

Board of Trustees decision to expel student on basis of gross misconduct not justified

Legislation	Ombudsmen Act 1975, section 22(1)(d); Education Act 1989, section 17
Agency	Macleans College Board of Trustees
Ombudsman	Peter Boshier
Case number(s)	526391
Date	May 2021

Student expelled after isolated incident – Ombudsman found that the family were not given the full opportunity to respond to the allegations, and the Board’s minutes did not show how the decision was arrived at – Ombudsman not convinced that the incident was serious enough to constitute gross misconduct under the Education Act 1989 – Ombudsman recommended that Board apologise to the student and his family and amend the record to confirm that the student should not have been expelled.

Background

In September 2019, the Macleans College Board of Trustees expelled a student from the school. The incident prompting the student’s suspension and subsequent expulsion was that the student swore at a teacher over the use of a device.

The family complained about the Board’s process and decision. The Board conceded that the family was not provided with all relevant information 48 hours prior to the suspension hearing, as required. However, the Board believed that this was not a material issue and that the Board’s decision would have been the same. The Board confirmed its view that the student’s conduct met the statutory threshold of gross misconduct. The Board stated that it did not pursue other disciplinary options as the student was not remorseful and it considered that further misconduct was likely.

The Chief Ombudsman investigated whether the Board followed a reasonable process in relation to all matters connected to the suspension hearing and whether the decision to expel had been reasonable. He considered whether the single event which triggered the suspension, met the threshold for ‘gross misconduct’ required under section 17 of the Education Act 1989.

Investigation

Failure to provide adequate opportunity to comment

The Chief Ombudsman was not satisfied that the student and his family were provided with an adequate opportunity to comment. They were not provided with a full schedule of documents before the suspension hearing. The Chief Ombudsman noted that the documents did not in fact show any pattern of ongoing misconduct by the student. They could have supported an argument by the family that the behaviour was an isolated incident.

Decision-making process and associated record

The Chief Ombudsman noted that Ministry of Education Guidelines required the Board to undertake a balancing exercise that included all relevant circumstances.¹ Although the Board appeared to have considered most of the relevant factors, there were question marks around some factors, such as that the behaviour was out of character for the student. The record of the Board's deliberations were insufficiently detailed to enable the Chief Ombudsman to be confident that all relevant factors were considered, including whether leniency would have been appropriate. Nor was the Chief Ombudsman confident that the Board had undertaken a reasonable and fair balancing exercise.

Threshold for gross misconduct

The Chief Ombudsman was ultimately not satisfied that the incident met the threshold for gross misconduct under section 17 of the Education Act. The Chief Ombudsman noted that the Ministry of Education Guidelines require a high threshold for gross misconduct, and such conduct must be serious enough to justify removing the student from school. The Board maintained that the behaviour constituted gross misconduct on the basis of its standards. However, the Chief Ombudsman noted judicial authority that a breach of school rules does not, in itself, meet the statutory requirement for gross misconduct.² In this case, the Chief Ombudsman considered that the Board had overstated the harm of the student remaining at the School. The student's behaviour was not '*reprehensible to a high degree*'. The Chief Ombudsman accepted that the behaviour required a robust response. However, he considered that there were a large number of alternative actions that the School could have considered. The Chief Ombudsman stated:

¹ The Ministry of Education, 'Guidelines for principals and boards of trustees on stand-downs, suspensions, exclusions and expulsions, Part I: Legal options and duties', <https://www.education.govt.nz/assets/Documents/School/Managing-and-supporting-students/Stand-downs-suspensions-exclusions-and-expulsions-guidelines/17-5-18-SuspensionLegalGuideWEB-1.pdf>.

² M & Anor v S & Board of Trustees of Palmerston North Boys' High School [2003] NZAR 705, 712 (decided 5 December 1990).

There were disciplinary options available to the Board other than expulsion which would have been more appropriate, proportionate, and achieved the desired disciplinary aims.

Outcome

The Board undertook to ensure its processes were aligned with the Ministry of Education Guidelines. The Chief Ombudsman recommended that Board apologise to the student and his family and amend the record to show that the student should not have been expelled. In response, the Board confirmed that it had complied with the recommendations.

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