

**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND THE CHILD.**

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**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2025-485-433  
[2025] NZHC 3313**

UNDER the Declaratory Judgments Act 1908,  
Judicature Amendment Act 1972, Bill of  
Rights Act 1990, Privacy Act 2020,  
Ombudsmen Act 1975 and High Court Rules  
2016

BETWEEN RUTH CALLAGHAN  
(as litigation guardian for a minor)  
Plaintiff

AND ATTORNEY-GENERAL (sued on behalf  
of): THE MINISTER OF EDUCATION,  
THE MINISTRY OF EDUCATION AND  
THE EDUCATION REVIEW OFFICE,  
TEACHING COUNCIL OF  
NEW ZEALAND, OFFICE OF THE  
OMBUDSMAN, PRIVACY  
COMMISSIONER, CHILDREN'S  
COMMISSIONER, PRINCIPAL OF XY  
SCHOOL, BOARD OF TRUSTEES OF XY  
SCHOOL  
Defendants

Hearing: 29 October 2025

Counsel: Plaintiff in person, with child's father as person in support  
(via AVL)  
I Clarke for Attorney-General (in respect of the Minister of  
Education, Ministry of Education and Education Review Office)  
P Robertson for Principal of XY School and School Board  
of Trustees  
B J Maltby for Children's Commissioner

B J Maltby for Children’s Commissioner  
R Dewar, Lawyer for Child

Judgment: 3 November 2025

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## JUDGMENT OF GENDALL J

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### Introduction

[1] The plaintiff (referred to as “Ms Callaghan”), not her true name, applies to be appointed litigation guardian of her six-year-old son “Michael” also not his true name.<sup>1</sup>

[2] Until recently, Ms Callaghan’s son Michael attended a New Zealand school (the School). In December 2024 and March 2025, Ms Callaghan raised complaints about the conduct of other children at the School towards her son. Unsatisfied with the School’s response to the second complaint, Ms Callaghan made further complaints to the School Board and the Chief Ombudsman, both of which supported the actions taken by the School.

[3] On 10 July 2025, Ms Callaghan filed a statement of claim alleging failings and breaches of duty by a number of entities and persons. These include the Minister of Education, the Ministry of Education, the Education Review Office, the Teaching Council of Aotearoa New Zealand, the Privacy Commissioner, the Office of the Ombudsman, the Children’s Commissioner, the Principal of the School and the Board of Trustees of the School. Ms Callaghan seeks various forms of relief, including declarations of breach of statutory duties and Te Tiriti o Waitangi obligations, a number of orders relating to information held by the defendants, a direction that the Ministry of Education produce a culturally appropriate education access plan for Michael and in the meantime provide Māori-medium tutoring/education to her son. Damages are also sought in the sum of \$9 million.

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<sup>1</sup> The names of the plaintiff/applicant, her son, the school, and other identifying details of the case have been omitted or replaced by pseudonyms to protect the identity of the child and to comply with the 3 September 2025 suppression order of McHerron J. This order is to continue in the meantime until further order of this Court is made.

[4] On 18 August 2025, Ms Callaghan filed an interlocutory application seeking orders that she be appointed litigation guardian for Michael. The grounds for this application are that he is a minor, she is his legal guardian, she is willing and able to act in his best interests, and she has no interest adverse to her son in the conduct of this proceeding.

[5] The Attorney-General, acting in respect of the Minister of Education, Ministry of Education and Education Review Office, opposes the application of Ms Callaghan. This opposition is based on grounds that there are concerns as to Ms Callaghan's ability to fairly and competently conduct the proceeding on behalf of her son. This is said to be so when her son is young and requires an adult to make decisions on his behalf, there are broader concerns regarding decisions made about his education which are not in his best interests, and Ms Callaghan is not a lawyer and is unrepresented. The Attorney-General instead seeks an independent litigation guardian be appointed.

[6] Similarly, the application is opposed by the School and its Board of Trustees, as well as the Children's Commissioner.

## **Background**

[7] On 1 December 2024, Ms Callaghan made a complaint to the Principal of the School alleging sexualised conduct by another child at the school towards her son. On 2 December 2024, the Principal met with Ms Callaghan to discuss the matter. Together, they rang Oranga Tamariki to report the disclosure. Despite Oranga Tamariki advising that what had been alleged came under their developmentally age-appropriate sexualised behaviour continuum, the Principal put a safety plan in place for the remainder of the year. On 10 December 2024, Ms Callaghan wrote to the Principal advising she was happy with the safety plan that had been put in place.

[8] Although the next school year commenced on 5 February 2025, Michael did not return to school until 17 February 2025. On 6 March 2025, Ms Callaghan made a further complaint to the Principal that Michael had been physically bullied at school by four children. She requested a teacher aide be assigned to monitor and protect her son at school. However, on 7 March 2025 Michael stopped attending the school. The Principal investigated the complaint and found no evidence to substantiate

Ms Callaghan's allegations. Nonetheless, a safety plan similar to that implemented in December 2024 was provided to Ms Callaghan on 14 March 2025 setting out the ways in which the School would aim to protect her son.

[9] Ms Callaghan was not satisfied with the Principal's response and, on 17 March 2025, she made a complaint to the School's Board of Trustees. The Board reviewed the complaint and the relevant material, the school policy and legislation, and also questioned the Principal about the investigation. On 28 March 2025, the Board advised Ms Callaghan it had reviewed the complaint and supported the outcome of the investigation and the process that was followed. The Board's view was that it was safe for her son to return to school.

[10] In response, Ms Callaghan made a complaint to the Ombudsman. The Office of the Ombudsman investigated her complaint regarding the standard of the school's two investigations into her concerns about her son. On 27 June 2025, the Chief Ombudsman issued a comprehensive opinion which concluded the Board had not acted unreasonably. He concluded the Board had responded to the allegations in a timely manner, a thorough and robust investigation was carried out, and the safety plan prepared by the school was very detailed and specific.

[11] As I have noted, on 10 July 2025 Ms Callaghan filed a statement of claim purporting to bring proceedings on behalf of herself and Michael against the various parties. Following this she also filed two amended statements of claim alongside amended notices of proceeding and an interlocutory application seeking a wide range of orders—including for disclosure of documents requested under the Privacy Act 2020 and the Official Information Act 1982. An accompanying affidavit and a clarifying memorandum were also filed. Later, Ms Callaghan also filed a further memorandum seeking additional interlocutory orders including restrictions on evidence, mandatory interim relief in the form of culturally appropriate education support while the claim proceeded, and costs orders. The essence of Ms Callaghan's proceeding appears to be claims in tort (for negligence and breaches of statutory duties), for judicial review (relying on a range of statutes and other instruments, including the Treaty of Waitangi), and for declaratory relief under the Declaratory Judgments Act 1908. She seeks wide-ranging relief, including public law declarations,

orders that the Ministry of Education must provide Michael with “*culturally appropriate education*” (including te reo Māori immersion), and damages, as I note, in the sum of \$9 million. This includes \$3 million to be shared between Ms Callaghan and Michael, and \$1.5 million for Ms Callaghan personally.

[12] On 12 August 2025, McQueen J directed that Ms Callaghan must file and serve on each of the defendants/respondents an application to be appointed as a litigation guardian for Michael. Subsequently Ms Callaghan did so. The application was listed in this Court for a chambers call-over on 1 September 2025.

[13] Ahead of the call-over, Ms Callaghan filed a further 44 documents. These included:

- (a) ‘notices requiring admissions’ from each of the defendants/respondents and memoranda seeking evidential findings if the answers were unsatisfactory to Ms Callaghan;
- (b) documents alleging that the School’s Principal had made misrepresentations to the Police, the Ombudsman and the Teaching Council;
- (c) an affidavit complaining that Ms Callaghan had been removed from a school Facebook page as “retaliatory” conduct after she brought a proceeding in the Human Rights Review Tribunal;
- (d) memoranda seeking further interlocutory orders, including for the timetabling of defences and expert evidence regarding the substantive claims, and “sanctions” or “strike out” of any defence that relies on “materially false statements”; and
- (e) a memorandum dated 30 August 2025 in which Ms Callaghan advised that she had relocated to the Gold Coast, Australia with Michael.

[14] On 3 September 2025, in this Court McHerron J directed in a minute that a lawyer for the child be appointed, alongside orders suppressing the identity of the

child, the parents, other students, the school, the town in which it is located, and any other details which might lead to their identification. His Honour also ordered that, until the issue of representation was resolved, all other aspects of the proceeding were to be stayed.

[15] On 30 September 2025, Ms Callaghan filed a memorandum advising that Michael is now enrolled in a school on the Gold Coast, Australia.

[16] On 3 October 2025, counsel for the Attorney-General wrote to Ms Callaghan setting out an offer not to oppose her application if she agreed to engage independent counsel to represent her/Michael in the proceeding. On 9 October 2025, she declined that offer.

### **Legal principles**

[17] Rule 4.31 of the High Court Rules 2016 (HCR) provides that with limited exceptions and unless the Court orders otherwise, a minor must have a litigation guardian as his or her representative in any proceeding. A minor is defined as a person who has not attained the age of 18 years.<sup>2</sup> Michael is a minor. The Court may appoint a person as a litigation guardian for a minor if the litigation guardian:<sup>3</sup>

- (a) is able fairly and competently to conduct proceedings on behalf of the [minor] ; and
- (b) does not have interests adverse to those of the [minor]; and
- (c) consents to being a litigation guardian.

[18] In deciding whether to appoint a litigation guardian, the court may have regard to any matters it considers appropriate, including the views of the person for whom the litigation guardian is to be appointed.<sup>4</sup>

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<sup>2</sup> HCR, r 4.29.

<sup>3</sup> Rules 4.33 and 4.35(2)(b).

<sup>4</sup> Rule 4.35(3).

[19] The courts have held that the requirements in r 4.35 reflect that the overarching consideration is the interests of the incapacitated person.<sup>5</sup> The litigation guardian is obliged to act independently, objectively and in the interests of the incapacitated person.<sup>6</sup>

[20] While there is no requirement for a litigation guardian to be legally qualified or represented, that may be relevant to whether the proposed litigation guardian can conduct the proceedings competently and objectively.<sup>7</sup> Although a litigation guardian need not be indifferent as to the outcome of the proceeding,<sup>8</sup> they must not have adverse interests to the incapacitated person, including a personal grievance that may affect their objectivity.<sup>9</sup>

[21] And, as to the obligations of anyone appointed as a litigation guardian and their nature, Downs J in this Court in *Erwood v Holmes* said:

[56] I summarise. A litigation guardian may do anything the litigant could do, if able. This broad power attracts a duty to act in the litigant's best interests, and independently. These duties are fiduciary, or analogous to fiduciary ones. Litigation guardians have a broad discretion concerning the extent to which the litigant's views should be considered, or placed before a court. A litigation guardian may not have interests adverse to the litigant. Breach of any of these may lead to the removal of the guardian, and substitution of an alternative guardian. Breach may also lead to the quashing of an order, at least in sufficiently clear cases. Courts will not enter this area lightly given the nature and breadth of a litigation guardian's discretion.

[footnote omitted]

## Submissions

### *Submissions by Ms Callaghan*

[22] Ms Callaghan confirms she is an adult, the mother of Michael, and that Michael's father has expressly consented to her being appointed the litigation guardian. She says she has no adverse interests to those of Michael and she is independent, given she seeks no personal remedies in the role. The relief she says she

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<sup>5</sup> *Shetty v Fitzpatrick* [2022] NZHC 2601 at [23] and *Re Goldman* [2016] NZHC 1010 at [25].

<sup>6</sup> *Erwood v Holmes* [2019] NZHC 2049 at [56]; and *SO v Drumm* [2024] NZHC 354 at [20]–[22].

<sup>7</sup> *SO v Drumm*, above n 6, at [67]; and *X v M* [2020] NZHC 1377 at [15]–[24].

<sup>8</sup> *Groombridge v Blanche* [2020] NZHC 2394 at [19].

<sup>9</sup> *SO v Drumm*, above n 6, at [63] and *X v M*, above n 7, at [23].

seeks is simply safe education and restoration of cultural rights solely for her son. She argues that any personal grievances are separate and not before the Court, and there is no conflict of interest here. The proceeding she maintains remains centred on Michael's welfare, with her affidavit explaining what she contends are systemic failures that are said to be proved through her son's case.

[23] In terms of her competence, Ms Callaghan argues that in this proceeding to date she has managed pleadings, affidavits, notices and exhibits, and has complied with all Court timetables and directions. She notes her professional background in legal and contractual risk assessment and contends that it is directly transferrable. The cases *So v Drumm* and *X v M* are referred to in support of this submission.<sup>10</sup> She describes the relocation to Australia as protective and temporary, undertaken in Michael's best interests and only after safeguarding failures in New Zealand. Accordingly, she argues all this underscores rather than moots the need for these proceedings to restore Michael's right to safe education and cultural connection in New Zealand.

[24] In response to the Crown's offer and proposal that appointment as a litigation guardian be agreed to conditional upon her retaining a separate lawyer for Michael, Ms Callaghan claims this is both redundant and inconsistent with the Court's order, and the confirmed appointment of Ms Dewar as lawyer for the child. She says the proposal is outside r 4.30, with her contention that the Court has already provided independent representation for her son.

[25] Lastly, she says the proceedings in any event serve a public interest and constitutional function, vindicating an individual child's rights while ensuring accountability for systemic safeguarding and Treaty obligations. She submits the dual character of the proceedings strengthens, rather than dilutes, Michael's best interests.

#### *Submissions for the Attorney-General*

[26] Ms Clarke for the Attorney-General contends that Ms Callaghan does not have the requisite skills to undertake litigation for Michael. This is supported a number of

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<sup>10</sup> *SO v Drumm*, above n 6; and *X v M*, above n 7.



factors. The first of these is the fact that, in Ms Clarke's view, the substance of Ms Callaghan's claims are entirely misguided; secondly, that she has failed to comply with the rules of civil procedure; and thirdly, that she has sought a range of inappropriate procedural steps which have created and continue to create unnecessary cost. Ms Clarke also submits Ms Callaghan does not have the requisite judgment to act in Michael's best interests here. She points to Ms Callaghan's refusal to engage with the Ministry of Education about Michael's educational arrangements, Michael's lengthy absence from school, and her decision to relocate to Australia. Ms Clarke raises concerns about Ms Callaghan's objectivity, noting what are said to be her failures to engage with criticisms of her claim or alternative dispute resolution options. Her complete unwillingness to engage a lawyer to protect Michael's interests is also said to reinforce Ms Callaghan's unsuitability for the role of litigation guardian, as it demonstrates she is unable to put aside her own views to protect her son. Nor does the appointment of a lawyer for the child resolve the concerns, when her role is confined to informing the Court as to the child's welfare, views and interests, and she is unable to advise Ms Callaghan on how to conduct the litigation.

[27] Ms Clarke submits too that, if a litigation guardian is to be appointed, this should be an experienced lawyer familiar with practice in the High Court. This would ensure the prospective proceedings which are complex could be evaluated and undertaken with skills and objectivity in the best interests of the child. They should also be a legal aid provider so a legal aid application can be made to cover their fees. Ms Clarke also suggests that making any appointment conditional on no costs award being enforceable against the litigation guardian may help increase the likelihood of finding a suitable lawyer who would consent to appointment. She also maintains that the existing stay order should continue pending appointment of any litigation guardian.

#### *Submissions for the School*

[28] Mr Robertson, for the Board of Trustees and the Principal of the School, submits that Ms Callaghan's claims against the Board and Principal lack merit or are legally untenable. He says this must call into question Ms Callaghan's competence to be a litigation guardian. He notes that to succeed with a claim against the Board and Principal, Ms Callaghan will need to lead evidence that the processes followed were

inappropriate. He argues that will be difficult if not impossible here when Ms Callaghan's concerns were considered and rejected by the Chief Ombudsman, with his findings entirely consistent with the evidence of the Board and Principal.

*Submissions for the Children's Commission*

[29] Ms Maltby, for the Children's Commissioner, maintains too that Ms Callaghan entirely lacks competence here. She points to the fact Ms Callaghan is not a lawyer or legally trained, that her claims are unmeritorious and factually incorrect, that she has not taken on board criticisms of her claims, and that she lacks an understanding of tort and public law. She also notes the large number of documents Ms Callaghan has filed which are said to be irrelevant, unnecessary and inappropriate, and further, Ms Maltby says Ms Callaghan has failed to comply with the Court's rules and directions.

[30] Ms Callaghan, it is alleged, entirely lacks independence too, given that first, some of the relief she seeks is for *herself* rather than for Michael, that secondly, she says she is bringing the proceeding in the public interest as well as Michael's, and that, thirdly Ms Callaghan appears aggrieved with how *her* complaints have been dealt with. Ms Maltby further argues that Ms Callaghan lacks objectivity, which is evidenced by her taking steps inconsistent with her stated goal of securing te reo education and Māori cultural immersion for Michael, such as refusing offers of alternative education and moving to Australia.

[31] Lastly, Ms Maltby points to the fact Ms Callaghan has declined to engage counsel, even after the Attorney-General offered not to oppose her application if she did so, and explained both the availability of legal aid here and the role of Ms Dewar. She says Ms Callaghan's actions suggest she is completely unwilling to consider any views but her own, or to accept any constraints on her ability to conduct this proceeding as she sees fit. Accordingly, Ms Maltby argues that, even if Ms Callaghan did engage legal counsel, there are concerns she may not follow their advice, and therefore this may not be a sufficient safeguard to ensure the proceeding ostensibly for Michael is conducted competently and objectively.

[32] Ms Maltby therefore concludes that the Court should instead invite counsel to propose suitable lawyers who could act as Michael’s litigation guardian, with the proceeding remaining stayed unless and until a litigation guardian is appointed and the proceeding regularised. However, if the Court was of the view that Ms Callaghan is to be appointed, Ms Maltby says this should be conditional on Ms Callaghan indemnifying Michael for any costs award made against him. This, it is said, would help incentivise Ms Callaghan to take suitable advice and to conduct this proceeding only in a proper and sensible manner that did not expose Michael to unreasonable risk.

*Other defendants*

[33] The Teaching Council of New Zealand, the Privacy Commissioner, and the Office of the Ombudsman were not represented at this hearing before me, their requests not to appear having been granted earlier. No submissions on the present application were received from, or on behalf of, them but each advised they would abide the decision of the Court.

**Report of Lawyer for Child**

[34] Ms Dewar appeared before me as counsel for the child, Michael, and to speak to her report to the Court dated 23 October 2025. That report followed a zoom meeting on 3 October 2025 with Ms Callaghan and Michael. Importantly, Ms Dewar in her report stated in part:

[26] [Ms Callaghan] gave me a run down on what had happened for [Michael] and described both herself and [Michael] as being “traumatised” both by events and the way she has been treated by the various organisations she approached for help.

...

[34] There is no doubt that [Ms Callaghan] loves [Michael] very much and wants the best for him. That includes him learning te reo, particularly as she did not have the same opportunity.

...

[36] [Michael] may have some learning difficulties, may be neurodivergent and his speech is poor....

...

[39] In terms of the guardian ad litem issue, counsel is concerned that [Ms Callaghan's] energies are being directed to this litigation and it may become all consuming. That energy may be better directed to supporting [Michael's] integration into his current school and community and to ensuring that his developmental and educational needs are met.

[40] To this end, counsel concurs with Ms Clarke's [for the Attorney-General] suggestion that either Ms Callaghan engage and retain a lawyer to represent [Michael] to assist her to run the proceedings or a professional guardian ad litem be appointed in her place. Counsel does not consider that [Michael's] needs are being met by these proceedings. Rather they are adult focussed, raise issues and seek outcomes, that are beyond [Michael's] comprehension.

[35] I have taken into account in my deliberations all these helpful comments in particular, as well as the other matters raised in Ms Dewar's 23 October 2025 report which is before the Court.

### **Analysis**

[36] At the outset, I need to acknowledge that all parties recognise and accept there is no dispute here that Ms Callaghan loves and cares for her son, Michael, and wants the best for him.

[37] In this case, however, I find great difficulty in accepting Ms Callaghan's submission that she is able to fairly and competently conduct these proceedings on Michael's behalf, and that she has no adverse interests to Michael. It is clear that Ms Callaghan expresses deep concern for Michael's safety after the alleged incidents in late 2024 and early 2025, and also that she wants to ensure that he, as a tamaiti Māori, has access to te reo Māori medium education. However, her conduct of the proceedings to date, in my view, has demonstrated that she lacks the competence, the independence and the objectivity to act in Michael's best interests which must be the overarching consideration.

[38] It is acknowledged that Ms Callaghan may have some relevant experience from her professional background in legal and contractual risk assessment. But she is not a lawyer and is not well-versed in Court procedures. And, as noted by the Attorney-General and the Children's Commissioner, a number of her claims appear entirely to lack merit, she has failed to comply with procedural rules and Court directions, and she has chosen to take a range of procedural steps that do little to advance the claims

made on behalf of Michael and only add to the cost and delay of the proceedings. Examples include:

- (a) alleging failure to implement any safety plan following disclosures of harm when it appears safety plans were put in place after each alleged incident;
- (b) seeking a culturally appropriate education access plan for Michael when there is no legal requirement that bespoke arrangements be provided by a school for an individual child at the parents' request;
- (c) failing to identify a relevant statutory duty to support her proposed private law action;
- (d) relying on the Children's Act 2014 and Declaratory Judgments Act 1908 when the former does not create any legal right enforceable in a court of law, and the latter appears irrelevant given Ms Callaghan's concerns raise no issue about the meaning of a document;
- (e) commencing the proceeding on Michael's behalf without first applying to be appointed his litigation guardian
- (f) failing to serve the proceeding on the defendants in compliance with the High Court Rules 2016, as well as failing to serve her initial disclosure until six weeks after filing her statement of claim; and
- (g) filing over 50 documents in the proceeding, many of which lack relevancy, including interlocutory applications seeking premature directions or orders as to disclosure and evidence.

[39] I agree that the manner in which Ms Callaghan has conducted the proceeding demonstrates that, certainly in acting as a lay litigant, she is not sufficiently competent to act as Michael's litigation guardian. Rather, her being appointed to that position is likely to continue the current pattern of unnecessary interlocutory applications, filing

needlessly lengthy and numerous supporting documents, and pursuing what are said to be unmeritorious claims.

[40] Importantly, in my view, Ms Callaghan is ill-equipped to assess the legal merits of all the claims she has advanced here and the likely outcomes of this complex proceeding. Nor, as I see it, is she readily able to formulate and present competent legal argument, to focus on relevant matters and disregard irrelevant matters or take appropriate interlocutory steps. This is not in Michael's best interests. His litigation guardian needs to be able to make reasonable and informed decisions about whether to pursue the proceeding and, if so, to conduct it effectively and efficiently, centring always on his rights and interests as a child.

[41] I also concur with the views expressed on behalf of the Attorney-General and the Children's Commissioner that Ms Callaghan is insufficiently independent and objective to act in Michael's best interests here. To say that she lacked adverse interests to Michael is also, as I see it, a step too far. It also does not seem to be true, as Ms Callaghan claims, that she seeks no personal remedies in the claim she says is brought on Michael's behalf. As noted by the defendants/respondents, she seeks \$1.5 million in damages for "maternal psychological harm", as well as purported "shared damages" in the sum of \$3 million for Privacy Act breaches, retaliation and intimidation, loss of trust in institutions, institutional racism, and exemplary damages. As noted by Ms Maltby, Ms Callaghan also seeks declarations that relate to her own requests for private and official information, although to some extent it may be the case this information is sought to assist in her claims in respect of Michael. I agree that to a large extent, many of the claims and remedies sought by Ms Callaghan might be considered to be more appropriately brought in a separate proceeding in her own name.

[42] Arguably, the procedural history here might at one level support an argument that Ms Callaghan here is simply fixated on pursuing this litigation and opposing any of the defendants' proposals for resolution. I say nothing more on this, however. But I do need to note that, prior to the proceeding being commenced, the Ministry of Education had offered to transfer Michael to another New Zealand school or to broker alternative education options. A number of options were proposed. All were refused.

Ms Callaghan, as I understand it, also declined the offer for a restorative hui, as well as for mediation by the Human Rights Commission. Additionally, there does seem to be a reasonable argument that Ms Callaghan made decisions that appeared counter-intuitive to her stated goals and Michael's best interests, such as her decision to move to Australia where he is unlikely to find many options for te reo Māori medium schooling. Although she has indicated this is a temporary measure only and she will return to New Zealand "once the remedies sought in these proceedings are secured", such an outcome appears a remote prospect, and currently not one that will arrive soon. A possible lack of objectivity on her part might also be seen as demonstrated by her failure to address flaws in the claims she seeks to bring on behalf of Michael, flaws which were pointed out to her by the defendants/respondents in their memoranda.

[43] A further issue is the question of independence which has been described as a "fundamental" requirement of a litigation guardian.<sup>11</sup>

[44] And, as Lang J commented in *X v M*:<sup>12</sup>

...the fact that a litigation guardian is related to the party whose interests they represent in litigation is not unusual or, in most cases, untoward. It is relatively common for a parent to be appointed as litigation guardian for a son or daughter where there is no conflict between the interests of the parent and those of the son or daughter. In most cases, however, the litigation guardian is represented by counsel in the substantive proceeding. Counsel are independent of the parties and have no stake or personal interest in either the proceeding or its outcome. This ensures important decisions relating to the commencement and conduct of the proceeding are made competently and objectively. If that does not occur, the opposing party and the court can be exposed to considerable unnecessary time and expense in determining the proceeding.

Although Michael is Ms Callaghan's son, for reasons I have outlined above, I consider a possible lack of independence is an issue for Ms Callaghan here.

[45] In my view, it is also true that the course of action Ms Callaghan has pursued to date might perhaps indicate that she is focussed on public vindication and accountability for perceived failures by the defendants/respondents, and that therefore she lacks true independence and is unable to take an objective view on what is best for

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<sup>11</sup> *Erwood v Glasgow Harley* HC Auckland CP 179-SDO2, 17/3/2003 at [30].

<sup>12</sup> *X v M*, above n 7 at [21].

Michael. This issue is heightened by her continued refusal to engage legal counsel. She appears to consider this is unnecessary given a lawyer for the child, Ms Dewar, has already been appointed. However, on a number of occasions it has been explained that Ms Dewar's role is limited to informing the Court as to Michael's welfare, views and interests, rather than acting as legal counsel or representing Michael. Separate legal counsel would be able to advise Ms Callaghan as to the implications of bringing the proceedings, whether or how her concerns can be addressed through litigation, and the appropriate procedural steps to take to comply with the rules of civil procedure and the Court's directions. Her refusal to engage counsel, despite being advised that the cost of this could be covered by legal aid, might suggest perhaps that Ms Callaghan's appreciation of her ability to conduct these proceedings is unrealistic. And, in any event here, I tend to agree that engagement of legal counsel may not be a sufficient safeguard when Ms Callaghan's actions to date could suggest that she might not follow counsel's advice.

[46] I do not consider that the cases of *SO v Drumm* and *X v M* are supportive of Ms Callaghan's application, as she also contended before me. In *SO v Drumm* a without notice application for the mother to be appointed the litigation guardian was granted, with the case concerning whether another person, Mr Cullen, could also be appointed a litigation guardian.<sup>13</sup> I note that in *Drumm*, the court recorded that the child's mother was willing to instruct counsel to represent her child as required.<sup>14</sup> In *X v M*, the High Court upheld a decision refusing the father of a child to be appointed litigation guardian, on the basis he sought to conduct the proceeding himself rather than to appoint counsel, and lacked objectivity and independence.<sup>15</sup> Lang J noted his concerns that Dr X would not be able to narrow his focus to ensure that "irrelevant and extraneous factual matters are not introduced" and emphasised that most litigation guardians are represented by counsel to ensure important decisions are made competently and objectively.<sup>16</sup> Accordingly, I find these cases actually weigh in favour of declining Ms Callaghan's application, given the similarities of the present

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<sup>13</sup> *So v Drumm*, above n 6.

<sup>14</sup> At [26].

<sup>15</sup> *X v M*, above n 7, at [15]–[24].

<sup>16</sup> At [20]–[21].



situation with that prevailing in *X v M* and the distinguishing factors of legal counsel being engaged in *Drumm*.

## **Result**

[47] As a result, and for all the reasons I have outlined above, I am not satisfied that Ms Callaghan meets the test under r 4.35(2)(b) of the HCR. Her application is therefore declined.

[48] I consider instead that an independent and experienced lawyer should be appointed as Michael's litigation guardian here. Before me, Ms Maltby proposed that a Ms Jennifer Wademan, a Wellington barrister be appointed as Michael's litigation guardian for this proceeding. I heard no detailed arguments from all parties however, on that suggestion. Appointment of a suitable litigation guardian for Michael is an important matter which needs proper deliberation.

[49] I invite the parties to file memoranda proposing a suitable legal counsel to be appointed as Michael's litigation guardian (which may include Ms Wademan), with ideally agreement to be reached if possible. Otherwise, counsel and Ms Callaghan should also advise whether a further hearing would be required, or whether appointment of a litigation guardian can be determined on the papers. I am of the preliminary view that an order, as raised, that no costs awards may be enforceable against the litigation guardian is premature at this stage.

[50] The order for stay of this proceeding and the suppression orders made by McHerron J are to continue until a litigation guardian for Michael is appointed.

## **Costs**

[51] As to costs on the present application before me, these were sought by counsel for the Attorney-General, counsel for the Children's Commissioner, and counsel for the Principal and Board of Trustees of the School. Costs are reserved.

[52] Counsel and Ms Callaghan are urged to endeavour to resolve costs between themselves. If they are unable to do so, the parties may file memoranda on costs (four pages maximum) and the Court will decide the issue on the papers.

**Gendall J**

Solicitors  
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