. According to Alissa, her difficulties commenced from the time of her first

lupus attack which occurred in the first three weeks of term. She asked if she could go to the nurse's office but the teacher didn't appear to understand or accept the need for her to do other than sit outside and get some fresh air. It was not until Alissa explained that her condition was such that she could actually pass out that she was permitted to go to the nurse. Alissa could not initially recall who that teacher was but later identified the teacher as Ms Arioli.

26. Other complaints made by Alissa related to the use of inappropriately coloured white board markers and the failure to provide work for her to do while absent due to ill health. Alissa stated that some of the teachers would change the whiteboard markers to darker colours and some of the other teachers wouldn't. She also stated that she was sometimes given work but at other times no work was given and when she returned to school she found it awkward fitting back in because the teachers maintained she had been given work but she hadn't and would have to spend her recesses and lunch times sitting in the library trying to catch up. Alissa gave a further example of the problems she experienced with the teaching staff. She stated that at one point she lost her voice for a while and the teachers got very annoyed that she couldn't answer questions.
27. However, the principle focus of Alissa's complaints was the bullying she experienced whilst at Warnboro and the failure of the staff to take any, or any adequate, steps to protect her from such conduct. She stated that prior to her withdrawal from Warnbro there was a lot of bullying by students and that most of the teachers knew about the bullying. Although warnings were sometimes given, no further action was taken when the conduct was repeated. According to Alissa, she was told that she had to sort it out for herself. Alissa stated that she was often too scared to talk to the staff about her situation because she thought they wouldn't understand. She did, however, occasionally talk to the school nurse.
28. In her evidence-in-chief Alissa gave a particular example of an incident of bullying. She stated that she was pushed down a flight of stairs by another student. According to Alissa, this incident was observed by a male teacher whose name she could not now recall, who took no action and told her to sort the matter out herself. Alissa stated that she reported the incident to her form teacher, Ms Vernon and later told her parents. Under cross-examination Alissa said that she had gone to see Mr Drakesmith about this incident. This apparent conflict was not drawn to her attention and hence the possibility cannot be excluded that she spoke to both teachers. Her

explanation for not being able, then or now, to identify the teacher was that she only knew the teachers in her learning team and he wasn't one of them. At a later point in her evidence she said that she did know who he was she just couldn't remember his name.

29. Alissa also gave evidence of the two specific incidents of discrimination identified in the Points of Claim. She stated that there was an occasion on which Alissa's class was participating in a role-playing exercise to address bullying. The role-play took place in front of the class and involved one student playing the bully and the other the victim. On both occasions Alissa was required to participate in this role-play she was placed as the victim. Further, despite instructions to the effect that, if there was to be any pushing or shoving it was just to be light, she was "really pushed and shoved".
30. The other incident can be referred to in summary form as the "tennis court incident" which occurred during a physical education class. At some point Alissa was provided with a pass in the following terms: "Due to a serious medical condition Alissa cannot always do Physical Education. On occasions she cannot she has my permission to go to the library after informing the Physical Education teacher." Alissa stated that she did on occasions use the pass to go to the library instead of doing physical education.
31. On the day of the incident Alissa stated that she hadn't brought her sports uniform to school because she had forgotten to wash it the night before. For punishment, with the other people that didn't have their sports uniforms, she had to walk around the tennis court. It was a moderately hot day and after the third lap she stopped and asked her teacher, Mr Valentino, if she could go and get her hat but permission was refused. She walked two more laps and started feeling hot and dizzy. Her request to go and get a drink was also refused. As a result she suffered from a severe lupus attack, was taken to the doctor and was absent from school for several days.
32. In giving this account, Alissa did not refer to her pass or explain why it was she hadn't relied upon it. Under cross-examination Alissa gave the following, more detailed, account:

"I showed up for sport and I told him that I didn't have my uniform, and he said, "Well, did you have your pass?" and I said, "No. I left it at home in one of my main school files," because I left one of my files at home and that's the one that I keep it in, and he said, "Okay. As for punishment with the rest, you will walk around the tennis court," and then I said - - and I asked if that was our only option

and he said, "Yes." So I said, "Fine. I will do it," because that was the only option we were given and it was fair enough, but then I went and asked for the hat and that was when he said, "No." He said it was my punishment. Yet there was a couple of other students that got to go get their hats."

33. Elsewhere in her cross-examination Alissa mentioned that at some point the pass was taken from her by Mr Valentino who said that "the pass is becoming beyond a joke". She could not recall whether it was ever returned to her. She was uncertain in her evidence as to the timing of this event and it is not clear that she was even suggesting this as an explanation for not relying on the pass on the day of the tennis court incident. Later in her evidence Alissa stated that the tennis court incident occurred before the time when her pass was taken off her and that on the day of the incident she had simply left her pass at home. Alissa denied the suggestion that she chose to walk around the tennis court rather than going to the library but agreed that, although she had a disability, she tried to put it behind her and tried to do everything.
34. It was suggested on behalf of the Respondent that Alissa's evidence about the tennis court incident was affected by internal contradictions and that Mr Valentino's account of the incident should be preferred. In the Tribunal's view, the failure to mention the pass when first giving an account, her reference to the confiscation of the pass and her confusion about the timing of that event, is not sufficient to undermine Alissa's credibility as to the incident.
35. Alissa also gave evidence of the day she was withdrawn from school. It is apparent that the attitude of her fellow students to her departure was distressing to her. She said that as she was packing up she heard her fellow students say "Oh, she's obviously leaving for the day. Good riddance. We don't need her at this school any more." According to Alissa, as she walked out of the room she started to cry. In her evidence she said: "I basically just wanted to lock myself away in my room and never come out." Under cross-examination she stated that the teacher, Mr Drakesmith reprimanded the students and warned them that they would be sent to the office of the Student Services Coordinator, Mr Woodley, if the conduct continued. It would seem that, in relation to this incident, the response of the teacher to the bullying behaviour was appropriate and timely.

36. Under cross-examination Alissa gave evidence of incidents of bullying and problems with the way in which teaching staff dealt with her situation which she had not initially referred to in her examination-in-chief. Alissa conceded that she could not remember every incident, although she maintained that she remembered "those that really hurt her". Some of the bullying behaviour involved students suggesting she had AIDS and should be at a special school. Alissa stated that she took this up with a teacher although she could not remember which one. The bullying was also physical, involving pushing and shoving which on occasions resulted in bruising. On one occasion, when she was lining up waiting to go into class, she was pushed and fell over a bag, landing against a wall. This caused a large bruise down her arm as a result of which she attended the medical center and was later taken home by her mother. Alissa stated that she complained to the teacher who told the student to go directly to Mr Woodley's office without any warning. Again it would seem that the response of the teacher to the bullying behaviour was appropriate and timely.
37. Alissa also stated that on occasions, when the teacher was absent from the room, students would say hurtful things about her. When she complained to the teacher, the students were given a warning and, if the conduct were repeated, sent to Mr Woodley's office. There was an occasion on which conduct of this type occurred in the presence of a teacher. The teacher became angry and reprimanded the student but no punishment was imposed. According to Alissa, despite her complaints to staff about being bullied, she was never offered any assistance in dealing with the situation. When questioned about whether, and the extent to which she had complained to staff members, Alissa stated that she generally spoke mostly to Ms Reynolds, the nurse at the medical center, about the bullying.
38. After a meeting between her parents and the school, Mr Woodley would keep an eye on her sometimes, but that only lasted for about 3 weeks and then he stopped. The other students settled down a little bit but when they realised that Mr Woodley wasn't checking up on her as often the conduct re-commenced.
39. In cross examination, Alissa readily conceded that she had a good relationship with some of her teachers. Mr Drakesmith and Mr Bryan she felt she could trust because they would listen to her. She expressed no real problems with Ms Forth or Ms Vernon, although on one occasion Ms Vernon said that she was faking a lupus attack to get out of work. With respect to the use of appropriate whiteboard markers, Alissa described Ms Arioli as "not

quite helpful". She said that sometimes Ms Arioli "wouldn't care to listen" on this issue. Alissa stated that some teachers would suggest that she was faking a lupus attack just to get out of the class and of using her lupus as an excuse. Ms Arioli said, on a couple of occasions, that Alissa was faking a lupus attack to get out of work. Alissa also said that sometimes teachers wouldn't let her use her pass or leave the classroom. She said: "They would just say, 'No. You can stay in. I don't know if it's a true lupus attack or not.'". She gave another example of an incident where Ms Arioli refused permission for her to hand in an assignment late even though Alissa had been absent through illness. Alissa considered the only problem teachers to have been Ms Arioli and Mr Valentino.

40. Alissa's mother, Debourea Carter, provided a more detailed account of Alissa's school experiences. It is apparent from her evidence that the consequences to Alissa and her family of her experiences at East Waikiki were extreme, culminating in the decision to sell their home and move to another suburb. In comparison, according to Mrs Carter, the staff at Koorana expressed a desire to help and to obtain information to assist them to do so. There was one incident during Alissa's time there but once the school was notified, the principal talked to the class and explained Alissa's condition, after which the attitude of the students changed.
41. Mrs Carter recounted her recollection of Alissa's experiences at Warnboro. In February 1998 another student threatened to kill Alissa. Mrs Carter spoke to Mr Woodley and Alissa's form teacher about the incident and they said they would have words with the student and also watch over Alissa during lunch hours. Mrs Carter was not informed as to the action taken or its outcome. There was even an occasion when threats to kill Alissa were made in her mother's presence when Alissa was being picked up by her mother and was walking towards her car. Another incident occurred in March when a boy accused Alissa of having AIDS. Following a complaint to the school, that incident was resolved between the respective parents. Mrs Carter's evidence also supports Alissa's assertion that there was an occasion on which she was pushed down a flight of stairs. Mrs Carter remembers being called to school to pick Alissa up after this incident. There was a further incident in around second term where some other students made comments about Alissa having AIDS. Most of these incidents were reported verbally and on occasions meetings took place between Mrs Carter and various staff members but, in Mrs Carter's view, little or no action was taken.

42. According to Mrs Carter, the incidents of bullying were so numerous that Alissa became scared to go to school. Towards the end of 1998 the situation became so bad that Alissa said she wanted to kill herself. Mrs Carter spoke to everyone she could at the school with no result. She even called the police. Ultimately the decision was made to take Alissa out of school.
43. Carter's recollection of events was tested under cross-examination. There were some inconsistencies in her evidence as to dates on which events occurred and some inconsistencies between her account and the material contained in Mr Carter's initial statement of complaint to the Commission. However, in the Tribunal's view these discrepancies were minor and do not detract from her credibility generally. Mrs Carter impressed the Tribunal as a caring parent recounting to the best of her ability distressing events in her daughter's school life. The Tribunal considers Mrs Carter to be a truthful witness and accepts her account of events.
44. Mrs Carter gave evidence concerning the occasion on which Alissa walked around the tennis court. She specifically recalls being told by another student that Alissa was made to walk around the tennis court. She also recalls that it was a very hot day. When she saw Alissa she was extremely red and she passed out. She took her home and later phoned the principal who was unavailable. She was told by Alissa that the teacher, Mr Valentino, would not let her go to the library and she had to do her punishment by walking around the tennis court. She had her hat with her but Mr Valentino would not let her get it. Mrs Carter was not clear on whether Alissa's pass had been confiscated or the teacher wouldn't let her use it. Mrs Carter denied that Alissa had simply left it at home.
45. Mrs Carter said that she spoke to Mr Valentino about this incident to ask him how he could let it happen. She told him that she would take the matter up with the principal. When she did, she was told by the principal that the matter was one between her and the sports teacher.
46. Mrs Carter maintained that she had spoken to Mr Valentino on two previous occasions about Alissa's condition. In cross-examination she categorically denied that this was the first occasion on which she had spoken to him. Despite stating that she was a bit upset and raised her voice a little, she did agree

with the proposition, put to her in cross-examination, that the conversation was friendly. It was then suggested to her that if the account of events given to her by Alissa and recounted by her to the Tribunal were correct, the conversation would not have been friendly. However, in considering this proposition and the potential impact on the witness' credibility, it is necessary to take into account conclusions drawn about the witness from observing her demeanour in the witness box. Mrs Carter presented as a somewhat timid person who experienced some difficulties in asserting herself when being questioned. Whilst the Tribunal would not underestimate Mrs Carter's ability to take whatever action is necessary to protect her daughter, it does not follow that she would do so in a confrontationalist manner. In the Tribunal's view, the tone of Mrs Carter's conversation with Mr Valentino was not inconsistent with either Alissa's or Mrs Carter's account of what occurred on that day.

47. As to the attitude of the staff generally, Mrs Carter stated that her requests for school work to be provided to Alissa when she was absent through illness were largely declined. She said that only on four occasions was work made available. Often, on Alissa's return from illness she would be told to ask other students about the work which had been done in her absence.
48. Mrs Carter was also told by Alissa that Miss Arioli had said to her that she'd been faking a lupus attack. Mrs Carter was concerned that, if the teachers were saying such things, the students would follow their lead. Mrs Carter attempted to talk to Ms Arioli but she refused to meet with her and denied making the statement.
49. All these events occurred despite numerous and repeated attempts by Mr and Mrs Carter to advise Warnboro of the situation their daughter was experiencing at school and her special needs. As early as 1997 at the meeting with the principal of Warnboro to discuss Alissa attending Warnboro in 1998, Alissa's parents attempted to inform the school of the nature and extent of Alissa's condition. The principal, Mr Sanbrook, was provided with information from the Lupus Association about the condition. Mrs Carter expressed the view that Mr Sanbrook did not seem interested in the information about lupus and simply said that he would advise the teachers about Alissa's condition. Mrs Carter was not aware whether he did so.

50. Once Alissa commenced school, further information was provided by the parents. On 17 March 1998 Mr Carter wrote to the school enclosing a copy of a letter addressed to Centrelink which set out in some detail the problems associated with being a lupus sufferer. In his covering letter Mr Carter also offered to make himself available to help educate school staff on Alissa's condition and answer any questions or concerns they may have. It would seem that offer was not taken up. At some point the school was also provided with a copy of a report from Dr John Gardiner, a Senior Clinical Psychologist from Princess Margaret Hospital which refers specifically to the significant peer problems which Alissa had experienced at school due to her condition.
51. On 19 June 1997 Mr Sanbrook was provided with a list of the signs or symptoms of the condition so that the staff could take the appropriate action. Whilst this document doesn't spell out the severity of the condition, Mrs Carter stated that the severity of the condition was sufficiently explained to the principal from the outset.
52. It is clear from the documentation provided to the Tribunal that Mr and Mrs Carter made concerted efforts to ensure that the school was adequately informed as to Alissa's condition and her needs. It was Mrs Carter's understanding that Mr Sanbrook would speak to Alissa's form teacher so that the information could be given to all Alissa's teachers. However, it was Mrs Carter's experience from dealing with the teachers that, despite the attempts of her and her husband to provide information, there was a considerable amount of ignorance amongst the staff as to what lupus was. For example, Mrs Carter had to explain lupus to Mr Valentino on three occasions.
53. On 2 April 1998 Mr Carter wrote to the school asking for a meeting with Alissa's teachers who collectively comprised what was referred to as Learning Team 1. He suggested a date and time which was five days hence. According to Mrs Carter, that request arose from the fact that Alissa was being subjected to bullying and also that a death threat had been made against her. In the letter, the conduct of concern is described as "the abusive behaviour of other students towards our daughter". In his letter in reply, Mr Sanbrook asserts that he and his staff "fully appreciate Alissa's condition and....are doing everything within our power to assist Alissa in her learning environment". It is apparent from the text of the letter that Mr Sanbrook is well aware that Alissa

had been subjected to abusive behaviour by fellow students. One solution proposed is for Mr Woodley, the Student Services Co-ordinator, "to move through all classes with Alissa to attempt to identify students who are being abusive". It could fairly be said that adopting such a course had the potential to exacerbate rather than alleviate the problem. The request for a meeting was declined in the following terms: "...at this time the Learning Team cannot accommodate the time you suggest. We are busy preparing for end of term activities and notice was somewhat short. Mr Woodley is, however, only a phone call away." Even accepting the relatively short notice, there is no suggestion by Mr Sanbrook of a more convenient, alternative time. The Tribunal considers that the reference to Mr Woodley being only a phone call away clearly indicates that Mr Sanbrook is rejecting the request for a meeting with the learning team.

54. According to Mrs Carter it was not until close to the end of August that the school nurse had a meeting with the teachers. This meeting in fact took place on 10 September 1998. However, it is not surprising that Mrs Carter was unaware of the precise date of the meeting because, on her evidence, although she and her husband were told of the intention to hold the meeting, their offer to attend the meeting was declined. Mrs Carter stated that she had been told by the nurse that the staff were quite shocked and hadn't appreciated the severity of Alissa's lupus.
55. Mrs Carter described her experience with the staff at Warnboro as "like I was hitting my head against a brick wall". She felt that they would not listen to her and she felt powerless. She stated that she was unable to put a figure on the number of times she had to make complaints to the school but she described it as "constant".
56. In October 1998 Senior Constable Den Ridder was a school based police officer working in the area of Warnboro. In his evidence he stated that on 27 October 1998 he received a request to attend on the Carter family who were concerned that their daughter was suicidal as a result of her treatment by students and some staff at Warnboro High School. Following the meeting with the parents Constable Den Ridder attended at the school and spoke with Alissa in the presence of the Deputy Principal, Mr Nairn. In the presence of Mr Nairn, Alissa said that she was happy at school and did have some minor problems with students and teachers but they were sorted out quickly. In the report subsequently

prepared by him, Constable Den Ridder expressed the view that Alissa was "holding back". When he later spoke to Alissa in the presence of her parents, she told him that she had not spoken the truth in front of Mr Nairn as she was intimidated by him. She told Constable Den Ridder of being bullied at school and that teachers had singled her out in class and belittled her in front of the other students. She also told him of the tennis court incident when she had been made to walk around in the sun and was not allowed to get a drink of water or go to the toilet. According to the constable's report, this incident took place two weeks before he met with Alissa.

57. In his evidence before the Tribunal Constable Den Ridder stated that when he spoke to Alissa he considered "that there was a big problem there". He also described her as upset and crying although it was rightly pointed out in cross-examination that Constable Den Ridder's report describes Alissa as "relaxed". It may well be that, with the lapse of time, Constable Den Ridder's recollection of Alissa's emotional state is in error. Nevertheless, Constable Den Ridder's report is a reasonably contemporaneous account of events made by an independent person. Although the report relies, to a great extent, on accounts of events given by Alissa and her parents, it does evidence consistency between the complaints made by Alissa and her mother in their evidence before the Tribunal and those made closer to the events.
58. On behalf of the Respondent, the principal, Terry Sanbrook, the Student Services Co-ordinator, Noel Woodley, and the school nurse, Claire Reynolds, were called to give evidence. The following members of Learning Team 1 also gave evidence: Alan Drake-Smith, Vance Bryan, Vicky Forth, Lynette Vernon, Adel Arioli and Paul Valentino.
59. At the time of giving evidence Alan Drake-Smith was in his fifth year as a teacher at Warnboro. He taught Alissa information technology and mathematics. He stated that on the first day of the school term in 1998 he and the other members of Learning Team 1 attended an informal meeting with the principal. The school nurse was also in attendance. They were advised that Alissa had been placed in their learning team and that she suffered from lupus. They were given some information about the condition. He recalls being told that it was a very rare condition with symptoms similar to arthritis and that further information would be forthcoming as soon as it was available. They were told that

Alissa had been given a pass so that at any point in time she could leave the classroom but that she had to present the pass and let the teacher know. No other information concerning the condition was given at that time. He stated that the meeting was approximately 20 minutes in duration and the information wasn't adequate which was why more information was requested from the school nurse. Mr Drakesmith stated that no documentation was provided at that meeting. It was later during that term when he received a pamphlet outlining in more detail the lupus condition. He did not attempt to find out more information about the condition himself.

60. According to Mr Drake-Smith the major response at the first meeting to Alissa's special needs was the implementation of the pass. He said that, apart from that, "Alissa was to be treated as a normal student". If that was indeed the approach adopted by the teaching staff at Warnboro then it is of some concern. Insofar as that approach is designed to make Alissa feel comfortable in her school environment and not "different" from other students it is laudable. However, it carries with it a twofold risk: firstly, of treating her as if her needs were the same as other students when clearly they were not and secondly, of placing on Alissa the responsibility of identifying when her needs differed.
61. In the information later provided the teachers were told only to use dark-coloured pens. They were also told to ensure that she did not sit under direct light and that she sat as close to the board as possible. He said he never had a problem using the dark-coloured pens nor with making notes available to Alissa if she were absent.
62. There was a further meeting during term three when additional information was given to the teachers about Alissa's condition to keep them up to date. To Mr Drake-Smith's recollection the nurses were present at all meetings. The information came in the form of letters from the parents and the principal informing the staff about the state of Alissa's condition at that point in time. Mr Drake-Smith's explanation for why it was necessary to be provided with additional information was that "it was to keep them up to date, so that we could again best meet the needs of Alissa". In view of the fact that Alissa's condition was chronic and no witness before the Tribunal suggested that Alissa's condition had deteriorated to the point where her general needs had altered, the Tribunal considers that the more likely reason for

the third term meeting was a recognition that there was inadequate knowledge of Alissa's condition and needs amongst the teaching staff.

63. Mr Drake-Smith said that Mr Valentino was not at the meetings with Learning Team 1 but believes that he was provided with information about lupus. He did not state what he based that belief on.
64. Mr Drake-Smith found that Alissa progressed very well in his class although she was absent from school more than the average student. He said that because of her absences he made time available for her to come and see him if she wanted and also helped her out during class time. Mr Drake-Smith described Alissa as friendly, hardworking and a very trustworthy student. He said that she invoked the pass only on a couple of occasions.
65. Mr Drake-Smith stated that Alissa had a close-knit group of friends with whom she worked really well. He never saw any verbal or physical abuse directed at Alissa in or outside the classroom. However, during third term Alissa reported to him that someone had pushed her down the stairs. Because of the seriousness of the allegation he referred the matter to Mr Woodley in accordance with school policy. He met with Mr Woodley and told him about the incident but could not recall whether Mr Woodley made any notes. None were produced to the Tribunal. He could not recall being told by Alissa that there were any witnesses to this incident but conceded that there may have been. Neither could he recall being informed that a teacher had witnessed the incident. However this conflict could be explained by the fact that, on his own admission, he did not take down many details because he considered that Mr Woodley would be able to handle the matter.
66. Mr Drake-Smith denied seeing any conduct which would constitute bullying. He further expressed the belief that he would have noticed if there had been bullying of Alissa, however subtle. The basis of this belief appears to be the strict control he held over his classroom.
67. Vicky Forth commenced teaching in 1981 and taught at Warnbro in the 1998 and 1999 school years. She was the most senior of the teachers in Learning Team 1 but was not the leader of the team. Ms Forth stated in her evidence that a meeting between the

principal and the learning team members took place at the beginning of the first term, before the term commenced. They were advised that their learning team would be responsible for Alissa who suffered from lupus. They were to be aware of this fact and "support her in any which way we could". Ms Forth's further stated that, as the learning team members weren't really aware of the condition, the nurse provided them with a pamphlet about lupus. Ms Forth made a comment which describes the focus of the learning team, at least to Ms Forth's understanding. She said: "...but basically as far as we were concerned the medical issues weren't so important, it was the educational issues - that we were able to provide her a secure, safe, quiet environment where she was able to learn to her own ability." In the Tribunal's view, it is difficult to see how the teaching staff would be able to determine how best to meet Alissa's needs unless they were adequately informed of her condition.

68. According to Ms Forth, she knew that Alissa was very susceptible to heat and it was therefore important that she be in a cool environment with ready access to drinking water. In the event that Alissa suffered a lupus attack, she was to be sent to the school nurse. Ms Forth was also aware that Alissa had some difficulty seeing certain colours on the white-board. With those factors in mind, Ms Forth used only dark coloured white-board markers, covered the windows to cool the room and allowed Alissa to choose where she sat and to leave the classroom for a drink of water when necessary. Alissa was also allowed to use the learning team office as a safe haven from the other students. Ms Forth described herself as being conscious of Alissa's special needs and denied ever accusing Alissa of faking a lupus attack.
69. Although Ms Forth was made aware of Alissa's condition from the outset, she did not, in fact, teach Alissa until the second semester. She noted that Alissa was absent somewhat more than the other students. Ms Forth described herself as very vigilant in trying to help Alissa to settle back into class. If Alissa had been away she would show her what the class had done while she was absent and ask her to try and catch up the best she could and to ask for help if she needed it.
70. Ms Forth rejected the proposition that Alissa was, or could have been, bullied in her class. She also denied ever witnessing any incident in which Alissa was bullied by another student but did recall an occasion in early March when an incident of bullying

was reported to her and Mr Woodley. A meeting was arranged with Mrs Carter and Alissa in which the incident was discussed. According to Ms Forth, Alissa was not aware of the name of the person so the action taken was to encourage her to look out for that person. Alissa was told that if she could give the staff more detail they would act upon her complaint. At that meeting Ms Forth was also made aware that Alissa had been subjected to bullying at other schools which she had attended. The record of that parent interview was tendered in evidence. It is dated 16 March 1998 and states:

"Bullying...."Look at the girl. She can't do anything right. Look there's the girl with AIDS. There's the AIDS victim keep away from her". Occurs recess, lunch and before school.

Action for follow-up: Alissa is to report to a staff member as soon as it happens, so staff can act. Organise freezer packs in case of lupus attacks.

71. Ms Forth also identified the protocol which would apply when there was a complaint of bullying. The student against whom the complaint was made is taken aside and spoken to. They are told that the conduct is not appropriate and that they are not to treat others with disrespect. Ms Forth described the usual procedure as involving an apology, a requirement that the conduct will not be repeated and a withdrawal from the situation, whether by detention or being placed in a time out room. The parents are also involved in the process.
72. Lynette Vernon has been teaching since 1982 and was Alissa's form teacher at Warnboro. She also taught Alissa science. As form teacher, Ms Vernon's responsibilities extended to meeting with the students first thing in the morning, taking the roll, identifying and addressing problems and giving messages to the students.
73. She first became aware of Alissa when the principal came into her staff room just prior to the commencement of first term with a copy of the action plan provided by the parents and advised her that she was going to get a student called Alissa Carter who had special needs. She was told that she would need to find out about her and put appropriate procedures into place. Ms Vernon's recollection was that she spoke to the nurse and obtained a pamphlet from her. She also recalled having two meetings with

the other teachers in the learning team, one of which was attended by the nurse. She could not specifically recall whether the nurse attended the first meeting which was prior to the commencement of term, but believes that "it was very early on". Ms Vernon was made aware that stress was part of Alissa's condition.

74. At the meeting there was discussion about ensuring that Alissa did not sit under fluorescent lights, that dark coloured white-board markers were available, that she was allowed to leave the classroom when she felt an attack coming on and concerning the availability of ice packs. It was agreed that Alissa would be placed in the learning team with a girl who she was friendly with who could give her support. Ms Vernon also recalls agreeing with the other teachers not to advertise to other students that Alissa had special needs. She said: "So we thought we would just let her integrate as herself, as just a normal student, but we would as teachers keep an eye on her." As laudible as that sentiment appears, the fact remains that Alissa had needs beyond that of a "normal" student and once the school became aware that she was experiencing problems such an approach would necessarily have to be reviewed
75. With respect to assisting Alissa during her absences from school, Ms Vernon stated that the standard practice was to give children who were absent the photocopied material from the classes that he or she had missed. As Ms Vernon was aware that stress was part of Alissa's condition she was mindful of not overloading Alissa with work. If Mrs Carter requested her to obtain work for Alissa during absences from school, Ms Vernon would go to the members of the learning team and ask them for work for Alissa. She could recall doing that "a couple of times" for Alissa but couldn't now recall the response from the teachers. She also would have suggested to Alissa that she obtain copies of notes from other students, in particular her friends.
76. Ms Vernon denied that Alissa was ever bullied in her classroom. She also denied accusing Alissa of faking a lupus attack to get out of work or to get out of class. Ms Vernon stated that she could not remember an occasion when Alissa left her classroom but there were occasions on which Alissa was not present and the other students told her that she was with the nurse. Ms Vernon stated that Alissa had a medical pass and could leave the room at any time.

77. While Ms Vernon does not recall Alissa ever reporting to her that she had been bullied she does remember a meeting "early on" in the year as a result of which Alissa was allowed to use the learning team office in the morning before being walked to class by Ms Vernon. This was because Alissa "felt she was being bullied". Ms Vernon stated that Alissa used the office frequently and would chat to her. She described Alissa as happy, bright and cheerful. Ms Vernon disputed that Alissa utilized this option because she had been bullied or in order to avoid bullying. She said: "No...So I just felt it was times when, you know, she had arrived early and her friends weren't there." It would seem that the meeting to which Ms Vernon refers is the meeting of 16 March 1998.
78. Having worked at three other high schools Ms Vernon considered Warnbro to be proactive with respect to bullying behaviour. The school had a policy in place in the Managing Student Behaviour handbook which provided very clear steps to manage student behaviour including bullying. According to Ms Vernon the policy was "individualized" by and for the learning team. There was a set procedure which was carried out, documented and followed up. Ms Vernon was not asked to elaborate on the content of this individualized policy. She also stated that a victim of bullying could anonymously fill out a complaint form rather than point out the perpetrators to the teachers. Once that course was adopted by a student the complaint was dealt with by student services.
79. Vance Bryan has been a teacher since 1995 and at Warnboro since 1997. In 1998 he was a member of Learning Team 1 and taught Alissa in Society and the Environment. Mr Bryan stated in his evidence that he first become aware of Alissa when the principal spoke to the learning team and informed them that there would be a student starting who suffered from lupus. The school nurse was present and gave what Mr Bryan described as "a rundown on what this condition meant and how it would affect us and what needed to occur". To his recollection he was told about the need to use dark white-board markers and for Alissa to sit close to the board. He stated that they were also told what symptoms to look for. However, when asked to relate what those symptoms were Mr Bryan then stated that he didn't particularly recall being told to look for any particular symptoms just that there would be times when Alissa wasn't feeling well.

80. Mr Bryan remembers being given a leaflet on lupus at that first meeting and recalls another occasion about a week or two later when the nurse spoke to them and asked whether they had any questions about the information in the leaflet. He could not, however, remember being told anything about Alissa's symptoms.
81. Mr Bryan also stated that there were meetings held throughout the year relating to Alissa's condition. He said they were basically of an ongoing nature during which there was feedback between the learning team members and the principal and the nurse. He recalls a specific occasion on which the nurse met with the members of the learning team. However, Mr Bryan's recollection of the focus of this meeting was the fact that Alissa was falling behind in most of her subject area through her frequent absences which was to the detriment of her learning. As to Alissa's health, Mr Bryan stated that he had a particular recollection of discussing allowing Alissa to leave the classroom and go straight to the nurses station, or to Mr Woodley's office if the nurse was unavailable, at the first possible notion "of any particular circumstances that arose". Based on Mr Bryan's recollection that the learning team members were not advised of the symptoms of lupus, merely that there would be times when Alissa wasn't feeling well, it would seem that the onus rested on Alissa to identify the fact that she was experiencing problems.
82. Mr Bryan recalled being asked by the form teacher, Ms Vernon, to provide work for Alissa in her absences from school. In his initial response he said that his preference was for her to come and see him so that he could explain the work to her. He could not remember Alissa coming to see him as a result. At a later point in his evidence he said that he gave work to Ms Vernon but the work was never completed. However he subsequently stated that he didn't provide her with work when she was absent because it was his usual practice to insist on students coming to see him personally first and nobody asked him to make an exception to his usual and preferred practice. Alissa was not asked whether this view was communicated to her by Mr Bryan. It was not communicated to her parents because Mr Bryan said that he had never had any personal dealing with either of them.
83. Mr Bryan stated that he was aware that Alissa had a pass which entitled her to leave the classroom when she needed to. There was no need to sight the pass but she was required to advise him

that she was leaving the classroom and why. He has no recollection of Alissa absenting herself from his class.

84. According to Mr Bryan, at Warnboro bullying was viewed negatively and the school had an anti-bullying programme in place to deal with it. He was not aware of Alissa being bullied in his classroom and she didn't complain of it to him. Because Alissa sat close to the board and was never more than 3-4 feet away from him, Mr Bryan stated that it was not possible for her to be bullied without him being aware.
85. Noel Woodley commenced teaching at Warnboro in 1998. In addition to his teaching role he was appointed as the student services coordinator. At Warnboro at the relevant time, student services consisted of a group of people, including an educator, the school chaplain, school psychologist and the school nurse. Mr Woodley said that he was responsible for co-ordinating the behavioural processes that each learning team develops to assist in the support of their students.
86. Mr Woodley said that in February of 1998 the principal alerted him to the fact that there was a special needs student in Learning Team 1 and that she suffered from a condition called lupus. Mr Woodley was advised that he was to assist the learning team to accommodate this student. Only Mr Woodley and the principal were at this meeting although Mr Woodley remembers also speaking with the learning team about the matter.
87. Mr Woodley was told by the principal that lupus was a disease which affects the auto-immune system of the body and has symptoms similar to arthritis. He was told that Alissa suffered from pain and inflammation in the joints which can be brought on by stress and by physical activity. He was told that Alissa suffered from a degree of blindness in one eye. He was also told that the condition can be fatal. In fact, Mr Woodley had prior knowledge of lupus as he used to teach a student who suffered from the condition who subsequently died.
88. Mr Woodley said that his impression was that Alissa had made a very good start to the year and had blended in well. She had a close group of friends and the teachers were happy with her behaviour in the classroom. He had not personally witnessed anything which would cause him concern or affect her long-term attendance at the school. However, Mr Woodley recalled that in

mid-March information was passed on to him at the learning team meeting that Mrs Carter wanted to meet with him about Alissa's complaint that she had been verbally abused or threatened by some older students. Mr Woodley stated that Mrs Carter did not mention that Alissa had received death threats. Mr Woodley met with Mrs Carter and advised her that the school would investigate the situation. Mr Woodley said in his evidence that he had been informed that Alissa did not know the names of the students involved or that she could not recognise them. He asked to speak with Alissa but was told by Mrs Carter that Alissa was worried about coming to see him because she was intimidated by him. He then suggested that Alissa meet with him at lunchtimes in the playground where the bullying incident allegedly took place to see if she could recognize any of the people involved. Mr Woodley also felt that this would give him the opportunity to develop a rapport with Alissa which would make her more comfortable in dealing with him if any bullying should occur in the future. Those measures were implemented and Mr Woodley's diary records a number of occasions on which he met with Alissa at lunchtime and recess.

89. One entry made on 19 March 1998 records a meeting with Mrs Carter in which she was advised that Mr Woodley would watch Alissa during recess and lunch. Mr Woodley elaborated on that entry in his evidence by stating that Mrs Carter was advised that the school had been unable to identify the students involved in the incident. According to Mr Woodley, Mrs Carter seemed to think that the bullying of Alissa was constant but the only incident that had been brought to his attention was the one where Alissa complained of being pushed down the stairs. Mr Woodley also said in his evidence that when he met with and spoke to Alissa in the playground she was with a group of close friends and they were all giggling and happy. A further diary entry for 27 March 1998 notes that Alissa seemed reticent about coming to see him. Mr Woodley's diary entries of March and April generally support his evidence that he attempted to monitor Alissa by meeting with her in the playground during lunch and recess and inquiring after her welfare.
90. The Tribunal was concerned that the problems associated with Alissa being seen walking around the play ground with Mr Woodley looking at other students might outweigh the potential benefits. Mr Woodley stated that it did occur to him that

Alissa might not want to be seen with him and that, if he came to see her in the playground, it might actually cause her some trouble. However, he said that he was in the habit of moving around the yard and talking to groups of students so he saw it as a continuation of his usual activities. Apparently, meeting with Alissa at her home where she might be more comfortable discussing her experiences at school was not considered to be an available option. Mr Woodley stated that a visit to the student's home "would be an unusual occurrence".

91. Mr Woodley's account of his involvement following the incident in which Alissa was pushed down the stairs differs slightly from that of Mr Drake-Smith. According to Mr Woodley, it was after 8 April 1998 that he was approached by Mr Drake-Smith and told that Alissa had been pushed on some stairs. As Mr Drake-Smith was unable to describe the students who had been involved in this incident he asked him to speak with Alissa again to obtain some more details. Mr Woodley said that he spoke with Alissa's peer group who were with her during that lunch-time and was able to ascertain that one of the people who had pushed her was one of her friends. It appeared that the girls had had some sort of disagreement at lunch-time and the other girl had made contact with Alissa. When interviewed by Mr Woodley the girl stated that Alissa had called her a name and she had called Alissa a name and then she pushed Alissa. There was no reference to Alissa's condition in the course of this exchange. It seems that this version of events was accepted by Mr Woodley without giving Alissa the opportunity to comment upon its accuracy. This account of the incident was not put to Alissa in cross-examination nor was she asked whether Mr Woodley spoke to her about it. The ultimate action taken by Mr Woodley was to advise the girl involved that conducting herself in that way was not tolerated at the school and she was to stop doing it. As to whether a teacher was present during the incident, Mr Woodley stated that if there was a teacher there, he was unable to identify the teacher. It was clear from Mr Woodley's response that the initial report from Alissa did refer to the presence of a teacher.
92. Mr Woodley was asked about the support services put in place for students who are the victims of bullying. The matters identified by Mr Woodley in his response were directed at the teachers to assist them in dealing with the situation, rather than at the victims. When questioned further on the assistance available to

the victim Mr Woodley stated that a victim of bullying was encouraged to come to the student services area and to report the incident to a person with whom they feel comfortable. However, Mr Woodley confirmed that Alissa was reticent about coming to see him and never actually discussed with him any bullying incident or anything of concern to her.

93. One option specifically identified by Mr Woodley was to try to identify the culprit by showing the victim photographs of other student and or suggesting the names of students who had previously been involved in this type of behaviour. This option was not offered to Alissa but Mr Woodley did offer to walk with her at lunch-time to see if she could identify those who had bullied her. Alissa was not required to point them out at that time, merely to later advise Mr Woodley afterwards whether she had seen anyone who was involved. Mr Woodley did not state how this person was to be later identified if Alissa did not know who they were. According to Mr Woodley, Alissa declined this offer
94. Mr Woodley gave evidence about the strategies in place to deal with bullying in the playground. He said that the school had duty teachers to supervise the students. If it was known that there had been bullying incidents taking place with students the school ran mediation sessions between the students, counselled them and sometimes referred them to the chaplain. The school psychologist would also do skill development with the students, to identify bullies or strategies to deal with bullies. Mr Woodley described it as a multi-faceted approach.
95. According to Mr Woodley, the school wanted to be proactive in dealing with bullying issues in the school and, as part of the school's anti-bullying program, decided to run an all day series of workshops and activities to teach the students strategies to deal with bullying. Included in the workshop was a role-playing exercise in which the students were encouraged to swap roles, to be the victim, to be the bully and to be the observer. The role-playing exercise was conducted once in each learning team and each session involved 50-60 students with two teachers. The students were asked to form into groups of people they were comfortable with and rehearse their role-plays. They would then perform them to the whole class. In terms of supervision, Mr Woodley said that he and the other teacher were moving around the room the whole time. Following the performance of the role-plays, Mr Woodley would lead a discussion. Mr Woodley stated

that the students were instructed to swap roles and most would have but he could not guarantee that all the students did so. He agreed that it would be inappropriate for someone who had been bullied to play the person being bullied.

96. Mr Woodley was not able to give a date on which the workshop took place but believed it would have been in February or March of 1998. It was certainly before July when Mr Woodley ceased in his position as student services consultant. Mr Woodley stated that at the time of the role-playing exercise he was not aware that Alissa had been subjected to bullying at Warnboro. There is insufficient evidence for the Tribunal to determine the exact timing of the role-playing exercise or whether it occurred before Mrs Carter's complaint to the school of 16 March 1998. However, even if the Tribunal accepts that the role-playing exercise occurred prior to any act or complaint of bullying involving Alissa which occurred at Warnboro, the fact remains that Warnboro, through its principal, was aware that Alissa had been subjected to bullying at East Waikiki. That information should have been communicated to Alissa's teachers so that situations such as that now complained of to the Tribunal could be avoided.
97. Claire Reynolds is a registered nurse employed by the Health Department and currently working at Warnbro. Ms Reynolds works at Warnbro four days a week and on the remaining school day another nurse is on duty. The nurses work from the medical centre and are present during school hours. Their duties include conducting health education sessions in the classroom.
98. Ms Reynolds was working at Warnboro in 1998. She recalled Alissa Carter and stated that she first became aware of Alissa on 19 March 1998 when Mr Nairn provided her with a copy of the action plan prepared by the parents. She understood the purpose of the care plan to be to inform her about some of the issues that concern Alissa so that she could make notes of it in the medical records. Ms Reynolds rang Alissa's paediatrician to obtain information about Alissa and her lupus and reported back to Mr Nairn. Mr Nairn said that he would speak to the teachers concerned and make sure that they were informed. Mr Nairn did not give evidence before the Tribunal so it is not known whether he did, in fact, pass this information on.

99. Ms Reynolds stated that she put a copy of the information obtained by her into the academic records so the teachers could have access to it. However, none of the teaching staff were asked whether they accessed this information and the evidence given by them as to the source and extent of their knowledge is more consistent with the conclusion that such access did not occur. Neither did Ms Reynolds recall being contacted by the members of Alissa's learning team. As far as she was aware, they had been given information about Alissa's condition at the beginning of the year by the principal.
100. Ms Reynolds stated that she got to know Alissa through her visits to the medical center. She said that she gave Alissa a medical pass so that she could come to the medical centre at any time simply by showing the pass to her teachers. This description of the medical pass does not fit with the wording of the pass provided to Alissa by the principal. The existence of a more general pass was not further explored in evidence and was not raised in the context of the tennis court incident. It may, however, explain the discrepancies in Alissa's evidence as to the failure to use her pass on the occasion of the tennis court incident.
101. Ms Reynolds dealt with Alissa for sore throats, joint aches and pains. Also, on really hot days Alissa would come to the medical centre at recess and/or lunchtime to stay out of the sun. She saw Alissa on a frequent basis but did not develop a close personal relationship with her. Ms Reynolds stated that Alissa did not tell her she was being bullied and the medical records do not record any such complaint. However, Ms Reynolds did note that the medical staff do not deal with bullying.
102. Mr Reynolds stated that the nursing staff were approached by Mr Carter at the end of August 1998 with a request to provide Alissa's teachers with more information about lupus because he felt that the staff needed more knowledge on the subject. Mr Carter also indicated his intention to provide to the nursing staff any information that came from Alissa's doctors for dissemination to the teaching staff. Following this conversation, the nursing staff arranged to meet with Alissa's learning team and went through the pamphlet on lupus and outlined all the things that actually pertained to Alissa. Ms Reynolds was not aware that the teachers had already been provided with the pamphlet on lupus at their first meeting with the principal. Ms Reynolds stated that the impression she formed at the meeting was that the teaching staff

were willing to team together and help Alissa with any issues that she had. She did not elaborate on the basis for that view. Ms Reynolds confirmed that Mr and Mrs Carter were not invited to the meeting and hence were not present. The only information which Ms Reynolds was able to give as to communication with the Carters concerning the meeting was that the other nurse phoned Mr and Mrs Carter "to let them know how the meeting went".

103. There was a slight conflict in the evidence of Ms Reynolds as to the level of knowledge of Alissa's condition among the teaching staff. At one point Ms Reynolds expressed the view that the teachers were aware of how lupus affected Alissa but also recognised Mr Carter's concern that the seriousness of the condition, including the fact that it could affect many of the body's primary organs, had not been adequately communicated to the teachers and was not clearly understood by them. As a consequence, at the meeting in September Ms Reynolds focused on the possible outcomes of lupus.
104. The other nurse, who was not called to give evidence created a record of the contact with the parents which led to the 10 September meeting. The record was read into evidence and is in the following terms:

"I was approached in person by Mrs Carter regarding Alissa. Alissa is losing a lot of time from school due to becoming very stressed whilst in school. The parents feel the teachers need more information regarding lupus. A meeting with Alissa's learning team took place on the 10th of September and it was explained to the teachers what Alissa's condition entailed and what organs of the body were involved and what her difficulties were. The teachers were very supportive and agreed to assist in any way possible. They also requested that Alissa let them know if she had a problem with work, etcetera, as she tends not to complain. It was also agreed that next week the school nurse attend a health class with her peers to explain what lupus is for them and to also have a better understanding. I spoke with Alissa and told her she must now speak with her teachers when she is having a problem but also as her stress level should now reduce she should try to stay in school and not go home so often. Obviously, if she's feeling really sick she will be able to go home but her parents agree that Alissa sometimes goes home when not necessary. I spoke with Mr Carter by telephone

and explained what transpired in the meeting. He was very pleased with the outcome." (emphasis added)

105. The belief on the part of Alissa's teachers that "she tends not to complain" is significant for two reasons. Firstly, in her evidence-in-chief Ms Reynolds expressed the view that Alissa was perfectly capable of raising bullying concerns. Clearly, the two views are not consistent and the conflict was not adequately explained by Ms Reynolds. In the Tribunal's view, Ms Reynold's statement should be taken as no more than reference to the fact that Alissa was physically capable of complaining to Ms Reynolds and had many opportunities to do so. The second aspect of significance is that, in the Tribunal's view, because they were aware of Alissa's tendency not to complain, the teachers had an added responsibility to ensure that Alissa's special needs were being met and would not reasonably be entitled to wait until she made a complaint to them.
106. The meeting with Alissa's fellow students, referred to in the note in the medical records, did in fact take place on 16 September 1998. According to Ms Reynolds, one of the issues that had come up was that some of the students were saying that Alissa had AIDS and her parents wanted Ms Reynolds to address this issue with the student. Alissa elected not to be present at this meeting but was later advised of what had occurred. Ms Reynolds stated that she "went and spoke to the children again about how lupus affected Alissa and that...it was totally different from AIDS". Implicit in this statement is that there was a prior meeting between Ms Reynolds and the students but there is no reference to this elsewhere in the evidence or in the documentation provided to the Tribunal.
107. Ms Reynolds said in her evidence that there were a number of students at Warnboro with disabilities and she considered that the school dealt with these students very well. However, it is significant to note that the types of disabilities to which Ms Reynolds referred were relatively well known and mostly of a type with very obvious physical manifestations. Even if the Tribunal considers that Warnboro's way of dealing with students with disabilities is generally of an acceptable standard, it does not follow that the way it dealt with Alissa and her special needs was similarly of an acceptable standard.
108. Adel Arioli commenced teaching English at Warnboro in 1998, specializing in Literacy. It was her first full-time secondary

teaching position, although she had previously worked in a high school as a relief teacher. Ms Arioli explained that she was still learning the system of secondary full-time teaching during 1998 and appeared to be somewhat sensitive to questions which she perceived to be criticisms of the way in which she dealt with Alissa.

109. Ms Arioli stated that at the commencement of first term the principal informed Learning Team 1 that they had a student with lupus. He also explained the symptoms to look out for which Ms Arioli recalled as being temperature fluctuation and joint pains. To her recollection no documentation concerning the condition was provided to the teaching staff at that time. However, "not long after" that meeting there was a meeting with the nurse who provided more information. Of concern was Ms Arioli's comment that initially she did not realize that Alissa was the student with lupus. Neither was she made aware that Alissa had a problem with the whiteboard, which Ms Arioli tended to use frequently in her class.
110. Ms Arioli stated that she had never witnessed an incidence of bullying involving Alissa though it did come up in learning team meetings that Alissa had complained of being bullied. She said that the staff endeavoured to address any bullying situations by following through with the Managing Student Behaviour policy ("MSB policy"). When asked what action she would take if a student reported that she had been bullied, Ms Arioli gave the following response: *"It depends on the situation and what the accusation is as well. It's not as if you can go and start approaching other students regarding their behaviours if you have not seen the particular behaviour."* The Tribunal views that response with some concern, involving as it does a threshold requirement that, before a student accused of bullying can be approached, the behaviour has to be witnessed by a teacher.
111. Ms Arioli was somewhat critical of Alissa's progress, or lack of progress, in her class. She said that when Alissa was in class she seemed able to cope with her lessons but she didn't manage to get much work out of her, if any at all, which caused her concern. Later in her evidence Ms Arioli acknowledged that this was due to the fact that Alissa had been absent from school through her illness. She said that she vaguely remembered being told by Mrs Carter that Alissa was not at school because of the symptoms of her illness and that she was having difficulties with memory

which was one of the reasons why Alissa wasn't producing her work. According to Ms Arioli, as the year progressed Alissa was less and less at school which presented particular problems for the type of teaching implemented by Ms Arioli which was very hands on and involved constant interaction with and feedback from the students. She did recall the learning team being asked by Ms Vernon to provide work for Alissa. She said that she began "*to summarise the lesson contents for when Alissa would come in*" and made herself available to all students at lunchtime but Alissa did not take up this opportunity. She said that she endeavoured to give Alissa support in her subject area but Alissa chose not to take that support.

112. The impression gained by the Tribunal from Ms Arioli's evidence was that she did not have a good appreciation of the problems involved in Alissa's condition and remained unconvinced about the connection between Alissa's lack of productivity and her condition. Neither did she seem prepared to deviate from her normal teaching methods in order to meet Alissa's special needs.
113. When asked whether she had ever indicated to Alissa that she didn't believe that Alissa was suffering from a lupus attack when she said she was, Ms Arioli said that she did not recall ever saying anything like that. She also said that she did not recall an incident where she initially refused Alissa's request to go to the medical center. On balance, the Tribunal prefers Alissa's evidence in relation to both these events.
114. Paul Valentino commenced at Warnboro in 1997 teaching physical and health education. He said that he was made aware of Alissa's medical condition at the start of the school year by the nurse and the principal. He said that the nature of the condition was explained to him although it seems only insofar "*as it pertained to physical education*". Mr Valentino said that he was made aware of two things: that Alissa was sensitive to heat and to the sun and that she couldn't exercise if to do so was painful for her. He was also provided with a pamphlet on lupus from which he formed the view that the two main aspects of the condition from his perspective as a physical education teacher were overheating and the arthritic symptoms. Mr Valentiono stated that one of the management strategies implemented in relation to Alissa was that she be asked about her medical condition at every PE session. The Tribunal considers that strategy to be sound in

that it places responsibility for Alissa's welfare where it should properly lie, on the teaching staff rather than on her. It also overcomes what the teachers themselves recognized as Alissa's reluctance to complain. The evidence revealed that, however meagre the knowledge of lupus by teaching staff, they were made aware that heat and exercise were triggering factors. As those factor were more likely to arise in the course of a physical education class, the Tribunal considers that it was incumbent on Warnboro to ensure that Mr Valentino was as knowledgeable about Alissa's condition as reasonably possible and that he took active steps to ensure that the requirements of a physical education class did not cause her detriment.

115. Mr Valentino was unable to confirm whether the strategy was carried out but stated that "*...I do know that at all times I was interested in how she was going and if she had have said anything to me then I could have dealt with it but I can't recall.*"
116. To Mr Valentino's recollection, it was in about March that Alissa was given the pass entitling her to go to the library at any time that she felt she was unable to do physical education. It is apparent from the terms of the pass, and it was Mr Valentino's understanding, that Alissa wasn't totally excused from physical education but she was allowed to be excused whenever she wanted to be. Mr Valentino's recollection was that Alissa did sometimes participate in physical education but also used the pass throughout the year and did not appear to be embarrassed or concerned about so doing.
117. Mr Valentino said that he was aware, "at the briefest level", that Alissa was involved in some bullying in her learning team and was sensitive to bullying and that it was something he had to watch out for. However, he does not recall seeing any bullying.
118. Mr Valentino gave evidence concerning the tennis court incident. He stated that the school's policy was that if a child is unprepared for physical education by failing to bring an adequate change of clothing they were asked to walk around the oval or to walk around the tennis court. This was a new policy which was introduced in week 1 of Term 4. The rationale behind the policy was that it was beneficial for students to be involved in some sort of physical activity. Mr Valentino stated that this policy also applied to Alissa. He said: "*if she felt like she was able to participate or wanted to walk with her friends or to socialise with*

her friends then I allowed her to do that". However, if she wanted to use her pass and go to the library then she was allowed to do so.

119. It would seem that Mr Valentino does not have a specific recollection of the tennis court incident although he did deny forcing Alissa to walk around the court. He did recall being contacted by Mrs Carter about the incident and that this occurred early in October. On that basis the incident took place shortly after the implementation of the policy.
120. Whilst Mr Valentino had no actual recollection of the incident he did make some comments as to how events would have transpired. When asked how it had come about that Alissa walked around the tennis court he said "*she would have been offered that course and she would have taken it*". Mr Valentino does not suggest that he specifically gave Alissa the option to either walk around the tennis court or to go to the library. The scenario most consistent with his evidence is that, together with a number of other students who had omitted to bring a change of clothing, she was instructed to walk around the tennis court in accordance with the policy. He further stated that she couldn't have objected because, if she had, he would have let her go to the library. Mr Valentino agreed that, in order to avoid walking, she would have had to make a specific request and/or produce the pass. Mr Valentino expressed the view that any child who was experiencing problems would have come to him and complained "we would have managed it from there". He said that he knew that Alissa was aware of how to manage her situation and maintain that he did not force her to walk. He was asked whether in enforcing the policy he took into account the disinclination of children with disabilities to appear different from their peers by actively seek to be excused rather than be excused at the instigation of the teacher. Mr Valentino said that he took this into account all the time which was why they dealt with such matters subtly. However Mr Valentino made no prior arrangement with Alissa as to how best to deal with such a situation and it seems that dealing with matters "subtly" in fact meant placing the responsibility on Alissa. Mr Valentino described his approach in the following terms: "*...the approach I always took was that Alissa knew what was best for her and if she chose to do that then I felt that was okay.*"

121. In his evidence-in-chief Mr Valentino stated that the telephone conversation concerning the tennis court incident was the only occasion on which he spoke to Mrs Carter. However, in cross-examination he was taken to the Learning Team 1 data which recorded that in Week 1, Term 1, he received "a note from Alissa re her not participating in PE by choice". It is also recorded in that document that he spoke to Mrs Carter about this issue. Mr Valentino said that he had read those notes and did not deny that the phone call took place, he simply had no recollection of it. It can be seen that even the school's records support Mrs Carter's evidence that she had previously spoken to Mr Valentino about Alissa.
122. According to Mr Valentino, during the phone call following the tennis court incident, Mrs Carter wanted to make it clear to him what was involved in lupus and re-emphasised Alissa's sensitivity to heat and her arthritic symptoms. Mr Valentino said that Mrs Carter raised the point that while Alissa was walking she had been at risk of a lupus attack. If Mr Valentino's account of this conversation is accepted it conflicts with the evidence given by Alissa and Mrs Carter that Alissa actually suffered a lupus attack as a result of the incident although perhaps it is simply a matter of degree as it was not suggested by Mrs Carter that Alissa had to be hospitalised as a result of the incident.
123. It is significant to note that Mr Valentino initially stated that when he finished the phone call "I felt confident that I knew exactly how to manage the disease". Mr Valentino did qualify his statement by saying that his level of knowledge was "not much more different than how I had felt before but I felt like the mum knew that it was being handled well in phys ed and that the situation had been dealt with adequately." However, the document produced to the Tribunal entitled Learning Team One data on Alissa Carter states that "Paul had not realised the severity of the situation because Mrs Carter had not complained to him directly". When questioned on this Mr Valentino gave the following response:

"What I would probably say is that I was not fully aware of the potential, of the serious consequences or the potentially serious consequences. I knew what the problems were, that she was sensitive to the heat and that she had problems in her joints, but I didn't realise quite how sensitive it could have been if she had have been involved against her will."

124. As to the tone of the conversation with Mrs Carter, Mr Valentino said that it was very pleasant and he did not have the impression that the matter was serious or that he had done anything wrong. He admitted that he did not have a full recollection of the call and believes he would have if it had arisen from a situation where he had been at fault. Mr Valentino said that he got off the phone feeling like "the mum was satisfied with what we had dealt with."
125. Mr Valentino was questioned by counsel for the Respondent on whether the phone call was in relation to forcing Alissa to walk around the tennis court. His response was: "No, it couldn't have been because I wouldn't have done that". However, at an earlier point he said in his evidence that part of the discussion related to the fact that he was "never to force [Alissa] to undergo physical activity". It would seem that, at the very least, this was Mrs Carter's understanding as to what had occurred. Mr Valentino denied ever confiscating Alissa's pass or refusing her permission to get a glass of water or a hat or that his conversation with Mrs Carter related to those issues.
126. At the relevant time, Terry Sanbrook was the principal at Warnboro. He summarized for the Tribunal the teaching system and services which existed at Warnboro at the relevant time. Mr Sanbrook stated that learning teams comprising six teachers were each responsible for approximately 130 to 140 students. Originally physical education teachers were not part of the learning team but that omission was later rectified.
127. Mr Sanbrook first became aware of Alissa Carter in June 1997 when a request was made by Alissa's parents for an interview with him regarding a cross-boundary enrolment. Mr Sanbrook acknowledged that Mr and Mrs Carter were looking for a supportive school environment and one of the bases for a cross-boundary placement was the ability of the school to provide Alissa with the necessary pastoral care. Mr and Mrs Carter advised Mr Sanbrook of the nature and seriousness of Alissa's condition and provided him with the action plan and also the report from Dr Gardiner dated 19 March 1997. Mr Sanbrook stated that he was made aware that Alissa had suffered verbal harassment from other students at East Waikiki which she found distressing. He conceded that, in his experience, a child who had suffered that kind of harassment in the past would feel very threatened if they encountered similar behaviour in a new school.

Mr Sanbrook then stated that in those circumstances, "the obvious response would be to try to put into place as much support as we possibly could".

128. Mr Sanbrook said that he supported the cross-boundary application and made the commitment that at the beginning of the school year he would meet with the learning team and fully brief them on Alissa's condition. This briefing took place on or about the 27th of January. Mr Sanbrook said that he met with the learning team and used the written document that he had received from the parents to advise the teachers of the manifestations of the illness. He told the members of the learning team that, if there was any sign of these symptoms, they were to refer Alissa immediately to the school nurse or to contact the parents. During the meeting the teachers actually requested more information. As a result, the school nurse was asked if she could find some more information and approximately a fortnight later she provided the teachers with the pamphlet on lupus.

129. Mr Sanbrook also said that it was because he was made aware of Alissa's prior experiences that he took so much time explaining the situation to the teachers in order to make them sensitive to the needs of the student. However, when pressed on this point Mr Sanbrook conceded that he didn't actually tell Alissa's teachers that she had previously suffered bullying. He simply told them that she was "vulnerable". His explanation for that omission was that he "didn't feel it was appropriate at the time". He further elaborated on that explanation in the following terms: *"One of the things we made a conscious decision about earlier on, at the beginning, was that we wanted the student to feel that the mainstream situation - - that she was part of the school and not to highlight any adverse experience because once you do that that tends to exacerbate certain situations, so we made that conscious decision early on"*.

130. In the Tribunal's view, a desire to make Alissa feel part of the mainstream school environment might be an adequate explanation for not giving information about her past experiences to Alissa's fellow students but is hardly a compelling explanation for failing to bring to the attention of her teachers that she had previously been the victim of some quite serious bullying at a former school. In the Tribunal's view, Mr Sanbrook's response on this issue was unsatisfactory.

131. Mr Sanbrook also stated that he made a commitment to issue a pass that Alissa could carry in her file which excused Alissa from any activities at any time if she felt ill. That description of the pass is not consistent with its actual terms. It is more consistent with the description of the medical pass issued by Ms Reynolds. Mr Sanbrook was adamant that at no stage was Alissa's pass confiscated.
132. Mr Sanbrook gave evidence concerning the school's approach to bullying. He stated that the staff are issued with a fully comprehensive staff handbook at the beginning of the year. Included in handbook is the "Staff Roles and Responsibilities in Student Behaviour Management" policy which includes the school's anti-bullying policy. Mr Sanbrook described the policy as both pro-active and re-active. The proactive part of the policy encourages students to confide in teachers if they are being bullied and looks at strategies to combat bullying. The reactive part of the policy provides instructions to teachers on action to take if they encounter a case of bullying, including to whom the matter should be referred. Teachers are required to listen and respond firmly and promptly to reports of bullying and to support students who are being bullied. They are required to discuss bullying, improve the self esteem of victims, help victims to develop positive strategies to combat bullying, contact parents at an early stage, deal with the conflict in consultation with the victim and, where appropriate, impose the sanctions on the perpetrator which are provided for in the policy. The policy contains a clear statement that bullying will not be tolerated in the school. Mr Sanbrook also stated that, in order to raise awareness, the school regularly sends out a school bulletin in which anti-bullying devices are mentioned. However, he was unable to recall whether that was occurring in 1998.
133. While it is certainly important for schools to have a sound anti-bullying policy, it does not follow that a school with a sound written policy deals effectively and appropriately with bullying behaviour. In practical terms, how the policy is implemented, rather than how it is worded, is the more important factor. Mr Sanbrook stated that in 1998 the school initiated an anti-bullying programme during first term which involved, amongst other aspects, awareness raising through role playing.
134. In relation to Alissa's situation, Mr Sanbrook stated that he became aware that there were some issues of bullying and that

Alissa at times felt "uneasy". He spoke to the teachers, including Mr Woodley, about following that through and was assured that they had done so. It was Mr Sanbrook's belief that "all appropriate actions within our policy and procedures had been followed". He said that he was aware that Miss Vernon frequently walked to class with Alissa in the mornings and was there for her as a mentor. The school also arranged for another student to act as Alissa's peer support person.

135. When asked to elaborate on his knowledge of the problems being experienced by Alissa Mr Sanbrook stated that he was aware that students were calling her some names. He became aware of this from his informal talks with the learning team. He was also aware of the incident where Alissa was pushed down the stairs. He was told of this by Mr Woodley and also informed about the way in which it had been handled. As to the tennis court incident, Mr Sanbrook said that he was told of it by Mr Valentino following the call from Mrs Carter although he disputed that he had been advised that Alissa was forced to walk around the tennis court. According to Mr Sanbrook, Mr Valentino said that he had spoken to Mrs Carter and considered that the situation had been resolved. Mr Sanbrook's only contact with Mrs Carter about the incident was after Alissa had left "when the situation became more heated".
136. Despite being aware that Alissa was experiencing problems at school, Mr Sanbrook declined her parents' request for a meeting with Alissa's teachers "to discuss and educate yourselves about Alissa's Medical problem and the abusive behaviour of other students towards our daughter". Mr Sanbrook said that when he received the request he spoke to the learning team members and to Mr Woodley. Mr Sanbrook gave a number of reasons for refusing Mr and Mrs Carter's request. Included in those reasons were the fact that "we were just organising end of term activities", "the teachers had been given as much information as could possibly be given at this point", "the issue of abusive behaviour had been dealt with" and that "Mr Woodley and the learning team had been in constant communication with the parents".
137. In the Tribunal's view, the evidence does not support a conclusion that, as at 2 April 1998, the teachers at Warnboro had been given as much information as possible about Alissa's condition. While the initial complaint of abusive behaviour made

in March may have been the subject of a meeting and agreement as to follow up action, it was not the case that the problem was resolved. It is difficult to imagine what end of term activities would or should take precedence over a meeting with concerned parents in relation to the needs of a student with a serious illness exacerbated by stress who is being subjected to abusive behaviour by fellow students. Indeed it is difficult in such circumstances to understand why the principal would not make all reasonable efforts to give the parents the opportunity to impart whatever information they felt the teachers needed in order to meet the special needs of their child. It is also difficult to accept that the timing was, in fact, an issue when there was no offer to hold the meeting at another time. When that issue was raised with Mr Sanbrook he attempted to categorise his reference to Mr Woodley being "only a phone call away" as an immediate response to the request for a meeting. The Tribunal does not accept that proposition and considers that the terms of the final paragraph of the letter to Mr and Mrs Carter was highly unlikely to convey to them that they could, through Mr Woodley, arrange another time for a meeting with the learning team.

138. The Tribunal considers that Mr Sanbrook's response to the request of 2 April 1998 supports the evidence of Mrs Carter that Alissa's teachers did not seem to appreciate the seriousness of Alissa's condition and the problems she was experiencing at school and that the school was unwilling to accommodate the parent's desire to ensure that staff were fully informed of Alissa's condition, her needs and her experiences in the school environment.
139. At one point in his evidence Mr Sanbrook asserted that if he had received a written communication from a parent alleging bullying he would call a meeting of the learning team, invite the parents and address the issue. The Tribunal is unable to accept this assertion in circumstances where Mr Sanbrook refused Mr and Mrs Carter's specific request for just such a meeting. Mr Sanbrook also described himself as readily accessible and stated that an appointment could be made with him either directly or through his secretary. He stated that he told Mr and Mrs Carter that he was available to personally deal with them but they never took up that option. In view of his response to the letter of 2 April 1998 Mr and Mrs Carter could be forgiven for thinking that the offer was more one of form than substance.

140. Mr Sanbrook also attempted to bolster his position by reference to the fact that the request made later in the year for a meeting was not denied. However, it is clear on the evidence that this was a further request, that it was made to the school nurse and, although a meeting was convened, Mr and Mrs Carter were not in attendance. The Tribunal considered Mr Sanbrook to be particularly evasive on the issue of whether Mr and Mrs Carter were even invited to attend. Mr Sanbrook was asked if Mr or Mrs Carter attended the meeting held later in the year and he said "not that he remembered". The following exchange took place between Mr Sanbrook and the Tribunal:

"Is that because they declined to attend or because you didn't invite them to attend?---They were available - - they were invited to come, yes.

Is there a letter that invites them to that meeting?---I mean, we said we were running the meeting and that they could attend if they wished.

My question was is there a letter - - ?---No.

- - that invites them to the meeting?---No, there's not.

Well, then at any stage were Mr and Mrs Carter given the opportunity to meet with the learning team teachers and put before them the information that they felt was necessary for the teachers to have to deal with Alissa?---The learning team teachers - - it's part of, I guess, the philosophy of the school - - there's meetings going on with parents frequently in all sorts of situations.

Did Mr and Mrs Carter meet with the learning team at any stage?---They met with individual teachers but not with the whole learning team."

141. Mr Sanbrook further stated in his evidence that he didn't receive any written communication from Alissa's parents in relation to bullying other than the letter of 2 April. The Tribunal considers that that observation would have more substance if it were not for the fact that the parent's previous communication had fallen on deaf ears. Mr Sanbrook also stated that he could not recall receiving any complaints from Alissa or her parents about the way she was treated by the teaching staff. That view is supported by the documentation produced to the Tribunal but it should be

noted the 2 April letter clearly sets out a belief on the part of Alissa's parents that the teaching staff were not sufficiently informed as to Alissa's medical problem.

142. Mr Sanbrook insisted that Mr and Mrs Carter did have the opportunity to discuss with teachers matters concerning Alissa's welfare and that because of the constant nature of the telephone contact between the parents and Mr Woodley, the parents were kept fully informed.

143. In his evidence, Mr Sanbrook expressed the view that "the staff had sufficient information, and more than sufficient information, to allow Alissa to go straight to the nurse or to the library if she felt under any illness or whatever. Mr Sanbrook elaborated on this view by stating that, as long as the teachers were aware that the student was sick, they didn't have to know everything about the illness. That view overlooks the fact that he is not in the best position to determine the sufficiency of information required to meet Alissa's special needs.

144. The Tribunal was not impressed by the evidence of Mr Sanbrook. In the Tribunal's view, there was a tendency on Mr Sanbrook's part to understate the seriousness of the complaints being made by Alissa's parents on her behalf and overstate the school's response to those complaints and to Alissa's special needs. Mr Sanbrook repeatedly made reference to being sensitive to Alissa's needs but, in the Tribunal's view, there was little evidence to support such a conclusion. On a number of significant issues Mr Sanbrook was evasive and the explanations he did give were less than compelling. Where his evidence conflicts with that of Mrs Carter or of Alissa, their evidence is to be preferred.

Factual findings

145. As outlined above, the allegations made against the Respondent fall into two categories. The first category includes the general attitude and conduct of Warnboro staff in dealing with Alissa and her lupus. In their evidence, both Alissa and her mother gave examples of problems which were attributed to a failure on the part of the teaching staff to appreciate the nature and extent of Alissa's condition. They include:

- The failure to understand Alissa's need to leave the classroom and attend the medical centre when her lupus was symptomatic;
- The failure to allow Alissa to use her pass to leave the classroom on every occasion on which she sought to do so;
- Accusing Alissa of faking a lupus attack to get out of class;
- The use of inappropriately coloured white board markers;
- The failure to provide work for Alissa when she was absent from school due to ill health;
- The failure to deal adequately with the bullying Alissa experienced at Warnboro.

146. There was also a proposition put to witnesses on behalf of the Complainant that Alissa should have been placed in the learning centre at Warnboro. However, it is apparent from the unanimous response from the teaching staff that the learning centre is a special education centre for children who are intellectually impaired or whose physical impairment has a substantial adverse impact on their ability to learn. In the Tribunal's view, the evidence does not support a finding that Alissa should have been placed in Warnboro's learning centre.

147. The second category comprises the two specific incidents; the role-playing exercise and the tennis court incident.

148. There is significant conflict between the account given by Alissa and her mother regarding Alissa's experiences at Warnboro and that given by the teaching staff. While there were some discrepancies in the evidence of Alissa, the Tribunal considers that they can be adequately explained by the time lapse since the occurrence of the events. Alissa's account of events, and that of her mother, is supported in part by that of the teaching staff and much of the documentary evidence provided to the Tribunal is consistent with the evidence of Alissa and Mrs Carter that Alissa experienced significant and ongoing problems during her time at Warnboro. Whilst the recollections of Alissa and her mother may well have been coloured by what the Tribunal considers to be the considerable emotional consequences of Alissa's experiences at Warnboro, the Tribunal found them to be credible witnesses.

149. There were also discrepancies in recollection between the individual teachers, particularly in relation to the timing of the provision of information on lupus. In the Tribunal's view, much of this can be explained by the effluxion of time. However, the considerable conflict between the recollections of the teachers and those of Alissa and Mrs Carter cannot be so readily explained. There was a substantial, perhaps understandable, defensive flavour to much of the evidence given by the teaching staff. There was a tendency, in the Tribunal's view to overstate the level of attention given to Alissa's special needs but at the same time to understate those needs and Alissa's negative experiences. There was also a concerning tendency on the part of all teaching staff to assume the adequacy of their knowledge of lupus.
150. However, in the Tribunal's view, responsibility for the inadequacy of the teachers knowledge, and hence responsibility for the consequences to Alissa, properly lies with the school administration and not with individual teachers, some of whom were relatively inexperienced and relied on others to provide them with the necessary information. It was Mr Sanbrook who made the commitment to Alissa's parents on behalf of the Respondent and it was his obligation to ensure that all reasonable steps were taken to inform the relevant teaching staff of any information which may affect Alissa's special needs. In the Tribunal's view, the persons in the best position to determine the adequacy of the knowledge of the teaching staff were the parents who were the only ones who had extensive and first-hand knowledge of dealing with Alissa's special needs. In those circumstances it was highly inappropriate for Mr Sanbrook to reject Mr and Mrs Carter's initial request for a meeting with teachers. It was even more unfortunate that, despite regular verbal complaints by the parents, it was not until some six months after the initial request for a meeting that the teachers were provided with more in depth information and even at that stage were deprived of the parent's input.
151. For the reasons outlined above, where the evidence of the Respondent's witnesses conflicts with that of Alissa and her mother, the evidence of Alissa and her mother is to be preferred. The Tribunal finds that the teaching staff at Warnboro were not adequately informed of the nature and

effect of Alissa's lupus and hence were not in the best position to adapt their teaching practices to meet her needs.

152. The Tribunal accepts Allissa's evidence that there were occasions on which teaching staff failed to understand her need to leave the classroom, failed to allow her to use the pass to do so and further finds that there was at least one occasion on which Alissa was accused of faking a lupus attack. The Tribunal accepts that there may have been occasions on which teachers used inappropriately coloured white board markers but considers that generally all reasonable attempts were made to address this specific aspect of her condition. Indeed, on the evidence of the teachers it seems to be one of the few aspects of her condition of which they were aware and had no difficulty in addressing. The Tribunal further finds that there is some substance to Alissa's complaints that some teaching staff were not particularly helpful in providing work for Alissa during her absences through illness. However, in the Tribunal's view all such omissions resulted from ignorance of Alissa's needs rather than any malice or indifference on the part of members of Learning Team 1.
153. The Tribunal considers that the evidence supports a finding that Alissa was the subject of regular and significant bullying which related to her condition. Although some incidents may not have involved specific reference to her condition, the Tribunal accepts that from early in the school year the bullying took the form of referring to Alissa, inaccurately and hurtfully, as the girl with AIDS. In the Tribunal's view the conduct thereafter was a continuation of the same theme and would certainly have been viewed by Alissa in that way. It was suggested by some witnesses that, while there may have been complaints, there was no eye-witness evidence to suggest there was any substance to them. For example, Ms Vernon preferred to describe the situation as one in which Alissa "felt she was being bullied". Each teacher denied that any incident of bullying had taken place in their presence. However, it should be noted that in the first recorded complaint of 16 March 1998 the allegation is that these events were taking place at recess, lunch and before school and hence may not have occurred in the presence of any teaching staff. Mrs Carter gave direct evidence of bullying which occurred in her presence when she was collecting Alissa from school and the Tribunal accepts that evidence. The Tribunal also accepts the

evidence of Mrs Carter and Alissa, supported by Senior Constable den Ridder that the situation had reached crisis point by 27 October 1998.

154. Warnboro did have in place at the relevant time an Anti-Bullying policy and certainly took steps to address the issue of bullying generally and also to address some of Alissa's complaints. Even Alissa's account of events indicates that in cases where abusive behaviour took place in the presence of a teacher, those teachers immediately intervened. However, the Tribunal finds that Alissa's complaints were not always dealt with adequately and the steps taken to address her complaints were not adequate to prevent a repetition of the conduct. Some of those steps carried with them the potential for Alissa to be further victimised. One example of this is Mr Woodley's offer to walk with her at lunchtime to see if she could identify those who had bullied her. Another is Alissa's participation in the role-playing exercise. A further problem with the approach taken is that it seemed to rely to a large extent on Alissa being comfortable enough with teaching staff to make complaints to them or ask for their assistance. The evidence before the Tribunal supports the conclusion that, either by reason of her personality or earlier experiences, Alissa was somewhat reticent in this regard. On the evidence presented to the Tribunal it would seem that there was no attempt to explore the connection between ignorance of Alissa's condition, both by the staff and her fellow students, and the bullying experienced by her and the inadequacy of the attempts to prevent repetition of the bullying. In that regard, it should be noted that it was not until September 1998 that Ms Reynolds spoke to Alissa's fellow students about her condition.
155. In the Tribunal's view, the most fundamental flaw in the way the school, through its staff, dealt with Alissa's condition was to place upon her responsibility for having her needs met. The two obvious examples of this was the repeated theme that if Alissa required assistance she had only to ask for it and also the repeated reference to the fact that she could rely on her pass. Mr Valentino best summed up this attitude when he said: "...the approach I always took was that Alissa knew what was best for her...". The fact is that responsibility for Alissa's well-being lay with the school at times when she was under their care and control. The responsibility did not lie with a child of tender years suffering a serious medical condition exacerbated by stress, who

was no doubt subjected to peer pressure and certainly subjected to peer abuse.

156. For these reasons, the Tribunal finds that Warnboro failed to take reasonable steps to meet Alissa's special needs arising from condition, as a result of which she suffered detriment including emotional distress, exacerbation of her symptoms and increased absences from school with a consequent deterioration in her academic performance.
157. As to the specific incidents of which Alissa complained, the Tribunal accepts Alissa's version of the role-playing incident and of the tennis court incident. In relation to the former, the Tribunal accepts that Alissa, having previously suffered substantial bullying, was distressed by having to play the victim in the role-playing exercise, not once but twice, and that it was unacceptable for the school, knowing of her previous history, to place her in that position. It was suggested on behalf of the Respondent that Alissa did not actually state that participation in the role-playing exercise had a particularly deleterious effect upon her and there was no evidence to suggest that it would necessarily have that effect. In the Tribunal's view, it was implicit in her evidence that she experienced an adverse effect. Further, the Tribunal considers that it is not necessary for there to be expert evidence, nor eye-witness evidence of the impact on her of this incident, in order for the Tribunal to conclude that a child whose school experience included significant bullying, when forced to re-live the experience of being a victim, would suffer distress.
158. The Tribunal is unable to determine whether the role-playing exercise took place before or after Mrs Carter's complaint of bullying of 16 March 1998 and accepts the evidence of Mr Woodley that he was not aware at the time of the exercise that Alissa had been the subject of bullying at Warnboro. However, Mr Sanbrook was aware that Alissa had been the victim of significant bullying at a previous school but elected not to pass that information on to Mr Woodley or any other teacher. Merely advising that Alissa was "vulnerable" would not necessarily have alerted Mr Woodley to the fact that it might be inappropriate for her to participate in this exercise and that it would be inappropriate for her to play the victim.
159. In relation to the tennis court incident, the Tribunal finds that Alissa was directed to walk around the tennis court on a hot day

as a result of which she suffered an exacerbation of her symptoms. The uncontroverted evidence before the Tribunal was that exercise and sunlight may trigger a lupus attack. In those circumstances it was imperative for the physical education teacher to be as fully informed of Alissa's condition as reasonably possible and to accept responsibility for ensuring that no direction given to her would adversely impact on her condition. Indeed, in the Tribunal's view, of all the teaching staff, Mr Valentino was the one who needed the greatest knowledge of her condition and it was the responsibility of the school administration to ensure that adequate information was provided to him. It was not enough to give Alissa a pass and expect her to accept all the responsibility for meeting her special needs. Even the management strategy that at every PE session Alissa be asked about her medical condition acknowledges that the onus for ensuring her welfare lay with the teaching staff.

160. On behalf of the Respondent much emphasis was placed on the fact that Alissa could have relied on her pass and had not previously been reticent in doing so. In that regard it must be taken into account that Alissa was not simply participating in physical education class. She was, in accordance with a new school policy, being punished for failing to bring an adequate change of clothing. The Tribunal considers that in the mind of a child there would be a significant difference between relying on the pass in the usual course of a physical education class and avoiding participation in a punishment. Whatever the reason for not producing or relying on the pass, in the Tribunal's view, that fact does not justify directing Alissa to walk around the tennis court without first inquiring whether she felt she was able to do so and without being vigilant as to any adverse impact upon her of so doing. It was also suggested that Alissa chose to walk around the tennis court. The only observation that needs to be made about that comment is that obeying the instruction of a teacher without question or complaint does not equate to an exercise of free choice.
161. In the course of these reasons, some criticism has been leveled at individual teachers. The Tribunal wishes to emphasise that it considers the conduct complained of by Alissa and her parents to be neither deliberately nor malicious based. In the Tribunal's view it arose out of a lack of understanding of Alissa's condition and her special needs which was the direct result of a decision on

the part of the principal to limit the information available to the teaching staff about Alissa's previous experiences and her condition in accordance with his own view of what was sufficient information to meet Alissa's needs, rather than that of the parents.

Conclusions

162. Having made those findings of fact, the more difficult issue for the Tribunal is in determining whether that conduct constitutes a breach of the Act. Despite the requirement to, as far as possible, give to the Act a construction that would eliminate discrimination on the ground of impairment, like many anti-discrimination statutes, the Act defines discrimination in a rigid and often highly complex and artificial manner: *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 402-3; *IW v Perth* (1997) 146 ALR 696 at 702 per Brennan CJ and McHugh J. Whilst the Act may be given a liberal construction, the Tribunal is not at liberty to give it a construction that is inconsistent with the actual wording. It is commonly thought that any failure to meet the quite reasonable requirement of accommodating the special needs of persons suffering impairment is necessarily discriminatory. However, it is important for the community to recognize that conduct may be unreasonable or reprehensible, and even discriminatory in the ordinary meaning of the word, but still not be in breach of the Act. If the community considers that situation to require a remedy, it must look to Parliament and not to this Tribunal.
163. Commendably, Counsel for the Respondent did not take an overly technical approach to the claim, approaching it on the basis that, by virtue of the various matters of which Alissa complained, there was an environment of hostility at Warnboro relating to Alissa's impairment which would not have faced a student without that impairment. The Tribunal was referred to the case of *Metwalley v University of Wollongong* (1984) EOC 92-030 ("Metwalley") as authority for the proposition that a person who has a particular characteristic covered by the discrimination legislation may suffer unlawful discrimination where less favourable treatment produces a hostile environment of a kind which would not face a person without that characteristic. In *Metwalley* the environment created was a racially hostile one. The complainant was subjected to race related derogatory remarks which others in his position did not have to experience.

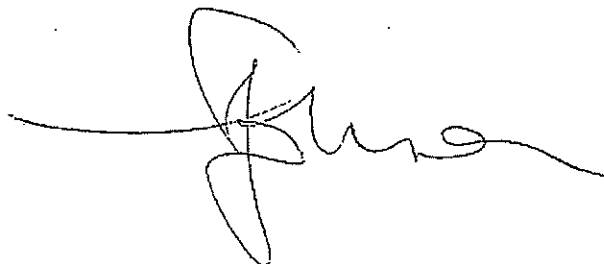
164. As indicated, while the Tribunal should not take an overly technical approach it must apply the law and determine whether the conduct of which complaint is made meets the definition of discrimination under the Act. In the Tribunal's view, the case of *Metwalley* is clearly distinguishable from the instant case. The complainant in that case was treated to different and less favourable treatment in that, unlike his peers, he was subjected to derogatory remarks. That treatment was clearly on the grounds of his race and was detrimental.
165. In Alissa's case, the Tribunal accepts without reservation that the conduct which the Tribunal's finds to be established caused her detriment. However, the reason for that detriment was not that Alissa was treated differently or less favourably than her peers but because her condition was not well understood and her special needs were not being met. In other words, she was treated the same when her needs were very different. In the Tribunal's view, those circumstances simply do not meet the definition of direct discrimination under the Act.
166. However, for the following reasons, the Tribunal considers that the elements of indirect discrimination are made out with respect to the two specific incidents; the role-playing exercise and the tennis court incident:
- (1) Alissa was required to comply with a requirement or condition. In the first incident that requirement was to participate in the role-playing exercise and also to play the victim. In the second incident she was required, in accordance with the policy, to walk around the tennis court;
 - (2) A substantially higher proportion of her fellow students without lupus, and who had not previously been bullied because of that condition, would be able to comply with both these requirements;
 - (3) Alissa was not able to comply with either requirement in a similar manner to her fellow students. With respect to the first incident, she could not comply without suffering the adverse consequences of re-living the experience of being bullied with the distress that involves. In the second incident she could not comply without risking or

experiencing an exacerbation of the symptoms of her lupus;

- (4) Neither requirement was reasonable in the circumstances. As outlined above, the teaching staff should have been made aware that Alissa was a victim of bullying. As the exercise was designed to prevent bullying there could be no benefit to Alissa or the school for Alissa, who was a victim of bullying, to participate in a role-play exercise as the victim. In relation to the tennis court incident, compliance with the policy was well and truly outweighed by the potential risks to Alissa, particularly in circumstances where Alissa was entitled to refrain from participation in physical education in any event. There would also have been available to the school other means of encouraging children to bring to school an adequate change of clothing which would not have carried a risk of physical harm to Alissa.

167. For the above reasons the Tribunal is satisfied that the Complainant was unlawfully discriminated against by the Respondent on the ground of impairment although with respect only to the two incidents described as the role-playing incident and the tennis court incident. To that extent the Tribunal finds the complaint proved.

168. The Tribunal further finds that the unlawful conduct caused Alissa distress and, with respect to the tennis court incident, also caused her physical harm. Accordingly, Alissa is entitled to compensation for the damage suffered as result of the Respondent's conduct. In all the circumstance, the Tribunal considers the appropriate award of damages to be the sum of \$1,000 in relation to the role-playing exercise and \$3,000 in relation to the tennis court incident. The award in total against the Respondent therefore amounts to \$4,000.

A handwritten signature in black ink, appearing to be 'J. B. Jones', written in a cursive style.