

# School Exclusion / Suspension Training

11 October 2022  
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# Agenda

## Part 1

- Background and the new code
- General Principles
- Power to exclude
- Standard of proof
- Equality Act 2010 issues
- EHCP / SEN
- Duty to arrange education
- The role of Governors

## Part 2

- Independent Review Panel hearings
- The role of the clerk and panel members
- What happens if the IRP uphold the decision to exclude
- What happens if the IRP reject the decision to exclude
- Police involvement
- Human Rights Act and natural justice

# Background and the new code

## Background

- New guidance
  - 1 September 2022 last update (caution if you printed the code on 31 August...)
- DfE Statutory Guidance – on exclusion from maintained schools, academies and pupil referral units
  - <https://www.gov.uk/government/publications/school-exclusion>



### **Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement**

Guidance for maintained schools, academies, and pupil referral units in England

September 2022

## 1) Key Changes in relation to the new code

- The term 'fixed-period exclusion' has been changed to 'suspension' throughout.
- Schools should not adopt a 'no exclusion' policy.
  - The DfE has said this can lead to incentives for schools not to exclude pupils, even when an exclusion is the best option to make sure the pupil can receive the support they need, and could present safeguarding issues and expose staff and pupils to unreasonable risks. The new guidance states that schools should instead work to create an environment where exclusions are not necessary because pupils' behaviour does not require it.
- The guidance includes a list of behaviours that may warrant a suspension or exclusion, including physical assault and verbal abuse. The DfE has stated that the list is not exhaustive.
- There is more detailed guidance on off-rolling and unlawful exclusions, outlining more examples of what could be considered one of these practices. The guidance also states that Ofsted considers any evidence of off-rolling and is likely to judge a school as 'inadequate' if there is evidence of off-rolling.

## 2) Key Changes

- Schools should consider other guidance alongside the exclusion guidance (Behaviour in Schools - Updated, KCSIE). The guidance also directly refers to KCSIE in new paragraphs about managing safeguarding incidents when it has been reported that a pupil has abused another pupil (peer on peer).
- Headteachers retain the power to end suspensions early and withdraw PEX.
- The DfE chose not to set a deadline for informing parents of suspensions and exclusions
  - Retained the 'without delay' approach – rather than imposing strict deadline / 3 days.
- In relation to LAC - headteachers will need to inform social workers and virtual school heads (VSHs) about exclusions and keep them informed throughout.

### 3) Key Changes

- Good practice guidance on the use of off-site direction and managed moves is included.
- There is guidance for governors on using data on suspensions and exclusions.
  - Governors are advised to carefully consider the level of pupil moves and the characteristics of pupils who are moving on any exclusions to ensure pupils are only being excluded when necessary, as a last resort.
  - Governors should also review suspensions, permanent exclusions, pupils taken off roll, and pupils who are on roll but attending education off-site.
  - MATs are advised to work with their academies to consider this data and whether there are patterns across academies in the trust.

## 4) Key Changes

- The updated guidance clarifies the involvement of pupils in investigations.
- The need to reintegrate returning pupils effectively into mainstream education has been emphasised after suspension. Emphasises the need for pupil and parental involvement, multi-agency collaboration, pastoral and academic support, and the offer of a fresh start to the suspended pupil.
- Significant update to the guidance on 1 September 2022
  - Clarifying that where a suspension does not bring a pupil's total number of days of suspension to more than five in a term, the governing board must consider any representations made by parents, but it cannot direct reinstatement and the board is not required to arrange a meeting with parents
  - This reversed the July 2022 online version...

# Basics - Good discipline

## Good behaviour

- Good behaviour in schools is essential to ensure that all pupils can benefit from the opportunities provided by education.
- New guidance says, *“the government recognises that school exclusions, managed moves and off-site direction are essential behaviour management tools for headteachers and can be used to establish high standards of behaviour in schools and maintain the safety of school communities”*
- Permanent exclusion should only be used as a last resort. The decision to exclude a pupil must be lawful, reasonable and fair.
- Schools have a statutory duty not to discriminate against pupils on the basis of protected characteristics, such as disability or race.
- Schools should also give particular consideration to the fair treatment of pupils from groups who are vulnerable to exclusion.



# Behaviour Policy

- Behaviour policy:
  - Updated guidance – “Behaviour in schools” provides advice on implementing a behaviour policy which creates a school culture with high expectations of behaviour.
  - To ensure that pupils, their parents and school staff are aware of the standards of behaviour that are expected and the range of disciplinary sanctions that can be imposed if a pupil's behaviour falls below those standards.
  - Behaviour of pupils outside school can be considered as grounds for exclusion (section 89(5) of the Education Inspections Act 2006).
  - Cyber-bullying which takes place out of school may also lead to an exclusion.

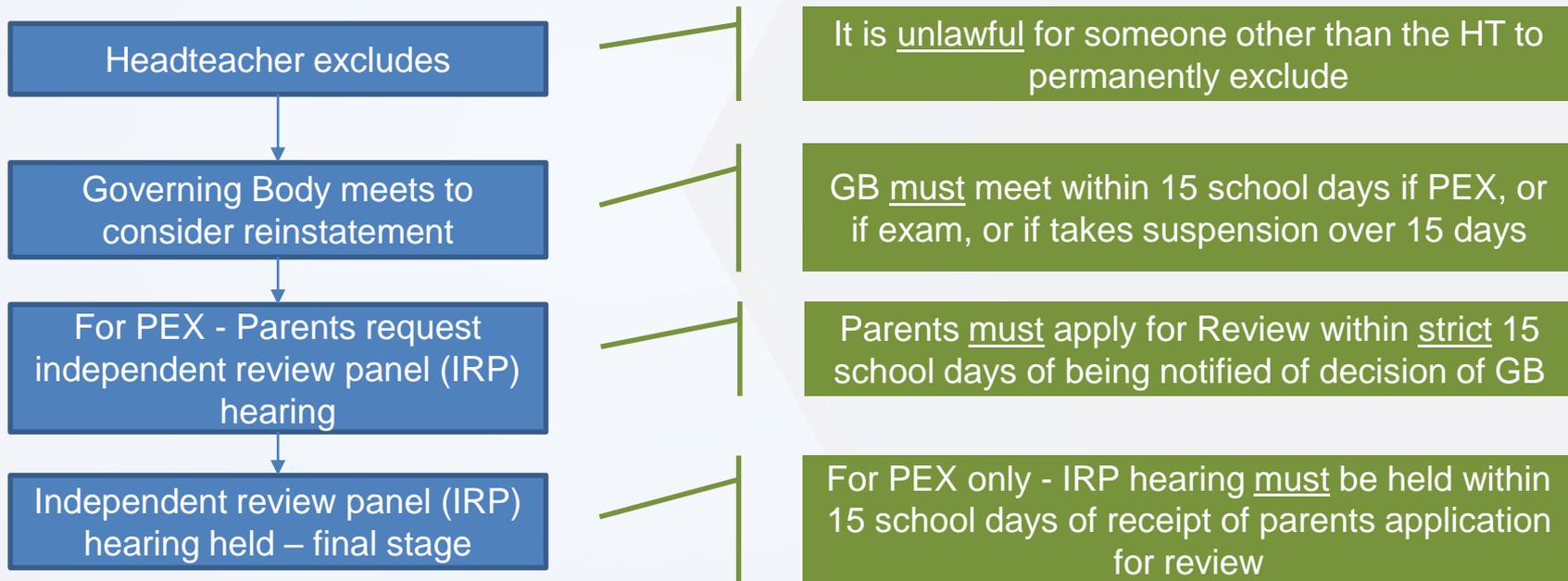


# A summary of the basics

## The basics...

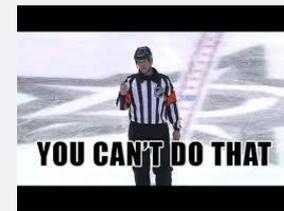
- There are 2 types of exclusion – suspension (previously called fixed term exclusion) and permanent.
  - A **suspension** is where the pupil is temporarily removed from school.
    - Maximum up to 45 school days in one school year, even if they've changed school.
    - If a child has been suspended schools should set and mark work for the first 5 school days.
    - If the suspension is longer than 5 school days (rare), the school / GB must arrange suitable alternative full-time education from the sixth school day (triggered by consecutive suspension totalling more than 5 days).
  - **Permanent exclusion** means the pupil is expelled. The LA must arrange full-time education from the sixth school day.

## The Basics



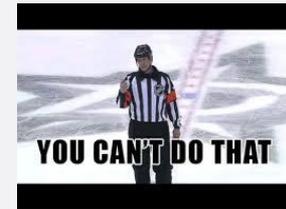
## What schools can't do...

- Only the Headteacher can suspend or permanently exclude.
- Can cause problems in MATs... “HT, Executive HT, CEO...”
- New guidance definition “*The term headteacher in this document means the headteacher of a maintained school, the teacher in charge at a PRU and the principal of an academy.*”
- If a head teacher is absent from school, the person “acting up” in this position during the absence may exclude a pupil (see section 579 of the Education Act 1996).
- However, an exclusion authorised by a teacher who is only “deputising” for the head teacher will not be lawful.



## What schools can't do...

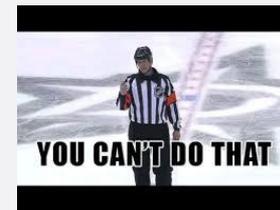
- Schools cannot convert or extend a suspension into a permanent exclusion.
- *Example – Issue 5 day suspension on 1 July. On 3 July, received additional information about severity and converted to permanent exclusion. This would be unlawful.*
- What you can do (in “exceptional cases” where further evidence has come to light) is issue a further or new suspension to begin immediately after the first period ends; or a permanent exclusion may be issued to begin immediately after the end of the suspension.



- Paragraph 74 of the exclusion guidance states that an effective method for providing parents with notification of the exclusion information may include:
  - E-mail (if agreement)
  - Text message (whilst referred to in the guidance, I would avoid this...)
  - Giving the notice directly to the parents.
  - Sending the information home with the excluded pupil
    - (whilst referred to in the guidance, I would avoid this... code recommends sending by an alternative method or checking safe receipt)

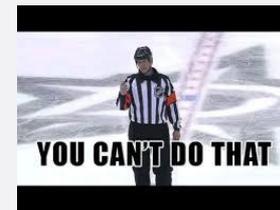
## What schools can't do...

- Schools must not discriminate (be cautious where SEN / EHCP).
- 'Informal' or 'unofficial' exclusions, e.g. sending a pupil home to cool off, are unlawful, regardless of whether they occur with the agreement of parents. This is often portrayed as doing the parent and child a favour by not making it official. But this is not lawful, even if the parent and pupil agree to it.
- Schools cannot use the threat of exclusion to influence parents to agree a “managed move”.
- Maximum of 45 days “suspension” in any one school academic year.



## What schools can't do...

- There are times when exclusion may not be appropriate. For example:
  - Poor academic performance.
  - Pregnancy.
  - Punishing pupils for the behaviour of the parents, for example, by extending a suspension until the parents agree to attend a meeting.
  - Minor incidents such as failure to do homework or to bring dinner money.



## Discussion point...

*Can you send pupils home if they refuse to comply with the school uniform policy?*

*Is this an unofficial exclusion?*

The leading case on challenges to a school uniform policy on religious grounds is:-  
R (Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15.

*Lord Scott of Foscote, giving the clearest reasoning on the exclusion point, stated that a direction encouraging the pupil to return to the school wearing the appropriate uniform was not an exclusion unless the school uniform rules, or the direction that the pupil comply with them, was so unreasonable as to be unlawful.*

# The legal test

## The test for permanent exclusion

- PEX should only be used as a sanction in response to:-
  1. (1) Serious or (2) persistent breaches to the school's Behavioural Policy; **and**
  2. Allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school.



## The test for permanent exclusion

In practice this means that there are two likely scenarios for a PEX

- the pupils has had a history of persistent disruptive behaviour and the school feel they cannot do anymore.
- the pupil has committed a single serious one-off offence, even if they have never been in trouble before. That might be something like assaulting a pupil or member of staff or bringing a knife or drugs into school.
  - New code gives examples...



## The test for permanent exclusion

Think carefully about which of these two reasons are used.

- 1) Persistent disruptive (be prepared to go through a plotted history of disruption over time)
- 2) One off serious offence (concentrate only on the one-off incident)

You can potentially use both in the alternative... but keep it simple where possible.

Remember you must also show... *“the pupil remaining in school would seriously harm the education or welfare of the pupil or others in the school”*

- “Others” can mean staff or other pupils.



## Permanent exclusion – for persistent breach

- If you are going down the “persistent breaches” route
  - can you show that all other approaches have been tried and exhausted?
  - If not, likely to be unlawful
  - For example, have you explored lesser sanctions, including suspension, off-site provision, consideration of managed move? See page 19, paragraph 31.
  - Has there been “reintegration meetings” following previous suspensions?
    - There is a range of measures at page 17, paragraph 30 of the code, such as regular contact, report cards, personalised targets and rewards, academic support to catch up, mentoring, meetings with parents.... Can you say you have tried these?



## The legal test when considering suspension / PEX

- Before taking a decision to suspend or exclude, the HT must ensure that:
  - The incident has been fully investigated.
  - All of the evidence has been considered and documented.
  - Remember - *“An ounce of documents is worth a tonne of recollection”*
- The pupil should be given an opportunity to present their case and version of events.
- Witnesses should be spoken to and statements taken, dated and signed (consider retaliation risk).
- CCTV should be examined (if applicable).
- The HT should take into account of any relevant mitigating factors, such as mental health issues, bullying, personal circumstances such as bereavement, unidentified SEN.



## The legal test

- The HT should only take a decision to exclude if, on the balance of probabilities, they are satisfied that the pupil is culpable.
  - This isn't a particularly high threshold ... 50/50 – meaning “*more likely than not*”.
- The head teacher should only take a decision to exclude if, on the balance of probabilities, they are satisfied that the pupil is culpable.



## Discussion point...

*An incident occurs...*

*An investigation takes place...*

*How soon must the HT take the decision to permanently exclude?*

## Alternatives to exclusion

- Where children are at risk of exclusion, schools should look at early intervention to address the underlying causes of the poor behaviour.
- If a child shows persistent disruptive behaviour, heads should consider a multi-agency assessment. For example, is there any unmet SEN?
- This may pick up unidentified special educational needs but also wider family issues affecting the child.
- A multi-disciplinary assessment may be carried out under the Common Assessment Framework (CAF assessment) which provides an opportunity for different agencies and services involved with a child to share information, identify needs and agree any actions.



## Alternatives to exclusion

- Internal exclusion. This involves exclusion from the mainstream class to a designated area within the school with appropriate support and supervision, or to another class on a temporary basis, and may continue over break times.
- Restorative justice. This enables an offending pupil to redress the harm that has been done to the victim and enables all parties with a stake in the outcome to fully participate in the process.
- Mediation, through a trained mediator or other third party, which approach may be appropriate where there has been conflict between two parties, for example a pupil and a teacher.
- Managed move. This option gives the pupil a fresh start but it can only be achieved with the consent of all involved, including the parents. Parents should not be pressured into moving their child because of a threat of PEX.
- Off-site provision - Maintained schools have more freedom to require a pupil to attend educational provision at a place outside the school premises in order to improve their behaviour on short term basis – dual registered. Academies can use this too if covered in Articles of Association...



## Vulnerable Groups

- Some groups are overrepresented in exclusion statistics.
- These include children with
  - SEN
  - children eligible for free school meals
  - children from particular racial groups
  - looked after children.
- Headteachers should look at providing extra support to these groups to try to reduce the risk of exclusion.





## SEN / EHCP children

- Head teachers and Governors must take into account SEN when administering the exclusion process which includes having regard to the SEND Code of Practice.
- Pupils with Education, Health and Care Plans (EHC plans / EHCP) and looked after children have additional needs and are vulnerable to the impacts of exclusion.
- Therefore, so far as possible, head teachers should:
  - Avoid excluding permanently any pupil with an EHC plan where possible.
  - Engage proactively with parents in supporting the behaviour of children with additional needs.
  - Consider what additional support or alternative placement may be required.
  - Assess the suitability of provision for a pupil's SEN.
  - Where a pupil has an EHC plan, consider requesting an Early Annual Review or Interim Emergency Review with LA.



## SEN / EHCP children

- WARNING – THIS IS PROBABLY THE HIGHEST AREA OF RISK
- The First Tier (Special Educational Needs and Disability) Tribunal
  - Appeal against EHCP (against LA)
  - Appeal against SEN Statement (against LA)
  - Claims of disability discrimination
    - Reasonable Adjustment claims (section 15 Equality Act)
    - Discrimination arising from disability claims (section 20 Equality Act)
    - Direct and indirect discrimination claims (section 13 and section 19 Equality Act)
- Or issue a claim of discrimination in the County Court.
- Six month limitation period from date of act.
- No compensation awarded – but apologies, requirement to change policy, take back child, training etc.

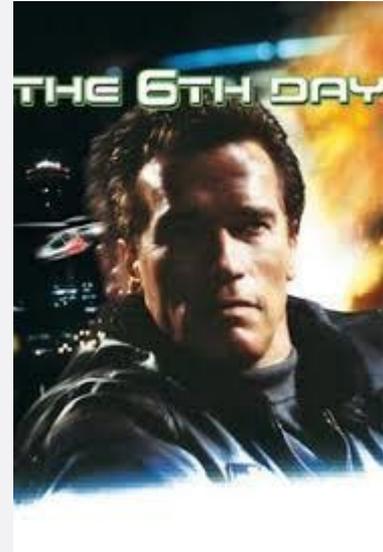
## Cancelling / Rescinding

- HT can cancel exclusion / suspension before the GB meet.
- Code refers only to exclusion – but I’m reading this as both suspension and also exclusion.
- Cannot cancel once the GB has met and considered the exclusion / suspension.
- If cancelled – then
  - Notify parents, LA, GB, social worker, VHT without delay.
  - HT to offer to meet parents
  - Report to the GB the number of cancelled exclusions per term
  - Allow the pupil to return
  - The code is silent on the attendance code – should you remove “E”. But what to use instead? Code C (but this needs to have been applied for by parent in advance)...

# The duty to arrange education

## Duty to arrange education

- **Suspension** - School / GB must arrange full-time education for suspension of more than five school days – this provision must begin no later than the sixth school day. Consecutive suspensions must also be considered in the same way.
- **PEX** - The LA must arrange full-time education for a pupil who has been permanently excluded, which must begin no later than the sixth school day of the exclusion, unless:-
  - in year 11 and has no further examinations left to sit.
  - has a statement of special educational needs that prescribes fewer hours of education than other pupils the same age would receive.



# Role of Governors

## Governor decision making

- In summary, Governors may be called upon at:-
  - (1) pupil behaviour committee stage / GB meeting (which follows the HT decision to exclude or suspend); or
  - (2) to be a panel member for Independent Review Panel hearing (which follows the GB upholding exclusion).
- Governors decide whether or not the pupil should be reinstated and if so, whether the pupil should be reinstated immediately or by a particular date.
- This training satisfies the requirements to sit on an IRP hearing panel.

## Governor decision making

- In terms of suspension:-
  - If the suspension is for 5 days or fewer, parents can still ask the governors to hear their views - but Governors don't need to meet with parents and GB can't overturn the Headteacher's decision.
  - This means parents have no right to attend any hearing with GB where FTE is 5 days or less – they can only make written representations.
  - Note the July version of the Code was temporarily different – but final September version reinstated the fact GB don't need to meet with parents where 5 days or less.

## Governor decision making

- In respect of PEX - governors must consider:
  - the interests and circumstances of the excluded pupil and have regard to the interests of other pupils and persons at the school; and
  - any representations about the exclusion.
- In respect of PEX - governors can:
  - Uphold an exclusion.
  - Direct reinstatement of the pupil on a particular date.
- If Governors decide that the pupil should be reinstated, the headteacher must comply with a direction to reinstate the pupil (regulation 6(5), 2012 Regulations).
- If Governors don't overturn the exclusion, parents can ask for an independent review hearing (IRP).

# Key dates and key timings

## Key dates and key timings

- This is where things often go wrong.
- It is complicated, so the next slide may assist...

|                                                                            | Suspensions                                                                                                                                                                                      |                                                                                                                                                                                               |                                                                                               | Permanent Exclusion                                                     |
|----------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|
|                                                                            | Up to and including 5 in one term                                                                                                                                                                | More than 5 but not exceeding 15 in a term                                                                                                                                                    | More than 15 but not exceeding 45 in a term (or result in missing an exam)                    |                                                                         |
| <b>Do the Governors have to meet?</b>                                      | Yes, but only if the parent has made written representations and requests that Governors meet to review the decision to exclude.                                                                 |                                                                                                                                                                                               | Yes – must meet                                                                               | Yes                                                                     |
| <b>When do Governors have to meet?</b>                                     | No specific timeframe but best practice within 50 <u>school</u> days of receiving notification of the exclusion                                                                                  | Within 50 <u>school</u> days of receiving notification of the exclusion, but only if written representations received from parents.                                                           | Yes, <b>must</b> meet within 15 <u>school</u> days of receiving notification of the exclusion | Within 15 <u>school</u> days of receiving notification of the exclusion |
| <b>Can the parent attend the Governor meeting?</b>                         | No, only written representations can be made. No need to meet with parents.                                                                                                                      | Parents can be present and make a verbal or written contribution                                                                                                                              |                                                                                               | Parents can be present and make a verbal or written contribution        |
| <b>If Governors agree to uphold the exclusion...</b>                       | Make a note on the pupil's educational record reflecting this.                                                                                                                                   |                                                                                                                                                                                               |                                                                                               | Make a note on the pupil's educational record reflecting this.          |
| <b>If Governors do not uphold the exclusion what choices do they have?</b> | Governors have no power to direct reinstatement<br>If Governors did not uphold the decision to exclude, this, and the reason for the decision, may be recorded on the pupil's educational record | Governors can reinstate the pupil immediately or on a fixed date<br>Where a pupil has already returned to the academy, Governors should record its decision on the pupil's educational record |                                                                                               | Governors can reinstate the pupil immediately or on a fixed date        |

## A summary of the governing board's duties to review the headteacher's exclusion decision

Conditions of exclusion

Governing board duties

Does the exclusion meet any of the following conditions?

- It is a permanent exclusion
- It is a suspension that alone, or in conjunction with previous suspensions, will take the pupil's total number of days out of school above 15 for a term
- It is a suspension or permanent exclusion that will result in the pupil missing a public exam or national curriculum test\*

Yes

The governing board must convene a meeting to consider reinstatement **within 15 school days** of receiving notice of the suspension or permanent exclusion.<sup>49</sup>

\*If the pupil will miss a public exam or national curriculum test, the governing board must take reasonable steps to meet before the date of the examination. If this is not practical, the chair of governors may consider pupil's reinstatement alone.<sup>50</sup>

No

Will the suspension(s) take the pupil's total number of school days out of school above five but less than 16 for the term?

No

The governing board must consider any representations made by parents but does not have the power to decide whether to reinstate the pupil.

Yes

Have the pupil's parents requested a governing board meeting?

Yes

The governing board must convene a meeting to consider reinstatement **within 50 school days** of receiving notice of the suspension.

No

The governing board is not required to consider the suspension and does not have the power to decide to reinstate the pupil.

# Duty to inform

## Duty to inform parents

- » Where possible, headteachers should notify parents that their child has been excluded and the reasons for this in person or by telephone – without delay.
- » The headteacher must also notify the parents, in writing, of the following information without delay:
  1. The reason(s) for the exclusion or suspension
  2. The period of a suspension or that it is a permanent exclusion
  3. The parents' right to make representations to the Governing Body, how representations should be made and how the pupil may be involved in this
  4. That parents have the right to attend a meeting, to be represented at that meeting and to bring a friend, if there is a legal requirement for the Academy Council to consider the exclusion

- » Should also confirm...
  5. That they must ensure their child is not present in a public place during the first five school days of a suspension, or until the start date of any alternative provision or the end of the suspension, where this is earlier
  6. Details of any alternative provision that is arranged, i.e. the start date of the provision, the times the pupil must attend the provision, the address the provision will take place at, and any information required by the pupil to identify the person they should report to on the first day
- » In the event that a pupil is suspended for a further period following their original suspension, or they are subsequently permanently excluded, the headteacher must issue a new letter to their parents without delay.
- » There should be standard letters to follow for this purpose.

## Duty to inform parents

- » Exclusion notification can be provided by delivering it directly or posting it to their usual or last known address.
- » Notification of exclusion can also be given to parents electronically (for example email); however, there must be a written agreement between the parents and the school for the information to be delivered in this way.
- » Effective methods include sending an email, text message (not recommended) or letter, or passing the information hand-to-hand, as long as all information is clear and easily understood. Where the information is sent home with the pupil – the school should also send by alternative method too, or contacting to confirm safe receipt.

## Duty to inform LA and Governors

- » The headteacher must notify Governors and the LA of:
  - » Any permanent exclusion, including where a suspension is followed by a decision to permanently exclude the pupil.
  - » Any exclusion or suspension which would result in the pupil being excluded or suspended for a total of more than 5 school days (or more than 10 lunchtimes) in a term.
  - » Any exclusion or suspension which would result in the pupil missing an exam.
- » All other exclusions should be reported once a term and include the duration and reason for the exclusion.
- » If a permanently excluded pupil lives outside the LA, the headteacher must notify the LA and the pupil's 'home authority' immediately.

## Duty to inform Social Worker and VHT

- » Where pupil is a LAC.
- » Information sharing is vital.
- » Be proactive.
- » Social worker and VHT need to be informed of the date of GB meeting – to share any necessary information. They can also attend, should they wish to do so.

## Who attends the GB meeting?

- » Parents (plus representative / friend).
- » Pupil (if over 18 years)
- » Headteacher
- » LA (where maintained or PRU – but not required to be invited to Academy GB)
- » Social worker (if applicable)
- » VSH if LAC

## GB outcome letter

- » Notify decision without delay, setting out reasons in sufficient detail.
- » Notify parents, HT, LA, VHT, Social Worker
- » Check if the parents live in a different LA – if so they need notifying too?
- » If upheld, set out time limit to request review at IRP.

**Short 5 minute Break**

# Independent Review Panel Hearings

*Newcastle | Leeds | Manchester*

wardhadaway  
lawfirm

## Independent Review Panel Hearing

- An independent review panel (IRP) reviews the GB decision not to reinstate a permanently excluded (PEX) pupil.
- There is no right to an independent review against a suspension of any duration.
- IRP decision is binding, but the panel does not have the power to direct reinstatement.
- IRP has more limited powers than the previous independent appeal panels and can only decide to:
  - uphold the exclusion decision of Governors;
  - recommend Governors reconsider their decision; or
  - if it considers Governors decision was flawed when considered in the light of the principles that apply on an application for judicial review, quash Governors decision and direct that them to reconsider the exclusion.

## Independent Review Panel Hearing

- Parents have 15 school days to request IRP hearing following.
- The 15 school days runs from the date on which notice in writing of the governing board's decision is given to parents.
- Notice is deemed to have been given on the same day if it is delivered or on the second working day after posting if it is sent by first class mail.

## Discussion point...

*If a parent only just misses the 15 school day time limit, should they be allowed to proceed to an IRP hearing?*

## Timings

- If the parents decide to review the permanent exclusion decision to an IRP, they must lodge their written notice of application of review within 15 school days after the day on which notice in writing was given of the decision to permanently exclude.
- The correct interpretation of “school day” in paragraph 2 of the Schedule to the 2012 Regulations was considered by the High Court in *R (P) v Haringey London Borough Council [2008] EWHC 2357* and held to be a full 24-hour period so that P’s notice of appeal, e-mailed at 9.08 pm on the last day for appealing but not read until three days later, was delivered within the deadline for appealing.
- An application for review must be:
  - In writing and set out the grounds of review.
  - Made within the specified deadline. An application made outside the time frame must be rejected.

## Evidence

- In determining that the exclusion decision should be quashed, the School is not able to bring a new reason for exclusion.
  - For example, “*we excluded for [drugs], but we have since learnt that we could have also excluded for reason [carrying a knife]*”.
- It can however receive and consider new evidence that it considers Governors were not reasonably aware of at the time it took its decision to uphold the exclusion when deciding whether to recommend the School reconsiders its decision.
  - For example, “*we have since received a video of the incident from a pupil who was a witness and present at the time, which implicates*”...

## IRP Bundle of documents

- Should produce a chronological paginated bundle of documents.
  - DfE Guidance (SEN and Exclusion) and a copy of the school behaviour policy.
  - EHCP / SEN information (if applicable)
  - All paperwork regarding the incident (or a history of behaviour if “persistent”) including signed witness statements (consider redaction if appropriate).
  - HT report.
  - Occasionally LA may produce a report.
  - Letters and minutes (PEX letter / GB minutes / GB outcome letter / parents letter requesting IRP).

## Who attends

- Panel of three – made up of specific groups (lay person, HT, Governor etc). [More detail on next slide]
- Clerk
- If requested by parents, SEN expert to provide impartial advice on how SEN may be relevant to the decision to exclude the pupil permanently. This can be SENCO (and can be from within the trust provided nothing to suggest doubts of impartiality).
- Parents and potentially the pupil
- Headteacher – to present investigation and decision making up to PEX.
- Chair of panel of Governors who upheld exclusion at Governor level following HT decision.
- LA – for maintained schools only – not academies. Can attend (and speak) with permission.

## Who attends

- Panel of three – made up of specific groups (lay person, HT, Governor).
  - A lay person who acts as chairperson. This person will not have worked in any school in any paid capacity (could have been a governor or volunteer).
  - A school governor who has been a governor for at least 12 consecutive months in the last 5 years.
  - A current HT or a retired HT (retired within 5 years).
- Clearly the panel must be independent of the child/parent and the school (but not necessarily the Trust) in question.
- New guidance – can't be a director of the Academy Trust of the school. Also can't be an employee of the Trust (excluding HTs).

## When must the IRP take place

- Must take reasonable steps to identify a date for the review which all parties are able to attend.
- However, the review must begin within 15 school days after the day on which the parent's application for a review was received.
- Note that where the issues raised by two or more applications for review are the same, or are connected, the panel may combine the reviews if, following consultation with all parties, there are no objections.

## The role of the clerk

- Not served as clerk at the meeting of the governing body that took the exclusion decision.
- Have an up-to-date understanding of developments in case law, legislation and guidance that is relevant to the exclusion.
- Make reasonable efforts to:
  - circulate copies of relevant documents to all parties five school days before the review starts; and
  - inform all parties that they are entitled to make written representations, attend the review and (if they decide to attend) may make representations in person or through a representative.
- Provide details of those attending the review and their respective roles to all parties.
- Attend the review and ensure that minutes of the review are produced.

## On the day...

- Introductions
- Check all papers received and read by panel
- Parents make representations (can be legally represented or by friend). Pupil also has right to speak.
- Questions to parents and pupil.
- HT to make representations (can also be legally represented).
- Questions to HT.
- Governor to make representations (can also be legally represented).
- Questions to Governor
- Summing up by all.

## On the day...

- The IRP should not rely on witness statements that have not been disclosed to the excluded pupil's parents.
- In *R v Dunraven School, ex parte B [2000] ELR 156 CA*, the court quashed the governing body's decision on the basis that there had been a breach of the requirement for fairness since prejudicial evidence was known to the head teacher and school governors, but was not disclosed to the excluded pupil's parent.
- In order to review the governing body's decision, the IRP will generally need to hear from those involved in the incident(s) leading to the exclusion. In the case of witnesses who are pupils of the school, it will be usually more appropriate for the panel to rely on written statements. Pupils of the school may appear as witnesses if they do so voluntarily and with their parents' consent (and in these circumstances their parents should be invited to attend the meeting to support their child).

## The decision...

- The principles to be applied are those of public law which underpin good decision-making. All decisions must be made having regard to the public law principles applicable in an application for judicial review:
- Illegality: whether the head teacher and/or the governing body acted outside the scope of their legal powers in taking the decision or upholding the decision to exclude.
- Irrationality: relying on irrelevant points or ignoring relevant points – or whether the decision of the governing body not to reinstate the pupil was so unreasonable that no governing body acting reasonably in such circumstances could have made it.
- Procedural impropriety: whether the process of exclusion and the governing body's consideration was so unfair or flawed that justice was clearly not done. This means not simply a breach of minor points of procedure but something more substantive which has a significant impact on the quality of the decision-making. Procedural impropriety may include bias, failure to consider relevant facts or evidence or a failure to give reasons for the decision (see paragraph 226).

## The decision...

- The decision of the IRP and the grounds on which the decision is made must be communicated in writing without delay to the parents, the local authority, the home local authority (if applicable), the governing body and the head teacher.
- The decision of the IRP:
  - Is binding on the parent, the governing body, the head teacher, the local authority and (in the case of an Academy) the Academy Trust.
  - Cannot be revisited once made.
  - Does not have to be unanimous and can be decided by a majority vote.

## The decision...

- The effect of a decision by the IRP to uphold a permanent exclusion decision means:
  - The pupil's name can lawfully be removed from the school roll the day after the conclusion of the review.
  - The local authority becomes responsible for the pupil and should take immediate steps to liaise with the parents to discuss future educational provision.
  - If a pupil is due to sit public examinations, they should be allowed to return to school as a visitor despite the IRP's decision to uphold the permanent exclusion.

## If IRP rejects the exclusion

- Where the IRP recommends Governors reconsider their decision not to reinstate the permanently excluded pupil or quashes Governors decision and directs that they reconsider the matter, Governors must reconvene within 10 school days of being given notice of the panel's decision.
- Note where quashed if Governors do not offer to reinstate the pupil or fails to reconsider the exclusion within ten school days, the panel may:
  - Direct Governors to place a note on the pupil's educational record.
  - Order the local authority to make an adjustment to the school's budget for the funding period during which the exclusion occurred in the sum of £4,000.
- Increased risk of Judicial Review if GB do not consider carefully the findings of IRP.



## The decision...

- There is nothing in the legislation or the guidance which confers a further right of appeal to an IRP against an adverse decision on reconsideration by the governing body.
- Potential for Judicial review – but thought to be a relatively slim risk.
- Possible Discrimination claim if SEN / EHCP and disabled.
  - *Note – You must not delay or postpone arranging an independent review panel where parents also make a claim of discrimination in relation to the exclusion to the First-tier Tribunal (Special Educational Needs and Disability) or the County Court.*

## Human Rights Act / Natural Justice

- Right to a fair hearing (Article 6 of European Convention on Human Rights) – although some legal debate as to whether this technically applies... see *R (B) v Alperton Community School [2001] ELR 359*; *S v Brent [2002] EWCA Civ 693*.
- Fairness and even handed approach.
- No bias.
- Approach with an open mind – no pre-determined outcome.

## Police involvement...

- A school-related incident might sometimes also be the subject of a police investigation that may subsequently result in criminal proceedings.
- This may hamper the school's investigation and can mean evidence available to head teachers, governing bodies and IRPs is limited.
- The Exclusion Code states that a head teacher need not postpone taking a decision on an exclusion solely because a police investigation is underway and/or any criminal proceedings may be brought in respect of the same incident.
- In such circumstances, a judgement must be made on the basis of the evidence available although a head teacher should give particular consideration to ensuring that the decision to exclude is fair. However, the final decision on whether to exclude the pupil is for the head teacher to make.
- Criminal proceedings must not delay the Governors or IRP from sitting.

## Police involvement...

- However, the IRP can consider the following relevant factors:
  - Whether any charge has been brought against the pupil and if so, the nature of the charge.
  - Whether relevant witnesses and documents are available.
  - The likelihood of delay if the hearing was adjourned and its effect on the excluded pupil, the parents, the victim or the school.
  - Whether an adjournment or declining to adjourn may result in an injustice.

## Contact details

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# questions and answers

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