

Inadequate record-keeping and unreasonable decisions by school board: Student discipline

Legislation	Ombudsmen Act 1975, Education and Training Act 2020
Agency	Bethlehem College School Board
Ombudsman	Peter Boshier
Case number(s)	533782; 542721, 542767 and 542864
Date	April 2021, June 2022

Two investigations into complaints about decisions by Bethlehem College School Board made under the Education and Training Act 2020 to exclude/expel students – investigations raised significant issues of record-keeping and decision-making – Ombudsman found that record-keeping was inadequate - Board’s decision-making process was unreasonable – removal of student from school is last resort - statutory tests for removal not satisfied.

Introduction

Background

Investigation A (ref: 533782) concerned the decision of Bethlehem College School Board (the Board) to exclude¹ a student on the basis of ‘*gross misconduct*’ following the decision of the principal to suspend the student due to ‘*continual disobedience*’. The primary issues of concern included disobedience/disrespect, and the student’s conduct towards other students. The student had been previously disciplined for cannabis use and vaping, but this was not a significant factor in the exclusion decision.

During investigation A, the Ombudsman received other complaints about the Board’s decisions to exclude/expel² a group of students. The Ombudsman deferred investigating these complaints until investigation A was finalised.

¹ Exclusion refers to the formal removal of a student aged under 16 years old from the school, and the requirement that the student is enrolled elsewhere.

² Expulsion refers to the formal removal of a student aged over 16 years old from the school, with the optional enrolment of the student elsewhere.

Investigation B (refs: 542721, 542767 and 542864) concerned the decision of the Board to expel a group of students from Bethlehem College on the basis of ‘*gross misconduct*’. This centred on incidents involving truancy and alcohol, amongst other matters.

Legislative framework for school discipline

Sections 78-88 of the *Education and Training Act 2020 (the Act)* deals with stand-downs, suspensions, exclusions and expulsions (in the case of a student over 16 years old).³ The [Education \(Stand-Down, Suspension, Exclusion and Expulsion\) Rules 1999](#) (updated on 1 December 2020) regulate the practice and process to be followed by boards, principals, students, and parents (and other persons) concerning school discipline. In addition, the Ministry of Education has issued detailed guidance for school boards about their legal obligations in relation to school discipline.⁴

Process of suspension, exclusion and expulsion

Section 80 of the Act enables principals to suspend (or stand down) a student if they are satisfied, on reasonable grounds, that there has been gross misconduct, continual disobedience or there is a risk of serious harm if the student continues to attend school. The board must then meet within a seven-day period to consider the suspension (section 81(5) of the Act). As noted in the Ministry’s guidance on suspension, the High Court has defined gross misconduct as misconduct that is ‘*striking and reprehensible to a high degree*’.⁵

It is important that principals take the necessary steps to establish the relevant facts and circumstances before making any decision to suspend a student under section 80. Clause 14 of the *Education (Stand-down, Suspension, Exclusion, and Expulsion) Rules 1999* requires a principal who has suspended a student to provide a written report to the board that contains all relevant information. Clause 17 requires that the relevant parts of the principal’s report are shared with the student and their family prior to the suspension meeting.

The Act and Rules place a discrete obligation on school boards to consider the circumstances before making a decision. Under section 81(1) of the Act, the school board must give consideration to the same statutory criteria as the principal, and may proceed to exclude the student only ‘*if the circumstances justify the most serious response*’. Clause 17 of the *Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules 1999* requires school boards to have ‘*due regard*’ for each circumstance relevant to the suspension and to consider each statutory

³ The Act incorporates and replaces the Education Acts 1964 and 1989. The Act retains large parts of existing education legislation, subject to various updates, including those that relate to school discipline.

⁴ Ministry of Education, ‘<https://www.education.govt.nz/school/managing-and-supporting-students/student-behaviour-help-and-guidance/stand-downs-suspensions-exclusions-and-expulsions-guidelines/>’ (‘Guidelines Part 1’).

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

option available. Ministry of Education guidance on suspension hearings suggests that school boards should consider:

- how other students have been affected;
- whether leniency would be appropriate;
- natural justice; and
- a range of responses for cases of varying degrees of seriousness.⁶

Ministry guidance on suspension hearings confirms that school boards have an independent role from the principal. Boards are required to exercise their judgment in reviewing a principal's earlier decision to suspend the student. This requires consideration of all the relevant circumstances, and the correct application of the relevant statutory test.

Investigations

Record-keeping

All of the complaints investigated raised significant issues around record-keeping.

The record-keeping obligations on school boards stem from the requirement under section 17 of the *Public Records Act 2005* to make and maintain full and accurate records. In the context of decisions about school discipline that impact on the rights of student to access education, it is vital that good records are kept, in the interests of accountability and transparency. The Ministry of Education guidance highlights this obligation, stating:⁷

You must record your decision, and the reasons for it, in writing. You must explicitly consider each option open to you. Your records need to be complete. There should be enough information in the report to show that you turned your mind to the criteria you had to apply. Document why you made the decision and how you arrived at the decision.

Investigation A

Investigation A concerned the decision of the Board to exclude a student from the college, and the associated record-keeping.

Record-keeping

The record of the process leading up to the student's exclusion consisted of three incident reports, during March and July 2020. In March, the student was issued a warning and the need for a behaviour support plan was noted, but not followed-up by the college. Otherwise, the student's pastoral record briefly recorded around a dozen disciplinary type incidents, including

⁶ Guidelines, Part 1, para 96, p 18.

⁷ Guidelines, Part 1, para 97, p 18.

three particular incidents involving conduct towards other students. The July 2020 incident report triggered the student's suspension on the basis of '*continual disobedience*'. However, the Board went on to exclude the student on the basis of '*gross misconduct*'.

The Ombudsman identified significant gaps in the information about the student's alleged misbehaviour in the documentation provided by the Board. The decision to exclude the student on a different ground than which they had been suspended was not explained. (The Ombudsman therefore surmised that the Board had likely intended to expel the student on the basis of continual disobedience.) There was no record of how the Board considered each of the circumstances relevant to the suspension, or the statutory options available to it. For example, the Ombudsman considered that the issues regarding the student's support needs were '*circumstances relevant to suspension*', for the purposes of clause 17 of the Education Rules. Although some information was available to the Board on this point, there is no record of whether the Board took the information into account.⁸

Given the standard of record keeping, the Ombudsman was not confident that the Board had properly grappled or understood its task in reviewing the principal's suspension decision.

Decision to exclude

The Ministry of Education guidelines state '*the decision to exclude a student is only to be made in circumstances that justify the most serious response*'.⁹ It highlights that exclusion should be proportionate to the behaviour in question.

As noted above, the Ombudsman surmised that the Board had likely intended to exclude the student on the grounds of continual disobedience. The Ombudsman considered that the decision of the Board to exclude the student was disproportionate to the nature of the allegations. For example, information from the student's teachers indicated their behaviour in class had improved since being disciplined earlier in the year for cannabis use. The Ombudsman found it hard to square these reports with the Board's position that the student had been '*continually disrespectful and defiant*' towards teachers. There was no evidence that the student had continued to use cannabis or vape. The pastoral record showed only three specific incidents that could be construed as relevant leading up to the suspension, involving conduct towards fellow students, none of which the school had regarded as serious when they occurred.

In response, the Board maintained that its decision to exclude the student was appropriate in the circumstances. It stated that any '*real or perceived shortcomings*' in the disciplinary process would not have altered the Board's decision. It also confirmed that the student was excluded by the Board on the basis of '*gross misconduct*'. However, the Ombudsman did not consider

⁸ The Ombudsman was uncertain whether the school had taken adequate steps to support the student's behavioural issues and learning needs in the months leading up to his suspension and there was no Individualised Education Plan in place despite the apparent need for learning support. The Ombudsman also observed that it was not clear whether the principal had adhered to the requirement under section 103 of the Act that that students are provided with good guidance and counselling, and that parents are informed of issues harming the student's progress or relationships at school.

⁹ Guidelines Part 1, para 92, p 18.

that the Board had identified any behaviours of the sort that might be regarded as gross misconduct under the Act. The Ombudsman also considered that suspending a student under one ground, and excluding them under another ground was inconsistent with the principles of natural justice.

Investigation B

Investigation B focused on the exclusion/expulsion of a group of students,¹⁰ and again raised record-keeping and decision-making issues.¹¹

Suspension meeting / record keeping

The Ombudsman focused his investigation on the decision by the Board to exclude/expel the students, and the documentation of its decision-making. Based on the available records, the Ombudsman was not satisfied that the Board had undertaken the required balancing exercise that considered all relevant circumstances, as required by the Rules and highlighted by Ministry guidelines. The Ombudsman identified concern that none of the relevant documentation contained a principal's report (as required by Clauses 14 and 17 of the Rules) or any record of the Board's deliberations in excluding/expelling the students.

In the circumstances, there were no records to confirm that the Board had undertaken an independent review of the principal's suspension decision or adequately considered the circumstances. Given the clear expectation that school boards clearly and comprehensively document their decision-making in this area, the Ombudsman regarded this as a significant failure. The omission of the Board to keep adequate records was seen as a fundamental flaw of its decision-making process. There was also nothing to confirm that the Board was presented with all the information required to make a decision on the exclusion/expulsion of the students. This meant that the Board was not in a position to make an informed decision based on the relevant factors.

In response, the Board acknowledged the shortcomings in its process, particularly the concerns about its record-keeping. The Board also commented that it had acted in good faith, and it remained of the view that threshold for '*gross misconduct*' was met by each of the students. However, the Ombudsman considered that the decision-making process was fundamentally flawed. Given that the board did not properly contextualise the students' behaviour by considering all the circumstances, there could be no confidence that the correct conclusion was reached. The Ombudsman was particularly concerned that the Board omitted to consider the impact of its decisions on the educational wellbeing of the students. The Ombudsman encouraged the Board to reflect on the gravity of expelling a student, and the effect on the

¹⁰ The group included students under and over the age of 16 years.

¹¹ Investigation B also included a fourth complaint about how the Board responded to a complaint about how the College investigated concerns about a student's behaviour. This complaint was upheld and the Ombudsman recommended that the Board provide a more detailed response to the student's family about their concerns.

students, their families, and their futures. The Ombudsman noted that the negative effects of expulsion (and exclusion) on students were long-lasting and well-recognised. The Ombudsman highlighted that the Ministry of Education guidance refers to expulsion an '*act of last resort*'.¹²

Outcome

In both investigations, the Ombudsman concluded that the omission of the Board to adequately record its decision-making was unreasonable. The decisions to exclude and expel the students were held to be unreasonable in themselves. Overall, the Ombudsman was not satisfied that the Board had properly discharged its statutory function in reviewing the principal's earlier decisions to suspend the students.

In investigation A, the Ombudsman recommended that the Board:

- formally apologise to the student and their parents, and engage with them about how to restore the student's mana;
- offer to re-enrol the student at Bethlehem College;
- attach a copy of the Ombudsman's opinion to the student's exclusion record; and
- review Bethlehem College's record-keeping policies regarding disciplinary matters.

In investigation B, the Ombudsman recommended the Board:

- formally apologise to the students and their families; and
- attach a copy of the Ombudsman's opinion and the apology letters to the students' exclusion/expulsion records.

The Ombudsman also recommended that the Board publish information about the investigations in a notice in the college newsletter. The notice should briefly outline the Ombudsman's findings against the Board and state that parents may complain to the Ombudsman if they have complaints about the Board.

The Board accepted and implemented the recommendations.

Disclaimer

This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.

¹² Ministry of Education, '[Good Practice Guidelines for principals and boards of trustees for managing behaviour that may or may not lead to stand-downs, suspensions, exclusions and expulsions](#)', Part 11, page 28.