

Omission by school board to follow due process before excluding student for gross misconduct

Legislation	Ombudsmen Act 1975, Education and Training Act 2020, Education (Stand-Down, Suspension, Exclusion, and Expulsion Rules) 1999
Agency	School board
Ombudsman	Peter Boshier
Case number(s)	557444
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Investigation about school board's decision to exclude a student under the Education and Training Act 2020 – Ombudsman satisfied student's conduct met the statutory test for gross misconduct – but decision to exclude was unreasonable as the board did not consider all options and relevant circumstances – Ombudsman also concerned about record-keeping, natural justice and board's impartiality – board accepted recommendations including an apology.

Background

A student was suspended by the principal on the basis of 'gross misconduct' after bringing alcohol to school and sharing it with another student. The other student became intoxicated in front of several classmates. Prior to this incident, there had been various concerns about the student's behaviour in class including swearing, using their phone, being disruptive, and unexplained absences. The school asked the student to sign a behaviour contract and had spoken to the student's parents on several occasions. As required by the Education and Training Act 2020, the board met to consider the suspension.¹ The board then excluded the student from school.

¹ Sections 80 and 81 of the Education and Training Act 2020. The authority to suspend then exclude a student under 16 years of age was previously found in sections 14 and 15 of the Education Act 1989.

Investigation

The Chief Ombudsman investigated whether the board followed a reasonable process in relation to the suspension hearing, and whether the decision to exclude the student was sound.

Decision to suspend: gross misconduct

Sections 78-88 of the Education and Training Act cover stand-downs, suspensions, exclusions and expulsions. The [Education \(Stand-Down, Suspension, Exclusion and Expulsion\) Rules 1999](#) 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.²

Section 80(1)(a) of the Act states that a principal can suspend a student if they are satisfied on reasonable grounds that the student's 'gross misconduct' is a harmful or dangerous example to other students at the school. The board must then meet within seven days to consider the suspension (section 81(5) of the Act). Under section 81(1)(c) of the Act, if the circumstances of the case 'justify the most serious response', then the board may exclude the student from the school, which means the student needs to enrol at another school.

As noted in the ministry's guidance on suspension, the High Court in *M & Anor v S & Board of Trustees of Palmerston North Boys' High School* defined gross misconduct as misconduct that is 'striking and reprehensible to a high degree'.³ The High Court also stated that breaching school rules, including alcohol-related incidents does not, in itself, meet the statutory requirement for gross misconduct:

*...schools may have a general policy towards alcohol and drugs but cases of alcohol and drug use must not be resolved automatically in accordance with such policy. Principals and Boards instead must carefully consider all the circumstances of each individual case before deciding whether or not individual alcohol related conduct amounts to gross misconduct. It may be troublesome, but it must be done.*⁴

The Ombudsman was satisfied the board could consider the incident amounted to 'gross misconduct'. The record of the decision confirmed that the board took into account the amount of alcohol involved, the level of intoxication and impairment of the other student, the dangerous example to other students who witnessed the incident, and that there were potentially unlawful elements to what occurred. The fact that it was a breach of school rules was only one factor the board took into account. However, the Ombudsman was not satisfied

² 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).

³ *M & Anor v S & Board of Trustees of Palmerston North Boys' High School* [2003] NZAR 705 (decided 5 December 1990).

⁴ Ftn 3 above, page 712.

that the board took all the relevant circumstances into account in its decision to exclude the student.

Decision to exclude student

Section 81 of the Act provides three options for school boards when considering the appropriate disciplinary response:

- lift the suspension before it expires, either unconditionally or subject to any reasonable conditions the board wants to make;
- extend the suspension conditionally for a reasonable period determined by the board when extending the suspension; and
- if the circumstances of the case justify the most serious response, the board may exclude the student from the school by extending the suspension and requiring the student to be enrolled at another school.

The Education (Stand-Down, Suspension, Exclusion and Expulsion) Rules specifically require boards to consider each circumstance relevant to the suspension (clause 17(1)(a)) and each of the statutory options (clause 17(1)(b)). The rules also require the board to record the deliberation in writing (clause 17(4)).

The ministry's guidelines note that making a decision requires boards to undertake a balancing exercise that includes all the relevant circumstances. This includes consideration of the statutory criteria and the student's individual circumstances, before determining what further action is appropriate. In terms of recording the decision, the guidelines state:

*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. [Emphasis added].⁵*

The Ombudsman relied on the board's record of its decision-making to assess whether the board fulfilled its statutory obligations. There were two key reasons recorded (other than the finding of gross misconduct) for why the board decided to exclude the student:

- the student did not show a commitment to changing; and
- staff and students would not be safe if the student returned.

Given the available record, the Ombudsman was not satisfied that the board properly considered each circumstance relevant to the suspension, or gave proper consideration to the three alternative options.

⁵ Ftn 2 above, Paragraph 97.

For example, it was unclear how the board came to the view that the student did not show a real commitment to change, given the available information. The student's records suggest that the student took accountability for their actions and was remorseful. The Dean's report demonstrated the student had shown behavioural improvements over the course of the term. However, there was nothing to suggest that the board took these positive aspects into account or that it balanced this information against other factors.

It was also not clear from the record why the board reached the conclusion that the student posed an ongoing safety risk to other students. There was no record of the student previously causing injury or threatening to harm anyone, making it unsafe for students and staff. The board subsequently advised the Ombudsman that it had relied on a comment made by staff that teachers felt unsafe around the student when the student became upset. The Ombudsman was concerned the comment was vague and did not contain any information about the particular behaviour at issue. Although the Ombudsman acknowledged the importance of teachers feeling safe, in the disciplinary context, there must be some objective basis or identifiable behaviour to justify such a conclusion. The Ombudsman did not consider there was sufficient information in this case to support such a finding.⁶

The Ombudsman also understood that the board refused to consider information the student put forward about potential trauma they were experiencing. The Ombudsman was concerned that the board labelled this information as an 'excuse' and a distraction rather than considering whether the information provided a genuine explanation for the student's behaviour. The Ombudsman was not confident that the board had assessed all the available information objectively.

In terms of the two other options (extending or lifting the suspension rather than exclusion), the records simply stated that the board '*considered the other disciplinary options*'. Based on this general statement, the Ombudsman was not satisfied the board explicitly considered each statutory option available to it. There was no explanation of why the other two disciplinary options were discounted.

Overall, while the finding of gross misconduct was justified, the Ombudsman considered the board omitted to consider the wider context of the student's behaviour and did not consider whether there was more that the board could have done to support the student.⁷ There was no clear information to confirm that the board had undertaken the required balancing exercise when reaching its decision. The Ombudsman emphasised that when excluding a student from school, the board must be clear about why the circumstances justify the most serious response, and that all the circumstances are considered. The record of the decision must have enough detail to reveal the deliberative process.

⁶ The Ombudsman expressed concern that the parents did not receive information about the comment before the suspension meeting. The Ombudsman was concerned that this raised natural justice issues because the parents and student were unable to comment on a key piece of information which adversely affected the student – this seemed inconsistent with section 78 of the Act.

⁷ Under section 103(a) of the Act, Principals must take 'all reasonable steps' to ensure that students get 'good guidance and counselling'.

The Ombudsman concluded that the board did not follow due process because it failed to give due regard to each circumstance relevant to the suspension and failed to demonstrate that it considered the alternative disciplinary options before deciding to exclude the student.

Obligation to record the decision and the reasons for it in writing

The Ombudsman did not consider the board recorded its deliberations adequately. The notes did not refer to key documents and did not explain how the board reached relevant conclusions. As discussed above, the notes did not reflect that the board took into account each circumstance relevant to the suspension, nor did it explain how it weighed and balanced the relevant factors. The notes did not explain why the board considered the most serious response was justified. The Ombudsman regarded this to be a crucial omission.

Pre-emptive removal of student from roll

Section 86 of the Education and Training Act states the student must stay on the school's register until they are enrolled at another school. The Ombudsman considered that the board acted contrary to law when it removed the student from the register before they were enrolled at another school, and that the board did not properly respond to the parents' complaint about this issue.

Impartiality of Board and respect for student

Under the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999, the board must treat each participant with respect during the suspension hearing.

The student's family was concerned that some of the questions and comments during the hearing had belittled the student in the context of an already stressful situation. Although this was not recorded, the Ombudsman considered there was sufficient information to suggest that it was more likely than not that this had occurred. The Ombudsman acknowledged that boards might ask questions of the student that challenge what they have put forward to explain their behaviour. However, the Ombudsman considered that some of the board chair's comments and questions during the hearing were not relevant to the suspension and were disrespectful. This gave the impression that the board at times lacked objectivity during the hearing.⁸

Outcome

The Ombudsman formed the final opinion that the board's decision to exclude the student was unreasonable, the board chair's conduct was unreasonable, the board acted contrary to law when it removed the student from the roll, and the board's response to the parents about the roll issue was unreasonable.

⁸ Under the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999, the Board must treat each participant with respect during the suspension hearing.

The Ombudsman recommended that:

- the board attach a copy of his opinion to the student’s disciplinary record;
- the board undertake a further review of the school’s disciplinary and suspension policies and practices, relating to:
 - natural justice, record-keeping, its obligation to explore each disciplinary option, its obligation to give due consideration to each circumstance relevant to the suspension in its proper context, and its obligation to treat participants with respect; and
- the board apologise to the student and family for the errors identified in the investigation and for not treating the student with respect during the suspension meeting.⁹

The Ombudsman had considered recommending the school offer to re-enrol the student. However, the parent did not consider this necessary as the student was already settled in another school.

The board accepted and implemented all of the Ombudsman’s recommendations.

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.

⁹ Apology to be made in accordance with this Office’s guidance: [He rauemi tātaki ea – A resource for offering an effective apology.](#)