

Challenging School Exclusions

A Report by JUSTICE

Chair of the Working Party
Professor Richard de Friend



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The views expressed in this report are those of the Working Party members alone, and do not reflect the views of the organisations or institutions to which they belong.

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EXECUTIVE SUMMARY

The number of permanent and fixed term exclusions in England has risen year on year since 2012, with a rate of permanent exclusions which far outstrips that of Wales, Northern Ireland and Scotland. Furthermore, the effects of exclusion are concerningly disparate, disproportionately affecting children with special educational needs and disability and those from minority groups. Any exclusion interferes with a child's right to an education and permanent exclusions in particular can have far-reaching and serious consequences for a child's future.

Against this background, there is growing concern around the quality of decision-making in formal exclusions as well as the prevalence of informal exclusions and so-called "off-rolling". Indeed, the recent Government-commissioned review by Edward Timpson concluded that we *cannot* be confident that all exclusions are lawful, reasonable and fair.

In addition to this work analysing the substantive issues, consideration of the procedural issues is also vital. When wrong decisions to exclude are made, there must be a process through which they can be challenged effectively and rectified swiftly, minimising the consequences for the child. Our JUSTICE Working Party has focused on this procedural aspect, examining the processes currently used to make, confirm and review a decision to permanently exclude a pupil. The report highlights a number of serious weaknesses in the processes currently in place, including:

- Schools' **inconsistent understanding of the law** which governs the use of their powers to exclude, combined with overly rigid application of behaviour policies;
- **Poor communication** between schools and pupils' parents or carers, resulting in missed opportunities to share relevant factors prior to the exclusion decision being made;

- An ineffective first stage of review before school governing board panels which lacks independence, resulting in a “**rubber-stamping**” of the headteacher’s decision;
- The **inadequacy** of the second stage of review by Independent Review Panels, in terms of, amongst other issues, their varying standards of procedure, the varying special educational needs expertise available, and their powers – they are unable to direct the mandatory reinstatement of wrongly excluded pupils;
- **Inaccessible** guidance to parents/carers and pupils on the exclusions process and **alienating** jargon within the review process.

The Working Party’s proposals are comprehensive and even radical, and yet, we consider, wholly necessary to address the weaknesses identified. Our proposed new process includes:

- Robust systems and processes in schools prior to exclusion, including **mandatory training** on the law governing exclusion powers for all teachers in leadership positions; more consistent **consideration of unmet needs**, particularly special educational and health needs, prior to permanent exclusion; and **better communication** between the school, the pupil and the parents/carers by meeting prior to exclusion and listening to their representations.
- **Introducing** a new role of the specialist “**Independent Reviewer**” to conduct an investigative review into individual exclusion decisions, replacing the first stage review currently being conducted by the governing board of the school.
- **Transforming** the second stage of review by placing it within an **appeals body** with specialist expertise. The appeals body would be able to remake the decision afresh, to direct mandatory reinstatement, and order other remedies such as wiping a child’s record of the exclusion and requiring the pupil to be allowed to sit an exam. The Working Party has identified that the First-tier Tribunal (Special Educational Needs and

Disability) could act as this appeals body, having already attained the necessary expertise, making it the First-tier Tribunal (Education).

- **Improving** the design, content and availability of guidance on the exclusion review process to make it coherent and accessible to parents/carers and pupils; signposting to, and improving the availability of, independent service advisors and support services.
- **Enhancing** awareness by professionals within the review process of how to effectively communicate with parents/carers and pupils and include them within the process, including making reasonable adjustments for those with additional needs or vulnerabilities.
- **Including** the pupil by seeking their views at all stages of the review process.

This bold Report rethinks the process of school exclusions and how they are challenged, proposing a system which is procedurally fair, efficient, robust, accessible and accommodating of the needs of all children.

I. INTRODUCTION

Background

- 1.1 Over the past few years there has been widespread and growing concern around the use of school exclusions in England. Such concern has been fuelled by the ongoing increase in both formal and informal¹ exclusions; the extent to which the risk of exclusion falls disproportionately on the most disadvantaged and vulnerable pupils; the devastating impact that exclusion can have on the education and future prospects of pupils; and evidence of a strong correlation between exclusion and youth crime.
- 1.2 Over the past five years, there has been a substantial rise in both the number and rate of permanent and fixed term exclusions in England.² In 2017/18 there were 7,905 permanent exclusions, an increase of over 70 per cent since 2012/13. There were 410,753 fixed term exclusion in 2017/18, a 54 per cent rise in the same period.³ In addition, it is estimated that there are thousands more pupils who are informally excluded from school and are therefore not captured in the school exclusions data.⁴

¹ See footnote 23 below for a definition of informal exclusions.

² Permanent and fixed term exclusions are defined in paragraph 2.2 below.

³ Permanent exclusions in England have risen from 4,630 in 2012/13 to 7,905 in 2017/18. The rate of permanent exclusions that is the number of permanent exclusions as a percentage of the number of pupils has also increased year-on-year since 2012/13, although it remained constant at 0.10% between 16/17 and 17/18. The number of fixed term exclusions has risen from 267,520 in 2012/13 to 410,753 in 2017/18. The rate has increased from 3.51 per cent to 5.08 percent. See Department for Education (“DfE”), ‘Permanent and Fixed Period Exclusions in England 2017 to 2018 - National Tables’ Table 1, available at <https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2017-to-2018>; DfE, ‘Permanent and Fixed-Period Exclusions in England: 2016 to 2017 - National Tables’ Table 1, available at <https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2016-to-2017>.

⁴ The FFT Education Datalab estimated that between 6,200 and 7,700 pupils remained the country but were missing from education statistics at GCSE level in 2017; its concern was that many of these pupils had been informally excluded. See Nye, ‘Who’s Left: The Main Findings’ *FFT Education Datalab* (31 January 2017) available at <https://ffteducationdatalab.org.uk/2017/01/whos-left-the-main-findings/>. An investigation by *The Times* found that 13,000 pupils did not have GCSE results recorded in 2017 despite appearing on their schools’ rolls a year earlier. See Morgan-Bentley, ‘Weak Pupils Expelled as Heads “Game” Exam Tables’ *The Times* (28 August 2018) available at <https://www.thetimes.co.uk/article/weak-pupils-expelled-as-heads-game-exam-tables-zwnfrd8ck>.

1.3 By comparison in Wales in 2016/17 165 pupils were permanently excluded,⁵ in Northern Ireland in 2017/18 15 pupils were permanently excluded⁶ and in Scotland in 2016/17, only five pupils were permanently excluded.⁷ Even accounting for differences in sizes of population, the rate of permanent exclusions in England far outstrips that in the other home nations.

1.4 Not all pupils are at equal risk of exclusion. Those with special educational needs and disabilities (“SEND”) are at particular risk. Although pupils with SEND account for just under 15 per cent of the pupil population,⁸ 45 per cent of all permanent exclusions and 43 per cent of all fixed term exclusions in 2017/18 were of pupils with SEND.⁹ Pupils of Gypsy, Roma and Irish traveller heritage as well as Black Caribbean pupils have a much higher rate of exclusion than other ethnic groups.¹⁰ In addition, children eligible for school meals are four times more likely to be excluded than those who are not.¹¹ Children with several of these characteristics are at an even higher risk of exclusion.¹²

⁵ Welsh Government, ‘Permanent and Fixed-Term Exclusions from Schools: September 2016 to August 2017: Tables’ Table 1, available at <https://gov.wales/permanent-and-fixed-term-exclusions-schools-september-2016-august-2017>.

⁶ Department of Education of Northern Ireland, ‘Pupil Expulsions 2017/2018’ available at https://www.education-ni.gov.uk/sites/default/files/publications/education/pupil%20expulsions%202017_18.pdf.

⁷ Scottish Government, ‘Summary Statistics for Schools in Scotland No. 8: 2017 Edition’ p. 27, available at <https://www.gov.scot/publications/summary-statistics-schools-scotland-8-2017-edition/>.

⁸ DfE, ‘Special Educational Needs in England: January 2019’ Table 1, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814244/SEN_2019_Text.docx.pdf.

⁹ DfE, ‘Permanent and Fixed Period Exclusions in England 2017 to 2018 - National Tables’ (see n. 3 above) Table 5.

¹⁰ DfE, ‘Permanent and Fixed Period Exclusions in England: 2017 to 2018 - Main Text’ p. 6, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820773/Permanent_and_fixed_period_exclusions_2017_to_2018_-_main_text.pdf.

¹¹ Pupils known to be eligible for free school meals were 4 times more likely to be permanently excluded and 3.7 times more likely to receive a fixed-period exclusion than those not eligible. DfE, ‘Permanent and Fixed Period Exclusions in England 2017 to 2018 - National Tables’ (see n. 3 above) Table 9.

¹² Timpson, ‘Timpson Review of School Exclusion’ (2019) p. 10, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807862/Timpson_review.pdf.

- 1.5 Exclusion rates also vary markedly between regions, local authorities and even between schools within the same local authority.¹³
- 1.6 Being excluded from school can be a life changing event for a pupil with profoundly negative consequences for their futures. Pupils who have been excluded are unlikely to reach the same levels of academic achievement as their peers, making it more difficult for them to progress to further study and work,¹⁴ especially given that the quality of the education which excluded pupils receive in alternative provision is often far below that received in mainstream education.¹⁵ As the Working Party heard from parents and teachers alike, being excluded also negatively impacts on children's mental health,¹⁶ reinforcing their sense of rejection and negative self-image.¹⁷ Being excluded can also increase children's vulnerability to criminal exploitation, with some pupil referral units offering fertile recruitment ground for gangs.¹⁸
- 1.7 Faced with this evidence, in March 2018 the Government commissioned Edward Timpson CBE, a former Children's Minister, to conduct a review of exclusion practice. The report looked at how head teachers use exclusions in practice and why some groups of pupils are more likely than others to be excluded. Published in May 2019, it concluded that rates of exclusion can depend not only upon a pupil's (mis)behaviour, but on such factors as: the quality of leadership and culture within schools; how well-equipped schools

¹³ For example, in 2017/18 the rate of permanent exclusions varied from 0.06 in the South East to 0.14 in the North East. However, within the North East, North Tyneside had a permanent exclusion rate of just 0.06 compared with the rate in Redcar and Cleveland of 0.27. DfE, 'Permanent and Fixed Period Exclusions in England 2017 to 2018 - Local Authority Tables' Table 17, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820450/Permanent_and_fixed_period_exclusions_2017_to_2018_-_LA_tables.xlsx.

¹⁴ Gill, Quilter-Pinner and Swift, 'Making the Difference: Breaking the Link between School Exclusion and Social Exclusion' Institute for Public Policy Research (2017) p. 21, available at <https://www.ippr.org/files/2017-10/making-the-difference-report-october-2017.pdf>.

¹⁵ Timpson (see n. 12 above) p. 8.

¹⁶ Ford et al., 'The Relationship between Exclusion from School and Mental Health: A Secondary Analysis of the British Child and Adolescent Mental Health Surveys 2004 and 2007' *Psychological Medicine* (25 August 2017) available at <https://ore.exeter.ac.uk/repository/handle/10871/28337>.

¹⁷ Gill, Quilter-Pinner and Swift (see n. 14 above) p. 21.

¹⁸ See e.g. 'School Exclusions "Fuelling Gang Violence"' *BBC News* (30 October 2018) available at <https://www.bbc.com/news/uk-46027265>; House of Commons Home Affairs Committee, 'Serious Youth Violence: Sixteenth Report of Session 2017-19' (2019) paras 163–171, available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1016/1016.pdf>; Timpson (see n. 12 above) p. 8.

are to manage disruptive behaviour, and in particular whether they are able to offer early help and put in place alternatives to exclusion; and the incentives created by the current performance-monitoring and funding system.¹⁹

- 1.8 Timpson determined that, at present, we cannot be confident that all exclusions are, as the Statutory Guidance published by the Department for Education (“DfE”) requires, “lawful, reasonable and fair”,²⁰ and recommended a large number of measures aimed at better ensuring that they would be. These concentrated in particular on schools’ behavioural management systems, improving alternative provision, the excluding school retaining accountability for the education of permanently excluded pupils, and tackling off-rolling.

The Working Party

- 1.9 It was beyond Timpson’s scope to examine the procedures which are currently used to make, confirm and review a decision to exclude a pupil and whether they are sufficiently robust and effective to ensure that exclusions comply with statutory requirements. However, he acknowledged that many would welcome seeing further analysis of how the current review process operates in practice.²¹
- 1.10 This Working Party has sought to provide that analysis, focussing on the process for challenging exclusion decisions as well as the procedural aspects of the initial decision to exclude. In this report we trace the stages of the current review process from the initial decision to exclude, through to the independent review panel (“IRP”), ending with an examination of issues of accessibility and the support available to parents and pupils, which cut across all stages of the process.
- 1.11 The Working Party recognises that there is a place for exclusion as part of a head teachers’ powers to respond to behavioural incidents in schools. However, as the Statutory Guidance and Timpson emphasise, it must be used lawfully, reasonably and fairly and, in the case of permanent exclusions only

¹⁹ Timpson (see n. 12 above) p. 11.

²⁰ DfE, ‘Exclusion from Maintained Schools, Academies and Pupil Referral Units in England: Statutory Guidance for Those with Legal Responsibilities in Relation to Exclusion’ (September 2017) p. 6, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641418/20170831_Exclusion_Stat_guidance_Web_version.pdf.

²¹ Timpson (see n. 12 above) pp. 87-88.

as a last resort, where absolutely necessary.²² We believe that a robust review process is crucial to ensuring that this is the case and that every child, irrespective of their background or individual circumstances, receives the same opportunity to be educated.

- 1.12 Given the scope of the work, the Working Party has therefore not looked at substantive issues such as the circumstances in which a pupil should be excluded. It has also not had the opportunity to address the issue of informal exclusion.²³ Nevertheless, we recognise that informal exclusion is an important and pressing issue, which affects potentially thousands of children.²⁴ We acknowledge the work that the Children’s Commissioner²⁵ and Ofsted²⁶ are currently undertaking on this and would welcome further efforts being taken to address it.

²² DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) p. 6; Timpson (see n. 12 above) p. 3.

²³ Informal or unofficial exclusions refer to circumstances in which a pupil is removed from the school environment without it being officially recorded as an exclusion. This might include pupils being sent home for “cooling-off periods” or being put on extended study leave, without this being recorded as a fixed-term exclusion, or “off-rolling” where a pupil is removed from a school’s roll entirely without a formal permanent exclusion, for example parents being coerced into accepting home education. See Children’s Commissioner, ‘Skipping School: Invisible Children, How Children Disappear from England’s Schools’ (February 2019) p. 10 available at <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/02/cco-skipping-school-invisible-children-feb-2019.pdf>; Children’s Commissioner, “‘Always Someone Else’s Problem’: Report on Illegal Exclusions” (2013) p. 6, available at https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Always_Someone_Elves_Problem.pdf. Ofsted define “off-rolling” as “the practice of removing a learner from the provider’s roll without a formal, permanent exclusion or by encouraging a parent to remove their child, when the removal is primarily in the interests of the provider rather than in the best interests of the learner. Off-rolling in these circumstances is a form of ‘gaming’”, Ofsted, ‘The Education Inspection Framework’ para 29 and footnote 16, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/801429/Education_inspection_framework.pdf. The Education Policy Institute (EPI) has recently reviewed schools data in detail and identified that 1 in 10 pupils are absent from school in an unexplained exit, see Hutchinson and Crenna-Jennings, ‘Unexplained pupil exits from schools: Further analysis and data from multi-academy trust and local authority’ EPI (October 2019) available at https://epi.org.uk/wp-content/uploads/2019/10/Unexplained-pupil-moves_LAs-MATs_EPI-2019.pdf.

²⁴ See statistics at n. 4 above.

²⁵ Children’s Commissioner, ‘Skipping School: Invisible Children’ (see n. 23 above).

²⁶ See e.g. Owen, ‘What Is Off-Rolling, and How Does Ofsted Look at It on Inspection?’ *Ofsted blog: schools, early years, further education and skills* (10 May 2019) available at <https://educationinspection.blog.gov.uk/2019/05/10/what-is-off-rolling-and-how-does-ofsted-look-at-it-on-inspection/>.

- 1.13** The Working Party has focused largely on permanent exclusions for a number of reasons. First, due to the huge impact that permanent exclusions can have on a pupil's life. In some cases, this can be greater than that of a criminal conviction, yet the process for challenging a permanent exclusion is far less robust than the procedural safeguards which are available in the youth justice system. Second, whilst the Working Party heard concerns from consultees regarding the use of fixed-term exclusions, these tended to relate to substantive issues such as the threshold for the number of days in a year a pupil can be excluded in an academic year.²⁷ Whilst the Working Party shares these concerns, they were not ones which fell within its terms of reference. However, some of our recommendations, in particular those that relate to the initial decision to exclude, are equally applicable to both fixed term and permanent exclusion. We have also considered in Chapter 4 an enhanced oversight role for governors in reviewing a school's overall use of fixed term exclusions.
- 1.14** The Working Party has limited the geographical scope of its work to England as each of the home nations has different systems in place to deal with exclusions. However, we have looked at practice in the devolved nations, as well as in the United States, in order to understand and learn from the way in which different jurisdictions deal with issues related to the review of exclusion decisions.
- 1.15** The Working Party appreciates that some of its recommendations – particularly in relation to the “first stage” review – would require additional expenditure at a time when funding for schools, local authorities, and above all, special educational needs (“SEN”) provision, has suffered years of cuts. However, it believes that any such additional expenditure would be offset by the savings which would flow from the reduction in the number of second stage challenges, resulting from higher quality and more reliable initial decision making.²⁸ Furthermore the Working Party insists that, for the

²⁷ The current threshold is 45 days per school year, School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, reg 4. Timpson recommended that the DfE should consult on a revised limit on the total number of days pupils can be excluded for in academic year, see Timpson (see n. 12 above) p. 96.

²⁸ There was a 49.1 per cent real-term reduction in government funding for local authorities between 2010/11 and 2017/18. See National Audit Office, ‘Financial Sustainability of Local Authorities 2018’ (2018) p. 4, available at <https://www.nao.org.uk/wp-content/uploads/2018/03/Financial-sustainability-of-local-authorities-2018.pdf>; National Audit Office, ‘Support for Pupils with Special Educational Needs and Disabilities in England’ (2019) p. 4, available at <https://www.nao.org.uk/wp-content/uploads/2019/09/Support-for-pupils-with-special-education-needs.pdf>. We note that the Government has recently announced a three-year plan to boost school funding by £7.1 billion by

reasons outlined above, it is essential that all exclusions are lawful, reasonable and fair, and a relatively modest increase in expenditure to help achieve that would be more than justified.

2022/23 to reverse budget reductions, including an extra £700 million for pupils with SEN, see Coughlan, 'School Funding Boost to Reverse Cuts' *BBC News* (4 September 2019) available at <https://www.bbc.com/news/education-49580350>.

II. OVERVIEW OF CURRENT PROCESS FOR CHALLENGING EXCLUSIONS

2.1 The power to exclude, the requirements relating to the exercise of that power and the procedure for challenging exclusions are set out in section 51A of the Education Act 2002, the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 (“the 2012 Regulations”) and the DfE’s Statutory Guidance on exclusions.²⁹ Overall, the provisions apply equally to both maintained schools and academies.³⁰ However, there are some important differences in their application that we highlight in this Report. These stem from the different governing structures and funding arrangements of maintained schools and academies, in particular the fact that academies are funded by central government, rather than local authorities, and therefore are not subject to local authority control.³¹

Initial decision to exclude

2.2 There are two types of exclusion: (i) permanent exclusions (sometimes known as expulsions), where a pupil must leave their current school and cannot return; and (ii) fixed period exclusions (sometimes known as suspensions), where a pupil is temporarily barred from attending schools for a certain number of days up to maximum of 45 days in a school year.³²

2.3 The decision to exclude either permanently or for a fixed period can only be taken by the head teacher³³ and may only be made on disciplinary grounds.³⁴ A decision to permanently exclude should only be taken:

²⁹ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above).

³⁰ We use the term “school” throughout the report to refer to both maintained schools and academies unless otherwise stated. Maintained schools are funded, controlled and run by the local authority and have to follow the national curriculum.

³¹ Academies were first introduced in 2000 but subject to a rapid expansion following the Academies Act 2010. They are run by an academy trust, which is a charitable company limited by guarantee and are funded directly by central government. The terms on which academies are funding are set out in a contract between the Secretary of State for Education and the academy trust called the Education Funding Agreement. They have much more autonomy in the day to day running of the school than maintained schools. For example, academies do not have to follow the national curriculum, have freedom to set pay and conditions for staff and are free to purchase support services from the local authority or other providers.

³² 2012 Regulations, reg 4 in respect of maintained schools and reg 22 in respect of academies.

³³ Or principal in academies. This report uses the term “head teacher” throughout to refer to both head teachers of maintained schools and academy principals. Education Act 2002 s. 51A(1); 2012 Regulations reg 21.

- (i) in response to a serious breach or persistent breaches of the school's behaviour policy; and
- (ii) where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school.”³⁵

Statutory review process

2.4 The current review process comprises two main stages:

- (i) the governing board review; and
- (ii) the IRP review.

It is the parents of (or those with parental responsibility for) the excluded pupil rather than the pupil themselves, who have rights of review under the current process, unless the pupil is over 18.³⁶ In this report we use the term “parents” throughout to include anyone with parental responsibility for the pupil.

2.5 The governing board – the governing body of a maintained school or the academy trust of an academy³⁷ – must review the following types of exclusion and decide whether the pupil should be reinstated:

- all permanent exclusions;
- exclusions which will result in the pupil missing a public exam or national curriculum test;
- where the exclusion will take the pupil's total days of exclusion above 15 for a term;
- where the exclusion will take the pupil's total days of exclusion above five for the term and the pupil's parents have requested a meeting to consider reinstatement.³⁸

³⁴ Education Act 2002 ss. 51A(1) and (10); 2012 Regulations regs 21(1), (2) and (5).

³⁵ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 16.

³⁶ 2012 Regulations reg 2(1).

³⁷ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) p. 3.

³⁸ 2012 Regulations reg 6 in the case of maintained schools and reg 24 in the case of academies.

- 2.6 In the case of permanent exclusions,³⁹ if the governing board decides not to reinstate the pupil, the pupil's parents may apply for a review of the governing board's decision by an IRP.⁴⁰ In the case of fixed term exclusions, there is no further review under this process.⁴¹
- 2.7 The IRP cannot consider the merits of a governing board's decision; it must evaluate it according to the principles of judicial review. This means it will look at the way in which the governing board made its decision – i.e. did it act in accordance with its legal obligations – and not whether the IRP would have come to the same decision. The IRP can decide either to:
- (i) uphold the governing board's decision; or
 - (ii) recommend that the governing board reconsiders reinstatement; or
 - (iii) quash the decision and direct that the governing body reconsiders reinstatement.⁴²
- 2.8 If the IRP directs or recommends that the governing board reconsiders whether a pupil should be reinstated, the governing board must reconvene to do so within ten school days of notice of the IRP's decision.⁴³ The IRP may order that, if the governing board declines to reinstate the pupil following a direction to reconsider, an adjustment downwards of £4,000 is to be made to the school's budget. For academies this takes the form of a payment directly to the local authority in which the school is located.⁴⁴

³⁹ *Ibid* reg 6(6)(b)(ii) in the case of maintained schools and reg 24(6)(b)(ii) in the case of academies.

⁴⁰ It is the local authority's responsibility to arrange the IRP for maintained schools and the academy trust's responsibility to arrange it for its academies, *ibid* reg 7 in the case of maintained schools and reg 25 in the case of academies.

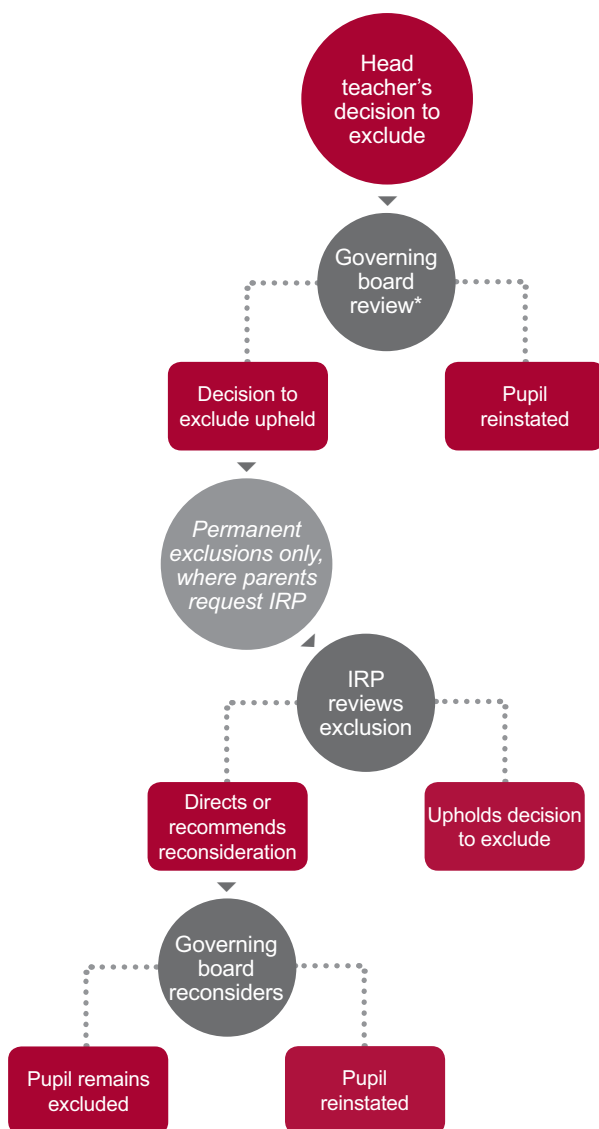
⁴¹ However, it would, in theory, be open for the pupil to bring a judicial review claim against the governing board, however this is unlikely to occur in practice for the same reasons as set out in paragraph 2.10 below. In addition, parents can bring a claim for disability discrimination under the Equality Act 2010 in respect of a fixed-term exclusion in the First-tier Tribunal (Special Educational Needs and Disability) (see paragraph 2.13 below).

⁴² Education Act 2002 s. 51A(4).

⁴³ 2012 Regulations reg 8 in the case of maintained schools and reg 26 in the case of academies.

⁴⁴ *Ibid* reg 7 in the case of maintained schools and reg 25 in the case of academies.

Figure 1: Current process



*The governing board will automatically review the head teacher's decision in the following circumstances:

- i. where the exclusions will result in the pupil missing a public exam or national curriculum test;
- ii. if the exclusion is permanent; or
- iii. where the exclusion will take the pupil's total days of exclusion above 15 in a term.

The governing board will also review a fixed-term exclusion which will take a pupil's total days of exclusion above five in a term, if requested by the parents.

Further redress

Judicial review

- 2.9** If the parents are dissatisfied with the outcome of the IRP they can, in theory, bring a judicial review claim against the IRP or the governing board where it does not reinstate the pupil following an IRP. However, this rarely happens in practice; the Working Party is aware of only one such reported case.⁴⁵
- 2.10** This is because parents are unlikely to realise that judicial review is an option, particularly as the Statutory Guidance refers to it only obliquely.⁴⁶ In any event, having been through two, or possibly three, hearings already (the governing board review, the IRP hearing and the governing board reconsideration following an IRP decision), parents are likely to be discouraged from a further challenge which requires a High Court action, and which, unless they qualify for legal aid, might prove financially impossible.

The Local Government and Social Care Ombudsman

- 2.11** Parents of pupils excluded from maintained schools also have the option of making a complaint to the Local Government and Social Care Ombudsman (“LGSCO”) in respect of the IRP. The LGSCO can consider the administration of the hearing, whether parents were given the opportunity to have a SEN expert present and whether the panel made a lawful decision.⁴⁷ If the LGSCO finds fault with the way the IRP heard the review it can ask the local authority to set up a fresh panel to hear the review again. It can also ask the local authority to review its procedure or the training it gives panel

⁴⁵ *R (on the application of CR) v Independent Review Panel of Lambeth LBC* [2014] EWHC 2461 (Admin).

⁴⁶ It states that minutes of the IRP should be retained in case they need to be seen by a court and mentions the possibility that the governing board may face challenge in the courts if it refuses to reinstate the pupil without strong justification. DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) paras 169 and 172.

⁴⁷ LGSCO, ‘Exclusion from School’ (October 2018) available at <https://www.lgo.org.uk/make-a-complaint/fact-sheets/education/exclusion-from-school>.

members.⁴⁸ However, the possibility of making a complaint to the LGSCO is not specifically mentioned in the Statutory Guidance.⁴⁹

The Education and Skills Funding Agency

2.12 Complaints about academies can also be made to the Education and Skills Funding Agency (“ESFA”). However, complaints must first go through the academy’s complaints procedure and the ESFA can only consider how the academy handled the complaint; it cannot change an academy’s decision about a complaint.⁵⁰

First-tier Tribunal (Special Educational Needs and Disability)

2.13 In addition to the IRP process outlined in paragraphs 2.6 and 2.7 above, parents (or the pupil if over 16) can bring a claim for disability discrimination in the First-tier Tribunal (Special Educational Needs and Disability) (“FTT (SEND)”) under the Equality Act 2010.⁵¹ The FTT (SEND) can hear disability discrimination claims relating to both fixed-term exclusions and permanent exclusions. However, this appeal route appears to be underutilised.⁵²

⁴⁸ *Ibid.*

⁴⁹ The only reference to any ombudsman is in the context of the local authority/academy trust retaining minutes of the IRP as they “may be needed by the Public Service Ombudsman” (it is not clear which ombudsman is even being referred to here). DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 169.

⁵⁰ ESFA, ‘How ESFA Handles Complaints about Academies’ (4 October 2018) available at <https://www.gov.uk/government/publications/complain-about-an-academy/complain-about-an-academy>.

⁵¹ The Equality Act 2010 s. 85 provides that the responsible body of a school must not discriminate against a pupil in the way it provides education for the pupil or by not providing education for the pupil. Schedule 17 para 3 states that a claim that a responsible body has contravened Chapter 1, Part 6 (which s. 85 falls within) may be made to the First-tier Tribunal.

⁵² Sheffield Hallam University's Centre for Education and Inclusion Research was commissioned by the DfE to undertake a research study to compare the processes of the IRP and FTT (SEND) routes for challenging a permanent exclusion. During the course of the study it became apparent that numbers of parents opting for the FTT (SEND) were too low to be able to make any meaningful comparisons. As such, the study was redesigned primarily to look at the processes of the IRP. See Wolstenholme, Coldwell and Stiell, ‘Independent Review Panel and First-Tier Tribunal Exclusion Appeals Systems: Research Report’ DfE (2014) available at <http://shura.shu.ac.uk/10087/1/DFE-RR313.pdf>.

III. INITIAL DECISION TO EXCLUDE

- 3.1 This chapter considers the head teacher's initial decision to exclude. As explained in **Chapter 1** it is beyond the scope of this Working Party to comment on the circumstances in which an exclusion takes place. However, the Working Party believes that the procedures governing how an initial decision to exclude is made, could be improved so as to ensure that head teachers are using exclusion appropriately, fairly and in line with their current legal duties.
- 3.2 None of the head teachers we spoke to took the use of exclusion lightly. As stipulated in the Statutory Guidance,⁵³ they saw the use of permanent exclusions as a last resort; the only remaining viable option and often a sign that a pupil had been failed by the school system. They felt heavily the burden of making a decision that was likely to have a significant impact on a child's future. However, it is clear both from Timpson and other research,⁵⁴ as well as from our own evidence, that there are large variations between schools in the use of exclusion which cannot be explained by differences in the level and seriousness of the behavioural challenges they face.

Applying duties – training and guidance

- 3.3 The Statutory Guidance states:

*Any decision of a school, including exclusion, must be made in line with the principles of administrative law, i.e. that it is: lawful (with respect to the legislation relating directly to exclusions and a school's wider legal duties, including the European Convention on Human Rights and the Equality Act 2010); rational; reasonable; fair; and proportionate.*⁵⁵

Schools' wider legal duties also include ones relating to the identification and support of all children with special educational needs under the Children and Families Act 2014, the Special Educational Needs and Disability Regulations 2014 (the "SEND Regulations") and the Special Educational Needs and

⁵³ DfE, 'Exclusions Statutory Guidance' (see n. 20 above) p.6.

⁵⁴ Kulz, 'Mapping the Exclusion Process: Inequality, Justice and the Business of Education' Research report for Communities Empowerment Network (2015) available at <http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/04/26155057/Mapping-the-Exclusion-Process-Inequality-Justice-and-the-Business-of-Education.pdf>.

⁵⁵ DfE, 'Exclusions Statutory Guidance' (see n. 20 above) para 6.

Disability Code of Practice (the “SEND Code”). Given the proportion of excluded pupils who have SEND, it is important that teachers have a proper understanding of these duties as well as those under the Equality Act.

- 3.4 However, it is clear from those we have spoken to that the legal duties relevant to exclusions are not always fully understood by schools. One common error was that schools interpret their duties under the Equality Act not to discriminate against disabled pupils, as a requirement to treat every pupil the same.⁵⁶ However, the Equality Act actually requires schools to make reasonable adjustments to school policies and practices that may put disabled pupils at a disadvantage.⁵⁷ This will often involve applying disciplinary sanctions differently to disabled pupils in order to avoid putting them at a substantial disadvantage in relation to other pupils.
- 3.5 This may be particularly problematic where schools, as is increasingly the case, adopt zero-tolerance behaviour policies,⁵⁸ which by their nature do not allow reasonable adjustments to be made to accommodate behaviours that arise from a child’s special educational needs.⁵⁹ We also heard from head teachers who felt that they were unable to exercise any discretion to depart from their schools’ behavioural policy so as to avoid exclusion in appropriate circumstances. This could amount to an unlawful fettering of their discretion as well as a breach of their duty to make such reasonable adjustments as the circumstances required.
- 3.6 We were also told that head teachers sometimes had a poor understanding of the legislative requirements relating directly to exclusions, including the Statutory Guidance. For example, one education law practitioner told us that they had seen exclusion letters which did not provide any reasons for the

⁵⁶ This point was raised by both the National Autistic Society and Council for Disabled Children.

⁵⁷ The Equality Act 2010 s. 20.

⁵⁸ House of Commons Education Committee, ‘Forgotten Children: Alternative Provision and the Scandal of Ever Increasing Exclusions, Fifth Report of Session 2017–19’ (2018) para 23, available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmeduc/342/342.pdf>.

⁵⁹ This is despite the non-statutory guide for head teachers in Annex B of the Statutory Guidance, which asks head teachers to consider whether the school’s behavioural policy reflects the requirements of the Equality Act. However the same guide also asks head teachers to consider whether sanctions are “monitored to identify inconsistency and potential discrimination,” implying that discrimination always results from inconsistent application of sanctions. See DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) Annex B – A non-statutory guide for head teachers, p. 48.

exclusion.⁶⁰ A number of consultees also thought that schools were not fully aware of, or had simply failed properly to apply, the second limb of the criteria for permanent exclusion; the Statutory Guidance requires not only that there was a serious breach or persistent breaches of the school's behaviour policy but also that to allow the pupil to remain in the school would seriously harm their education or welfare, or those of others in the school. In particular, organisations representing the interests of disabled children, thought that head teachers did not properly assess whether allowing a pupil to remain in school, with appropriate adjustments, would actually cause any serious harm.

3.7 Teachers at maintained schools are required to have Qualified Teacher Status (QTS).⁶¹ However, the Teachers' Standards⁶² contain no specific requirements in relation to the Equality Act, SEND duties or the general legal requirements relating to exclusions. Consultees also told us that SEND training in initial teacher training is very variable.⁶³ Moreover, academies are free to employ teachers without QTS. There are no specific training requirements relating to exclusions nor continuing professional development requirements for head teachers, heads of year or other senior leadership on these issues either. Whilst we are aware that some schools do provide such training, the content and quality will inevitably vary between schools.

3.8 The Working Party considers that specific training on the exclusions Statutory Guidance, the application of the Equality Act 2010, the SEND Regulations and the SEND Code in the context of exclusions should be mandatory for all teachers in leadership positions within schools, including Special Educational Needs Coordinators ("SENCOs"). This knowledge should be refreshed through continuing professional development on at least a biennial basis. The Working Party notes that the Equality and Human Rights Commission has published "Technical Guidance for Schools in England" which outlines the requirements of the Equality Act

⁶⁰ The duty to provide reasons for an exclusion is set out in 2012 Regulations, reg 5 in the case of maintained schools and reg 23 in the case of academies.

⁶¹ See Government Guidance, 'Qualified teacher status (QTS): qualify to teach in England' available at <https://www.gov.uk/guidance/qualified-teacher-status-qts#history>.

⁶² These set the minimum requirements for teachers' practice and conduct. DfE, 'Teachers' Standards: Guidance for school leaders, school staff and governing bodies' (2011) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/665520/Teachers_Standards.pdf.

⁶³ See also Carroll and others, 'Effective Practice for Special Educational Needs and/or Disabilities Content in Initial Teacher Training' UCL Centre for Inclusive Education (2019).

for schools, including specifically in relation to exclusions.⁶⁴ This would provide a good basis for the Equality Act training.

- 3.9** Further clarity and practical guidance on how these duties should operate is also required. For example, Timpson found that although the Statutory Guidance sets out the need to apply reasonable adjustments to school policies and practices under the Equality Act where a pupil has a disability, there is insufficient clarity on how this should be done in practice.⁶⁵ Head teachers we spoke to said that they would welcome further guidance on both the practical implementation of their duties and how different pieces of governmental guidance and advice, that appear conflicting, fit together. **The Working Party endorses Timpson’s recommendation that:**

*DfE should update statutory guidance on exclusion to provide more clarity on the use of exclusion. DfE should also ensure all relevant, overlapping guidance (including behaviour management, exclusion, mental health and behaviour, guidance on the role of the designated teacher for looked after and previously looked after children and the SEND Code of Practice) is clear, accessible and consistent in its messages to help schools manage additional needs, create positive behaviour cultures, make reasonable adjustments under the Equality Act 2010 and use exclusion only as last resort, when nothing else will do. Guidance should also include information on robust and well-evidenced strategies that will support schools embedding this in practice.*⁶⁶

Pre-exclusion procedure

- 3.10** The Statutory Guidance currently says very little about what procedures should be followed prior to a decision to exclude taking place.⁶⁷ We believe

⁶⁴ Equality and Human Rights Commission, ‘Technical Guidance for Schools in England’ available at https://www.equalityhumanrights.com/sites/default/files/technical_guidance_for_schools_england.pdf.

⁶⁵ Timpson (see n. 12 above) pp. 59-60.

⁶⁶ *Ibid* p. 60.

⁶⁷ Previous versions of the Statutory Guidance on school exclusions have contained more detail than the current Statutory Guidance about the steps head teachers should take prior to excluding a pupil. They have including directions to do the following: ensure that a thorough investigation has been carried out; consider all evidence available to support the allegations; allow and encourage a pupil to give their versions of events; check whether the incident may have been provoked; if necessary, consult others; keep a written record of actions taken including any interview with the pupil concerned. See Department for children, schools and families, ‘Improving Behaviour and Attendance:

that the following additional procedural requirements would assist head teachers in ensuring that all their exclusion decisions are “lawful, reasonable and fair” and used only when necessary.

Communication

3.11 Many exclusions raise issues of communication and trust between the pupil and parents on the one hand and the school on the other. We were told by a governance officer of a multi-academy trust (“MAT”) that even where an exclusion is made on the basis of persistent breaches of the behavioural policy, parents complain that they had not known that their child was heading towards an exclusion, or were unaware of, or uninvolved in, the interventions that the school might have been attempting in order to avoid one. Parents told us that they would much prefer to work with the school to address issues before an exclusion occurred, rather than having to challenge it adversarially afterwards.

3.12 The Statutory Guidance currently provides that head teachers should,

[T]ake account of any contributing factors that are identified after an incident of poor behaviour has occurred. For example, where it comes to light that the pupil has suffered bereavement, has mental health issues or has been subject to bullying”⁶⁸ [and that] “where practical, the head teacher should give the pupil an opportunity to present their case before taking the decision to exclude.”⁶⁹

However, there is no process required or even suggested for doing this. In focus groups conducted by Just for Kids Law, some pupils stated that they had not been allowed to tell their side of the story before being excluded, or that when they did, they had felt that it would not have made any difference to the outcome.⁷⁰ Young people we spoke to who had been permanently excluded also told us that they had not had a proper opportunity to express their feelings and ask for the help they thought they might need.

Guidance on Exclusion from Schools and Pupil Referral Units’ (2008) para 23, available at <https://dera.ioe.ac.uk/8486/1/Exclusion%20guidance%202008.pdf>.

⁶⁸ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 18.

⁶⁹ *Ibid* para 17.

⁷⁰ Just for Kids Law, ‘School Exclusions Review: Submission from Just for Kids Law’ p. 6.

- 3.13 We heard from one head teacher that they would normally hold a meeting with the pupil and their parents prior to a decision to permanently exclude being taken. This would give them an opportunity to discuss what is going wrong, and what support had already been provided to the pupil, as well as circumstances inside or outside of school that may have contributed to the pupil's behaviour and of which the school may be unaware. This approach often avoided unnecessary exclusions. However, this is not standard practice; an education law practitioner told us that they had only ever seen meetings held between the school and pupil and parents after an exclusion decision had already been taken.
- 3.14 We note that in other jurisdictions including Northern Ireland⁷¹ and Ireland⁷² it is a requirement to hold a meeting with the parents and pupil prior to permanently excluding a pupil.
- 3.15 **Prior to any decision to permanently exclude, a head teacher (or another appropriately senior member of staff) should make every reasonable effort to meet the pupil and their parents, in order to notify them that the school is considering permanent exclusion and should take fully into account any representations they may make.**
- 3.16 Given the shorter timescales involved in a fixed term exclusion, we do not consider that it would be practical to hold such a meeting in respect of every fixed term exclusion, although an effort should be made to do so where practicable. However, the Statutory Guidance provides that schools should have a strategy for reintegrating a pupil who returns to school following a fixed term exclusion.⁷³ This usually involves having a reintegration meeting, although it is not currently a requirement. **It should be a requirement to**

⁷¹ Reg 3(g) of the Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995 provides that a pupil may be expelled (the equivalent of a permanent exclusion) only after consultation about their expulsion has taken place between the principal, the parent and the Chief Executive or other officer of the Education Authority and Chairman of the Board of Governors.

⁷² In Ireland, schools must prepare a code of behaviour in accordance with the guidelines issued by the National Educational Welfare Board. These guidelines specify that where an expulsion may occur a meeting with the pupil and their parents "is essential". It provides them with the opportunity to give their side of the story and ask questions about the evidence. It may also be an opportunity for the school to explore with the parents how best to address the pupil's behaviour (National Educational Welfare Board, 'Developing a Code of Behaviour: Guidelines for School' p. 84, available at https://www.tusla.ie/uploads/content/guidelines_school_codes_eng.pdf).

⁷³ DfE, 'Exclusions Statutory Guidance' (see n. 20 above) p. 6.

hold a reintegration meeting with the parents and pupil following a fixed term exclusion, and this should be used as an opportunity for intervention to discuss how best to avoid further exclusions.⁷⁴ We were told by a parent of an excluded pupil that where reintegration meetings are held they are not always conducted in a way which is conducive to finding ways to avoid further exclusion. For example, they had experience of the pupil being made to promise not to repeat the behaviours which led to the exclusion, but this alone is unlikely to have any impact where those behaviours are related to SEND. **The DfE should provide tighter guidelines and training for head teachers on how to conduct reintegration interviews in order to ensure that they are used effectively to avoid further exclusions.**

External advice

- 3.17** Head teachers at a MAT told us that they might seek out external advice prior to making an exclusion decision by informally consulting another head teacher. At some MATs, executive principals must authorise any permanent exclusion. Some MATs also have governance officers who are available to provide advice to head teachers on exclusions. We also heard from local authorities that they are sometimes consulted by schools prior to a decision to exclude a pupil.⁷⁵ However, there is no *requirement* to do so either for maintained schools or academies.
- 3.18** We heard from a variety of different consultees that they thought providing head teachers with access to external advice would assist them to ensure that they were making lawful, reasonable and fair decisions. The advantage of involving local authorities is that they are likely to be aware of how exclusions are being conducted across a number of schools in their area and in particular how different schools may have been able to deal with similar

⁷⁴ It was previously a requirement under the Education (Reintegration Interview) (England) Regulations 2007 for a head teacher to request a “reintegration interview” with parents following the expiry of any fixed-term exclusion for a primary-aged pupil, or of a fixed-term exclusion of six or more school days for a secondary-aged pupil. The 2008 Exclusions Statutory Guidance stated that the interview was an opportunity, amongst other things, to “discuss how behaviour problems can be addressed”; “explore wider issues and circumstances that may be affecting the child’s behaviour”; and “reach agreement on how the child’s education should continue, how best they can be reintegrated and what measures could be put in place to prevent further misbehaviour” Department for children, schools and families (see n. 67 above) para 41. In Wales this duty still exists under the Education (Reintegration Interview) (Wales) Regulations 2010.

⁷⁵ See also Kulz (see n. 54 above) p. 38.

behavioural issues without resorting to exclusion. They will also be familiar with what support services or alternatives to exclusion are available.

- 3.19** The Working Party therefore considers that **access to advice should be made available to head teachers before they reach a decision to exclude. Head teachers should seek this advice, unless there is a good reason not to. The advice should be provided by someone external to the school who has knowledge of the relevant legal obligations. The inclusion officer (or equivalent) at the local authority could be an appropriate person to fulfil this role, as could a legal advisor) or a union representative.**

Identifying unmet needs

- 3.20** Behaviour that leads to an exclusion, may also be an indicator of unmet needs, as demonstrated by the fact that pupils with SEND are far more likely to be excluded than their peers. The Working Party is particularly concerned that the most common reason for permanent and fixed term exclusions is “persistent disruptive behaviour” (“PDB”), accounting for just over a third of all permanent exclusions and just under a third of all fixed term ones.⁷⁶ This involves pupils being excluded for a series of relatively minor incidents, such as breaches of the school’s uniform rules or shouting out in class, none of which would (unlike an act of violence, drug dealing or carrying a knife) justify exclusion in itself. A pattern of PDB may well be an indicator of unmet needs which further exclusions will do nothing to address, and will in all likelihood make matters worse.⁷⁷
- 3.21** In addition to accessing general advice set out in paragraph 3.17 above, schools should also obtain specialist, professional advice in relation to SEND. This might also help them to identify pupils’ unmet needs and avoid unnecessary exclusions. The Statutory Guidance already makes some provision for this. It states that where a school has concerns about the risk of exclusion of a child with additional needs or an EHC plan it should consider what additional support may be required and, where the pupil has an EHC plan, consider requesting an early annual review or interim/ emergency review.⁷⁸ However, the Working Party considers that this ought to be

⁷⁶ DfE, ‘Permanent and Fixed Period Exclusions in England 2017 to 2018 - National Tables’ (see n. 3 above) Table 4.

⁷⁷ One-off serious incidents may also be an indicator of unmet needs although they are likely to occur for a broader range of reasons.

⁷⁸ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 25.

strengthened so that **before a pupil with an EHC plan is excluded an annual review or interim/ emergency review of their plan must be conducted by the local authority.**

3.22 In theory, the school’s Special Educational Needs Coordinator (“SENCo”) should have been involved already. However Timpson found that there needed to be more consistency and made a recommendation to strengthen their effectiveness.⁷⁹ In any event, the Working Party has concluded that **any pupil without an EHC plan who is at risk of permanent exclusion on the basis of PDB should be assessed by an educational psychologist. If appropriate, based on the psychologist’s assessment, the school should then request an EHC needs assessment. Such steps should be taken before the exclusion is finalised.** This will not only assist schools to identify unmet needs, but also help them to demonstrate that they have discharged their Equality Act duties.

Systems and processes

3.23 The non-statutory guide for head teachers annexed to the Statutory Guidance sets out a number of steps that head teachers should follow before taking a decision to exclude, including:

- investigating specific incidents with all parties in a sensitive and fair way;
- considering factors that could have contributed to the pupil’s behaviour and sufficiently taking them into account;
- considering whether exclusion is the most appropriate and reasonable sanction;
- recording the reasons for the exclusion clearly, including the impact on others; and properly recording, documenting and retaining all relevant evidence.⁸⁰

3.24 However, we were told by a number of governors that such decisions were poorly evidenced, both in terms of the behavioural incident(s) themselves and the support that had previously been provided by the school to the pupil.

3.25 **Schools should have robust systems and processes in place in respect of exclusions to help ensure that head teachers have complied with their**

⁷⁹ Timpson (see n. 12 above) p. 69.

⁸⁰ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) Annex B, p. 51.

legal duties, followed a fair process and properly documented and evidenced their decision. Step-by-step guides, template documents and checklists can all assist in this regard. For example, some academies and councils provide pre-exclusions checklists for head teachers.⁸¹ This will also help head teachers to reassure themselves that they have used exclusion properly and lawfully as well as assist those who have to conduct or to participate in the review processes discussed in the next two chapters.

- 3.26 These issues are of particular significance in respect of permanent exclusions on the basis of PDB, which may involve incidents which occurred some time ago and were not properly evidenced or “tested” at the time. It is essential to have proper processes and systems in place to record incidents when they actually happen in order to improve the quality and reliability of the evidence on which permanent exclusions are based.

⁸¹ Ark Academies have a “Principals pre-exclusion checklist” and Islington Council provides head teachers with an “exclusions checklist”.

IV. STAGE I OF THE REVIEW PROCESS

Governing board review

- 4.1 As explained in **Chapter 3**, the first stage of review in the current process for challenging exclusion decisions is a review of the decision by the governing board of a school. This is the governing body of a maintained school or the academy trust of an academy. In this Report we use the terms “governors” to include maintained school governors, academy trust trustees and local governing body committee members in multi-academy trusts.⁸² The governing board is able to overturn a head teacher’s decision and reinstate a pupil in cases of permanent exclusions, exclusions that will result in the pupil missing a public exam or national curriculum test or fixed period exclusions that will take the pupil’s total days of exclusion above five in a term. The parents, the head teacher and, in the case of a maintained school, a representative from the local authority, must be invited to the meeting of the governing board to consider reinstatement and allowed to make representations.
- 4.2 The phrase we heard most often to describe this stage by all those involved in the process, including from some governors, was “rubber-stamping”. This is because governors are often not equipped with the right tools or knowledge to properly test the head teacher’s decision and their close relationship with the head teacher makes it very difficult for them to overturn their decision.
- 4.3 The DfE does not collect statistics on the outcomes of governing board reviews. However, data provided by local authorities in response to our requests under the Freedom of Information Act 2000, appears to confirm that governing board reviews do not provide an effective challenge to school exclusion decisions. In the vast majority of the 90 local authorities from which we received data, governing boards upheld head teachers’ exclusion decisions 95 per cent or more of the time. Moreover, in each year we analysed, at least a third of the local authorities recorded that governing boards upheld decisions 100 per cent of the time.⁸³ In a handful of local

⁸² In multi-academy trusts, governance functions may be delegated by the board to local governing bodies under schemes of delegation. It may be that local governing bodies have been delegated the responsibility of reviewing exclusions.

⁸³ JUSTICE’s Freedom of Information request asked for the total numbers of upheld and overturned permanent exclusions by governing board panels in both maintained and academy schools within the local authority for academic years 2015/16 to 2018/19. The 90 local authorities who provided data represented a broad cross-section of both rural and urban schools from across England. In addition to the 90 who provided data, a further five responded that the number of exclusions overturned by

authorities, no exclusions have been overturned by a governing board since 2015/16. Whilst it could be argued that this is evidence of good initial decision making by head teachers, a comparison with statistics on IRP decisions indicates that this is not the case – of the permanent exclusions that were reviewed by an IRP in 2017/18, only 60 per cent were upheld.⁸⁴ This is despite the limited grounds on which an IRP can find against a governing board’s decision (see **Chapter 5**). Further, evidence provided to the Working Party indicates that there are numerous issues with the governing board review stage.

Issues with the current process

Knowledge and understanding of exclusions duties

- 4.4 As set out in paragraph 2.3 above, schools are subject to a range of duties in respect of exclusions. A proper review of the head teacher’s decision to exclude therefore requires specialist knowledge of these duties. Governors and trustees are volunteers from a wide variety of backgrounds. Whilst some may have experience in education, SEND or the law, many do not. Although some governors will receive exclusions training from their trust, the local authority or education law practitioners, the 2012 Regulations do not require governors to receive any training in respect of school exclusions and the Statutory Guidance says nothing about governor training in this regard. Even where training is offered, its quality is variable⁸⁵ and attendance can be low.⁸⁶
- 4.5 We heard from governors, IRP members and civil society organisations providing advice and support to parents at governing board reviews that governors’ knowledge of the requirements relating to exclusions, including the Statutory Guidance, the Equality Act and SEND duties generally was

governing boards were too few and thus for data protection reasons relating to identification they could not provide data.

⁸⁴ DfE, ‘Permanent and Fixed Period Exclusions in England 2017 to 2018 - National Tables’ (see n. 3 above) Table 13.

⁸⁵ Just for Kids Law (see n. 70 above) p. 3.

⁸⁶ Kulz (see n. 54 above) p. 34.

extremely variable and often poor.⁸⁷ This was also acknowledged by Timpson.⁸⁸

- 4.6 We were told that local authority representatives can often be a key source of information for governors on the school's duties in respect of exclusions. However, whilst the local authority must be informed of all exclusions where the governing board has the power to reinstate the pupil,⁸⁹ it only has the right to attend the governing board review meeting and make representations in respect of maintained schools.⁹⁰ Where the excluding school is an academy, the local authority may only attend where requested by the parents and cannot make representations unless given permission by the governing board.⁹¹ It seems unfair that parents and pupils at academies are deprived of the often helpful input of local authority representatives at governing board reviews.⁹² This is particularly acute in cases where the pupil has or may have SEND; it is the local authority in which the statutory functions and duties for the assessment and monitoring of SEND are vested, in relation to all schools, and its representative is likely to have a greater knowledge of SEND duties and local support provision than the governors. IPSEA has noted that this seems out of step when considering the codification of duties with regards to pupils with SEND under the Children and Families Act 2014, which applies to both maintained and academy schools.
- 4.7 A number of consultees raised concerns regarding a lack of SEND expertise at the governing board review stage. They questioned why a SEND expert was available at IRP stage but not the governing board review. Some governors had asked for specialist SEND training but never received it. The Council for Disabled Children also questioned how local authorities were meant to fulfil their duty to identify children and young people who have or may have SEND⁹³ if there is no SEND expert present at the governing board meeting and no right for the local authority to attend in respect of academies.

⁸⁷ See also *Just for Kids Law* (see n. 70 above) p. 3; Wolstenholme, Coldwell and Stiell (see n. 52 above) p. 47.

⁸⁸ Timpson (see n. 12 above) pp. 88-89.

⁸⁹ 2012 Regulations, reg 5(2) and (3) in the case of maintained schools and reg 23(2) and (3) in the case of academies.

⁹⁰ *Ibid* reg 6(3)(b).

⁹¹ *Ibid* reg 24(c)(iii) and (e).

⁹² Kulz (see n. 54 above) pp. 37-38.

⁹³ Children and Families Act 2014 s. 22.

Procedural fairness

- 4.8 Not only are governors often not equipped to properly understand their schools' duties in respect of exclusions, they can also lack the knowledge, training and guidance to conduct a procedurally fair hearing.
- 4.9 The Statutory Guidance provides that governors must:
- not discuss the exclusion with anyone outside the meeting;
 - ask for, and circulate (where possible), written evidence in advance of the meeting;
 - allow parents and pupils to be accompanied by a friend or representative; make reasonable adjustments to support the attendance of the parties; and
 - identify steps to enable and encourage the excluded pupil to attend the meeting and speak on their own behalf.⁹⁴

Beyond this there is nothing in the guidance on the process or procedure that should be followed in conducting a hearing and not all governors will know all of the procedural requirements for a fair hearing.

- 4.10 Some local authorities or schools do provide an 'order of proceedings' to help ensure that reviews are fairly conducted, however, this is by no means universal and where it is provided, there is no guarantee that it is necessarily suitable. We were told by a number of governors that the local authority representative, when present, may advise governors on procedural questions; however, as explained above, they are not always present or able to make representations. In addition, the attendance of a local authority representative in and of itself will not be sufficient to ensure a fair hearing. A lack of procedural guidance and support can lead to unstructured hearings, with uneven questioning of parents and head teachers⁹⁵ and/or parents and pupils not given sufficient chance to present their case.
- 4.11 A fundamental feature of a fair hearing is that all parties are able to effectively participate in it. The 2012 Regulations require that governing boards take reasonable steps to arrange the review meeting for a time and

⁹⁴ DfE, 'Exclusions Statutory Guidance' (see n. 20 above) para 61.

⁹⁵ Kulz (see n. 54 above) pp. 33-34.

date when parents are able to attend.⁹⁶ However, we heard that governors do not always seek to accommodate parents; often, for example, arranging meetings for the hours when they are most likely to be at work. Moreover, in many cases parents and pupils do not attend governing board review meetings because they believe that it is inevitable that the governors will uphold the head teacher's decision. In cases where they do attend, governors with little or no experience or training in dealing with child or vulnerable witnesses, can end up questioning the pupil. We discuss further the issues of accessibility and support in **Chapter 6**.

Evidential issues

- 4.12** We were told by governors that evidence provided by the school is often of poor quality, not well documented, conflicting and difficult to understand. As explained in paragraph 3.26 above, this is often particularly acute in the case of exclusions based on PDB where some incidents may have occurred a long time ago; and the evidence for which may be poor or lacking and, in any event, not previously “tested”. In some cases, both governors and parents receive evidence in large and unstructured bundles prepared by the school shortly before the review meeting is due to take place. This makes it very difficult for parents in particular to understand, and therefore to challenge, the reasons for the exclusion and the evidence on which it is based. It also makes it very hard for the governing board to properly review the decision. One governor, who was also a lawyer, told us that every time their school had a new head teacher, they would have to give them informal training on how to properly prepare the paperwork for an exclusion review because they did not know how to do so.
- 4.13** We were also told that governors too often fail to rigorously test or assess the evidence that is presented to them by the school. This may be because they lack the knowledge of the relevant duties and skills to be able to do so and/or because of their relationship with the head teacher (see further paragraphs 4.15 and 4.16 below).
- 4.14** The recommendation made in paragraph 3.25 for schools to have proper systems and processes in place to ensure that incidents are properly investigated, and evidence recorded, is therefore intended to improve the quality of the evidence presented by the school at governing board reviews.

⁹⁶ 2012 Regulations, reg 6(3)(c)(ii) in the case of maintained schools and reg 24(3)(c)(ii) in the case of academies.

Governors' independence

- 4.15 The governing board's key responsibilities are to provide strategic leadership and accountability. It monitors and evaluates the progress of the school and acts as a source of challenge and support to the head teacher. In order to do this effectively, head teachers and governors will often have a close working relationship. Yet this relationship makes it difficult for governors to be objective when reviewing a head teacher's decision to exclude; and even more so to overturn it. Both governors and head teachers we spoke to recognised that this was an issue. One governor told us how the head teacher did not speak to them for six months following a decision to overturn an exclusion. We also heard anecdotal evidence of a training for governors in which the governors were told that its purpose was to help them support the head teacher in decisions to exclude.
- 4.16 In addition, governors have other interests in the school community that may conflict with their duty to undertake a fair and independent assessment of an exclusion decision. These include the school's reputation, safeguarding and financial performance. Where a governor is also a parent of a child attending the school in question, they may also have a strong interest in upholding the exclusion of a pupil who is considered disruptive and/or come under pressure from other parents who are not in full possession of the facts.⁹⁷
- 4.17 We were also told that on some occasions a governor sitting on the governing board review panel will have previously been involved in the decision to exclude, for example, by having been consulted by the head teacher before they made the decision. We were told by an IRP clerk that they had seen many instances where the chair of governors was involved in the decision to exclude and then sat as the chair of the disciplinary panel reviewing the exclusion.

The Working Party's solution

- 4.18 The Working Party considered several different models to resolve the issues identified above. We firstly considered Timpson's recommendation that:

DfE should work with others to build the capacity and capability of governors and trustees to offer effective support and challenge to schools, to ensure exclusion and other pupil moves such as managed

⁹⁷ Wolstenholme, Coldwell and Stiell (see n. 52 above) p. 47.

*moves and direction into AP, are always used appropriately. This should include training as well as new, accessible guidance for governors and trustees.*⁹⁸

- 4.19 The Working Party would certainly welcome any steps taken to build the capacity and capability of governors. In particular mandatory training would assist in addressing governors' lack of knowledge of the exclusions framework and how to conduct a procedurally fair hearing. Any such training should be standardised at a national level to help address the existing inconsistencies in approach. However, we believe that this can only go so far in addressing the issues identified above. In particular, it would not address the difficulties faced by governors in remaining impartial, and as importantly, in avoiding the appearance of bias simply as a result of their working relationship with the head teacher.
- 4.20 In the course of our evidence gathering we came across some existing models that bring a greater element of independence to the process. For example, the Ark academy chain has delegated responsibility for reviewing exclusions to a "Resolutions Committee". All members of the committee are current governors at one of the Ark schools. Exclusion reviews are conducted by a panel of governors from the committee, with at least one governor from a school other than the excluding school sitting on the panel. Governors who are parents of pupils at the excluding school do not sit on panels for that school. Training is offered to members two or three times a year and governors cannot sit on the committee if they haven't been trained or had previous experience. IPSEA also told us that they are aware of some schools which use governors from different schools to scrutinise decisions to exclude.
- 4.21 Whilst such systems bring a greater element of independence to the process, they still suffer from a number of weaknesses. First, while drawing on external governors, may work for multi-academy trusts, it would be much more difficult to implement for single academy trusts or maintained schools. Second, although the governors are not from the excluding school, they belong to the same chain and corporate body and may well know the head teachers reasonably well. Moreover, the system still relies on volunteer governors to review decisions when they may not necessarily have the expertise that is required to enable a robust review, as discussed above.
- 4.22 It was also suggested to us by a head teacher and a governor that one solution would be to have one independent person or chair on the exclusions review

⁹⁸ Timpson (see n. 12 above) p. 89.

panel, potentially from the local authority, to inject some independence and ensure the governors asked the right questions and had the right information. However, the majority of the panel would still have a close relationship with the head teacher.

- 4.23** Further, and perhaps of greatest importance, governance should operate at a strategic, rather than operational level and, as Emma Knights, CEO of the National Governance Association has pointed out, excluding a pupil is not a strategic decision.⁹⁹ The Working Party is therefore of the view that the governing board should no longer be involved in the review of individual exclusion decisions.
- 4.24** We propose that the governing board review stage is replaced by a new Stage 1 investigation process outlined in paragraphs 4.25 to 4.32 below. In line with its strategic role, the governing board would retain overall responsibility for their school's behaviour policy and the effectiveness of its behaviour management systems. This would, of course, involve the governing board assiduously monitoring (against a number of performance indicators) the school's use of both fixed term and permanent exclusions. We discuss this further in paragraphs 4.33 to 4.36 below.

Independent Reviewer

- 4.25** **The Working Party proposes that the mandatory review of exclusions currently conducted by the governing board¹⁰⁰ should instead be carried out by a specialist – which we term the “Independent Reviewer” (“IR”) – who would be independent of the school concerned and have relevant knowledge, training and experience. Parents would also retain the right to request a review (now to be conducted by the IR) of fixed term exclusions totalling more than five days in a term.**

⁹⁹ Staufenberg, ‘NGA: Replace Governor Exclusion Boards with Independent “Tribunals”’ *Schools Week* (9 October 2018) available at <https://schoolsweek.co.uk/nga-replace-governor-exclusion-boards-with-independent-tribunals/>.

¹⁰⁰ Currently these are: permanent exclusions; fixed term exclusions that take the number of excluded days to over 15 days in a term; and exclusions that will result in the pupil missing a public exam or national curriculum test.

4.26 The IR would have to conduct a mandatory review within the time scales currently provided for the governing board review, i.e. 15 school days from receipt of notice of the exclusion.¹⁰¹

4.27 The IR would adopt an **investigatory approach**¹⁰² and would therefore:

- review documentation and evidence relating to the exclusion incident(s);
- consider what reasonable adjustments and support the school may have put in place;
- consult the pupils and parents, including in regard to any possible mitigating circumstances and what additional support needs they believe are required;
- consult the head teacher and other school staff involved, including, where relevant, the SENCo; and
- consult the local authority regarding any ongoing engagement with the pupil, the potential for a managed move if it is something the pupil and parents would be interested in and is in the best interests of the child, and available support services where relevant.

4.28 At the end of the investigation, **the IR would produce a report** setting out what they think the best way forward is. This may include:

- withdrawal of the decision to exclude;
- assessment by an educational psychologist;
- request that the local authority conduct an EHC needs assessment;
- if the pupil has an EHC plan, an emergency review (if not already conducted);
- provision of additional support;
- making further adjustments;
- a managed move (if genuinely in the best interests of the child and the parents and pupil agree); or
- alternative provision.

¹⁰¹ Or where the exclusion will result in the pupil missing a public exam or national curriculum test prior to the date of the examination.

¹⁰² This would not be the first time a form of investigatory process has been used in the school exclusions context. Birmingham Council used to have a system whereby all pupils who were excluded would be allocated a Family Support Worker (“FSW”). The FSW would visit the pupil at home and produce a report for the Governing Board meeting. This would include background information as well as the pupil’s and parents’ views of the exclusion and the view of the FSW.

The report would be provided to the head teacher, the parents and the local authority. **The head teacher would then choose whether to accept its recommendations.** Where the recommendations are not accepted by the head teacher, good reasons for not doing so would need to be provided.

- 4.29 The Working Party acknowledges that this therefore differs from the current governing board stage where the governors have the power to direct reinstatement. We considered at length whether the IR's proposals should be mandatory. However, on balance, we consider that it is better that they are recommendations. The system is predicated on an investigatory, and therefore, collaborative approach. If the IR's proposals were mandatory this would set up an adversarial relationship between the IR and the head teacher from the start of the process. We believe that by making the proposals recommendations only, this will encourage schools to work together with the IR, the local authority and the parents and pupil to look beyond the single question of reinstatement and come up with a holistic solution that is in the best interests of the pupil.
- 4.30 If the IR recommends withdrawal of the decision to exclude and the head teacher does not do so, then an appeal would be available to the parents/pupil. The IR's report will also include clear information for parents and pupils on how to appeal (see further **Chapter 6**). We consider the details of what this appeal should look like in the next Chapter. However, we note here that we do recommend that the second stage appeal body has the power to reinstate the pupil. Therefore, where the head teacher has declined the recommendation of the IR, the parents and pupil will be able to produce the IR's report as evidence in the appeal and will have a strong, well evidenced case for overturning the head teacher's decision on appeal. We also believe that, given the likelihood of parents'/pupils' success on appeal in such circumstances, the head teacher will be more likely to comply with the IR recommendation than the governing board is likely currently to reinstate.
- 4.31 Given that Timpson envisages a greater oversight role for local authorities in respect of school exclusions, as well as for practical geographical reasons, the Working Party considers that local authorities should have responsibility for organising the IR investigation. However, individuals we spoke to from local authorities thought that it would be difficult for the IR to be a full-time employee of the local authority as this would impact the local authority's relationship with schools and potentially call into question the IR's independence. We therefore suggest that the IR is recruited by the local

authority but remains independent, and thus akin to a consultant.¹⁰³ The role should be fee-paid on a sessional basis and the individual would be required to have relevant expertise and demonstrable knowledge of schools' duties in respect of exclusions. The local authority would also be required to provide ongoing training.

4.32 The local authority would require additional funding for payment of the IR as well as recruiting, training, quality assuring and allocating a team of IRs.¹⁰⁴ There are a number of options for the mechanism by which this could be funded:

- **Option 1:** a lump sum provided to local authorities by central government;
- **Option 2:** schools pay an annual sum to the local authority to cover the costs based on the average number/rate (i.e. per pupil population) of permanent exclusions for each school in the area has over a defined period, for example, three years;¹⁰⁵ or
- **Option 3:** schools pay an annual fixed sum to the local authority to cover the costs of managing the system and are then invoiced for the daily cost of each of the investigations carried out.

The role of the governing board

4.33 The Working Party envisages a stronger scrutiny role for the governing board in relation to both fixed-term and permanent exclusions, but it will be at school wide, rather than individual level, which fits better with governors' strategic responsibilities.

4.34 Under our proposed review system, **the governing board would retain overall responsibility for exclusions and hold the head teacher to account**

¹⁰³ For example, Islington Council's Fair Access Panel (which finds school places for unplaced pupils, especially the most vulnerable, outside the normal admissions round) has an independent chair recruited by the local authority.

¹⁰⁴ The average number of permanent exclusions per local authority in 2017/18 was 52 (although the range between these is considerable – from zero to 324). Assuming 52 investigations per school year, we would estimate that three IRs per local authority, which would amount to an average of 1 to 2 investigations per month across the school year, would be sufficient. However, we would hope that with the recommendations made in this report, in addition to Timpson and other recent reports, the number of exclusions will reduce as schools are supported to make more appropriate decisions.

¹⁰⁵ Provision would need to be made for new schools who will not have had any permanent exclusions in the defined period.

for their use of exclusions across the school. This should include receiving reports on exclusions that have taken place between governing board meetings and looking at comparative data to see how their school's exclusion rates compare with those of other schools in the area (and which are therefore likely to have a similar pupil-profile).

- 4.35 In respect of permanent exclusions the governing board would also review whether the recommendations of the IR are being followed and if not, be able to challenge the head teacher on why this is the case, as well as look for emerging themes (for example the need for better training) from IR reports so that they can act on them.
- 4.36 **In respect of fixed-term exclusions, the governing board should conduct an annual audit of the use of fixed term exclusions.** This should include looking at patterns of fixed-term exclusions within the school, their overall efficacy and whether they are being used as an opportunity for intervention, before a potential permanent exclusion is reached. This could include examining documentation for a number of individual anonymised fixed-term exclusions, which would help ensure that schools are using them appropriately in individual cases as well as having an appropriate level overall.

V. STAGE II OF THE REVIEW PROCESS

5.1 If the governing board does not reinstate a permanently excluded pupil, their parents may request a review by an IRP.¹⁰⁶ In the case of maintained schools, it is the local authority's responsibility to arrange for the review; in the case of academies, it is the academy trust.¹⁰⁷ However, many academy trusts buy-in the services of local authorities to administer IRPs for them. The IRP must comprise the following members: (i) a lay chair who has not worked in a school in a paid capacity; (ii) one or two head teachers or people who have been head teachers within the last five years; and (iii) one or two governors (or trustees at an academy trust) or people who have been governors within last five years.

5.2 The role of the IRP is to review the governing board's decision not to reinstate the pupil. The IRP can decide to do one of the following:

- (i) uphold the governing board's decision;
- (ii) recommend that the governing board reconsiders reinstatement; or
- (iii) in light of the principles applicable on an application for judicial review, quash the decision and direct that the governing board reconsiders reinstatement.¹⁰⁸

IRPs therefore do not have the power to reinstate pupils. Instead, where the IRP recommends or directs reconsideration the governing board must reconsider the exclusion within ten school days of notification of the IRPs decision.¹⁰⁹ Where the governing board declines to reinstate a pupil following a *directed* reconsideration, the IRP should order an adjustment to the school's budget (in the case of maintained schools) or payment to the local authority (in the case of academies) of £4,000.¹¹⁰

5.3 This IRP system was introduced by the Education Act 2011. Prior to this, school exclusion appeals were heard by Independent Appeal Panels

¹⁰⁶ Parents have 15 school days from receipt of the governing board's decision to request a review, 2012 Regulations, reg 6(6)(b)(ii) in the case of maintained schools and reg 24(6)(b)(ii) in the case of academies and para 2(1) of Schedule 1.

¹⁰⁷ *Ibid* regs 7(1) and 25(1).

¹⁰⁸ Education Act 2002 s. 51A(4).

¹⁰⁹ 2012 Regulations reg 8(1) in the case of maintained schools and reg 26(1) in the case of academies.

¹¹⁰ DfE, 'Exclusions Statutory Guidance' (see n. 20 above) para 163.

(“IAPs”). IAPs considered the decision to exclude afresh and had the power to direct the school to reinstate a pupil.¹¹¹

Independent Review Panel issues

Jurisdiction

Lack of an effective remedy

- 5.4 In our view the change from IAPs to IRPs left pupils without an effective remedy for unlawful exclusions. It leaves the ultimate decision on whether to reinstate a pupil in the hands of the governing board who can choose to “pay to exclude”, which in principle the Working Party believes is unsatisfactory. Furthermore, we heard from head teachers, governors, IRP members and civil society organisations alike that for most schools £4,000 is an insufficient sum to encourage them to reinstate an excluded pupil. This is indicated by the statistics which show that in 2017/18 pupils were reinstated in only 24 per cent of cases where the IRP recommended reconsideration and 40 per cent of cases where the IRP directed reconsideration.¹¹² In some cases, paying the £4,000 may be cheaper than providing the support the pupil requires.¹¹³
- 5.5 We were also told by practitioners that where the IRP directs reconsideration, the governing board often simply restates its original decision, even though it has been found to be flawed. In theory this could then be challenged again by way of judicial review. However, this is not made clear in the guidance.¹¹⁴ Furthermore, the costs risks involved in bringing judicial review proceedings mean that in reality, it is only those who are eligible for the limited legal aid available who will consider seeking judicial review. Therefore, these decisions usually go unchallenged.
- 5.6 We were told that the current limits on its jurisdiction and remedies deter many parents from applying to the IRP; and that those who had applied and

¹¹¹ Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002 reg 6.

¹¹² DfE, ‘Permanent and Fixed Period Exclusions in England 2017 to 2018 - National Tables’ (see n. 3 above) Table 13.

¹¹³ Kulz (see n. 54 above) p. 28.

¹¹⁴ The Statutory Guidance states that “Whilst the governing board may still reach the same conclusion as it first did, it may face challenge in the courts if it refuses to reinstate the pupil, without strong justification.” DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 172.

succeeded often concluded that the process had been confusing, unjust and pointless when they discovered that the IRP could not order reinstatement.¹¹⁵

5.7 Indeed, for these reasons the IRP system may be incompatible with the right to a fair trial under Article 6 of the European Convention on Human Rights. It was the Government's position during the passage of the Education Act 2011 that exclusions are not determinative of a civil right and therefore Article 6 does not apply to IRPs.¹¹⁶ However, the Joint Committee on Human Rights disagreed; in its view Article 6 is applicable to school exclusions and the IRP process breaches this right as it provides no opportunity to challenge factual findings and, without the power to reinstate, fails to give practical effect to the judgment of an independent tribunal.¹¹⁷

5.8 The lack of an effective remedy may also impact on head teachers' initial decision making. In a qualitative study commissioned by the Communities Empowerment Network ("CEN") (the "CEN Study"), a number of local authority exclusion officers thought that the change from the IAP to IRP system made it easier for head teachers to exclude. Two head teachers from the same study also admitted that permanent exclusions had become an easier option for them.¹¹⁸

Application of judicial review principles

5.9 There are also difficulties for a lay panel, whose members who are not required to have any legal training or expertise in applying judicial review,

¹¹⁵ Kulz (see n. 54 above) pp. 26-27 and 29; Wolstenholme, Coldwell and Stiell (see n. 52 above) pp. 38-39; Hodge and Wolstenholme, 'I Didn't Stand a Chance: How Parents Experience the Exclusions Appeal Tribunal' (2016) 20 *International Journal of Inclusive Education* 1297, pp. 1301-1302.

¹¹⁶ The Government relied on the case of *R (on the application of LG) v The Independent Panel for Tom Hood School* [2010] EWCA Civ 1423 in which the Court of Appeal held that Article 6 was not engaged by a hearing before an IAP.

¹¹⁷ Shortly after the decision in *R (on the application of LG) v The Independent Panel for Tom Hood School*, the European Court of Human Rights decided the case of *Orsus v Croatia* (Application No. 15766/03, 16 March 2010) which held that Article 6 did apply to an education dispute relating to the discriminatory treatment of Roma children in schools by placing them in separate classes. The Government maintained that Article 6 was not applicable because this dispute was different to exclusion. However, the Joint Committee on Human Rights disagreed, arguing that if Article 6 applies in the context of *Orsus v Croatia*, then there is an even stronger case it applies to exclusions from school. House of Lords House of Commons Joint Committee on Human Rights, 'Legislative Scrutiny: Education Bill; and Other Bills, Thirteenth Report of Session 2010-12' (2011) paras 135-143 <<https://dera.ioe.ac.uk/11715/1/154.pdf>>.

¹¹⁸ Kulz (see n. 54 above) pp. 27 and 31.

which is a complex area of law. This was noted by Collins J. in *R (CR) v Independent Review Panel of the London Borough of Lambeth* when he stated, “it is difficult to see that it is entirely satisfactory for what is a lay body to be required to apply judicial review principles in the decision they have to make”.¹¹⁹ We were told by individuals who represent parents at IRPs that practice varies between IRPs, with some evaluating the governing board’s decision on judicial review principles and others essentially conducting a merits review,¹²⁰ creating inconsistency between panels.¹²¹

5.10 In addition, the Statutory Guidance does not fully explain or set out the principles of judicial review.¹²² For example, as Collins J. pointed out in *R (CR) v Independent Review Panel of the London Borough of Lambeth*, the guidance omits from the description of irrationality, failure to have regard to a material consideration or having regard to an immaterial consideration.¹²³ One representative also told us they had found it difficult to make an argument based on fettering of discretion, another judicial review ground, because the panel members could not see it listed in the guidance.

5.11 Further, the Statutory Guidance can confuse matters. It states that “the panel must apply the civil standard of proof; i.e. ‘on the balance of probabilities’ it is more likely than not that a fact is true...”.¹²⁴ This implies that the IRP can make findings of fact, which sits oddly with the IRP exercising a judicial review jurisdiction. If it can, there is a further question as to whether its findings of fact are then binding on the governing board when the latter reconsiders its decision.

Knowledge and expertise

Training

5.12 The 2012 Regulations require that IRP members have received training within two years prior to the review on: (a) the requirements of legislation

¹¹⁹ [2014] EWHC 2461 (Admin) at [32].

¹²⁰ For example, a parent representative told us that they had had IRPs where cross-examination of the head teacher, chair of the governing board or child was allowed.

¹²¹ See also Hodge and Wolstenholme (see n. 115 above) p. 1302.

¹²² It sets out the grounds for judicial review in some 216 words. In contrast the leading text book on judicial review is some 1056 pages in length.

¹²³ *Supra* n. 119, at [34].

¹²⁴ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 137.

and statutory guidance governing exclusions; (b) the role of the chair; (c) the role of the clerk; (d) the relevant effect of the Equality Act 2010; (e) the effect of section 6 of the Human Rights Act 1998, and the need to act compatibly with human rights protected by that Act; and (f) the need for the review panel to observe procedural fairness and the rules of natural justice.¹²⁵

- 5.13 However, the training given to IRP members varies quite considerably. Some IRP members told us that they are provided with comprehensive training, covering all the topics required by the 2012 Regulations and run by someone who is legally qualified. However, others told us that the training they received was rushed, conducted by someone with no legal experience, who did not have sufficient knowledge of the relevant legal duties and contained very little beyond a summary of the Statutory Guidance. One IRP member told us they had the sense that the training was geared towards “dealing” with parents who made tricky arguments. This creates inconsistency between the knowledge of different IRPs and therefore their ability to properly conduct a review hearing.

Constitution of the panel

- 5.14 As noted above the IRP must comprise a lay chair, a head teacher and a governor. In general, consultees saw the benefit of having educational expertise on the panel in the form of head teacher and/or governors as they bring specialist knowledge of how the school system works. However, local authorities and IRP members told us that it was often a struggle to organise a properly constituted panel within the required time frame and in particular it was difficult to find head teachers.¹²⁶
- 5.15 There is no requirement for the panel to have a clerk, although we understand that they normally do and we were told by IRP members that it would be very difficult to run a hearing without one.
- 5.16 There is no requirement for anyone with legal expertise to be involved in the process and there appears to be a range of practice across IRPs in this regard; some have no one with legal training, some have chairs who happen to be lawyers, some have legally qualified clerks and others have a specialist legal advisor in addition to a clerk. Whilst some IRP members felt that the

¹²⁵ 2012 Regulations Schedule 1 paras 3(6) and 5.

¹²⁶ Especially due to the fact that the head teacher panel member must have held this post within the last five years. An IRP clerk and panel member both thought that head teachers who had been retired for more than five years still had valuable experience and the capability to sit as panel members.

involvement of someone with legal expertise was not usually necessary, most, particularly those who had a legally trained clerk or legal advisor available, felt that it was invaluable. One non-legally qualified clerk told us that although they had years of experience doing IRPs there were aspects that they were still not sure about and about which they needed to seek advice from the legal advisor. Having someone with legal qualifications was seen as particularly useful for ensuring that the panel applied judicial review principles and to advise on questions of procedure (see further paragraphs 5.22 and 5.23 below).

Special Educational Needs experts

- 5.17** Given the high proportion of permanently excluded pupils who have SEN, it is important that the IRP has access to specialist SEN advice. The 2012 Regulations state that, if requested by parents, the local authority or academy trust must appoint someone with SEN experience and expertise to attend the panel (the “SEN expert”), regardless of whether the school recognises that their child has SEN.¹²⁷ The panel must seek and consider the SEN expert’s views on how SEN may be relevant to the pupil’s exclusion.¹²⁸ The Statutory Guidance provides that the SEN expert should advise the panel on whether the school’s policies which relate to SEN, or the application of those policies in relation to the excluded pupil, were lawful, reasonable and procedurally fair. Where the school does not recognise the pupil as having SEN, the SEN expert should advise on whether the school acted in a legal, reasonable and procedurally fair way with respect to the identification of any SEN the pupil may have, and any contribution that this could have made to the circumstances of the pupil’s exclusion.¹²⁹ However the SEN expert’s functions do not extend to making an assessment of whether the pupil has SEN.¹³⁰
- 5.18** Consultees had mixed views on how helpful SEN experts are. A number of IRP members told us that they found the quality of assistance provided by SEN experts varied quite significantly between individual experts. Some IRP members thought that the current remit of the SEN expert was sufficiently broad. However, others thought that it would be more helpful if their remit

¹²⁷ 2012 Regulations, reg 7(1)(b) in the case of local authorities and reg 25(1)(b) in the case of academy trusts; DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) paras 126 and 128.

¹²⁸ 2012 Regulations Schedule 1 para 17.

¹²⁹ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) paras 165 and 166.

¹³⁰ 2012 Regulations Schedule 1 paras 17 and 18.

could be expanded. It was also pointed out to us that the experience required of SEN experts by the 2012 Regulations and Statutory Guidance is very generic, whereas it is possible to be an ‘expert’ in one area of SEN without understanding the implications of other areas of need.

- 5.19** Parents also have mixed views on the helpfulness of SEN experts. In a qualitative study of the view of IRP participants conducted by the Sheffield Hallam University Centre for Education and Inclusion Research (the “Sheffield Hallam study”), six out of 14 parents who had requested a SEN expert found them helpful. Others had concerns that the panel had not given the SEN expert sufficient opportunity to speak or that the SEN expert was not sufficiently qualified or up to speed on the individual case.¹³¹ A number of consultees also told us that they thought that SEN experts should have specific training on school exclusions.
- 5.20** It was also clear that there is a lack of clarity on the SEN expert’s role. IRP members and SEN experts had a range of different views on what the SEN expert was able to do – from being able to comment on anything at all that related to SEND, to being limited to providing general advice on the school’s duties relating to SEND and not being able to comment specifically on their application to the pupil or the school. Some parents in the Sheffield Hallam study also felt that the SEN expert had only been allowed to speak in general terms and not about the specific needs of the pupil.¹³² We were told by an IRP clerk that they themselves were not clear for how long the SEN expert can be present at the hearing.
- 5.21** Parents also do not always understand the role of the SEN expert. We were told by advice organisations that parents often assume that the SEN expert will be “on their side” and some wrongly believe that they will be able to assess their child for unidentified needs. A minority of parents in the Sheffield Hallam study were not even aware that they were able to request a SEN expert.¹³³

¹³¹ Wolstenholme, Coldwell and Stiehl (see n. 52 above) p. 49.

¹³² *Ibid.*

¹³³ *Ibid.*

Procedural fairness

Lack of procedural rules

5.22 The Statutory Guidance states that the chair of the IRP should outline the procedure to be followed and that the IRP should “support all parties to participate in the review and ensure that their views are properly heard”.¹³⁴ However, it does not indicate what the procedure should in fact be for the conduct of a hearing. Moreover, unlike in the courts and tribunals, there is no overriding objective to deal with cases “justly” or, as the Tribunal Procedure Rules provide, to “[ensure] so far as practicable the parties are able to participate fully in the proceedings”.¹³⁵

5.23 Although, most IRP members and clerks we spoke to had a set procedure provided by the arranging authority and followed it, these, unsurprisingly, were not uniform. We heard from representatives at IRP hearings that there were often significant differences in the way in which IRPs are conducted and that no two are alike. Some are overly legalistic, attempting to apply rules of civil procedure and evidence where to do so is not in the interests of justice,¹³⁶ whilst others are too informal, allowing discussion of irrelevant and/or unhelpful topics. The majority of participants in the Sheffield Hallam study felt that the process was conducted fairly. However, a small number of parents commented on their inability to respond to evidence put forward by the school and a minority of other interviewees (parents, head teachers and governors) felt that on some occasions they were not given sufficient time to speak, or to speak without interruption.¹³⁷ Some parent representatives we spoke to also told us that they were sometimes not given sufficient opportunity to make their case.

5.24 In addition, IRPs have no case management powers so their ability to deal with cases differently according to their complexity and specific issues, as well as to encourage cooperation between the parties, is limited. Although

¹³⁴ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 152.

¹³⁵ Rule 2(2)(c) of The Tribunal Procedure (Upper Tribunal) Rules 2008; and equivalent in other tribunal procedure rules.

¹³⁶ For example, Just for Kids Law had one panel attempt to strike out an IRP because the application had been sent by email, with permission of the local authority. (The Civil Procedure Rules provide that service by email is only valid where the party who is served has previously in writing that that they are willing to accept service by email (Practice Direction 6D, para 4.1(a)).)

¹³⁷ Wolstenholme, Coldwell and Stiell (see n. 52 above) pp. 38 and 40.

some IRPs ask schools for additional information and documents where they think this is required, they are unable to require parties to provide documents and, given that most of the evidence in exclusion reviews is held by the school, this makes the IRP overly reliant on whatever information the school decides to provide.

Conflicts of interest

- 5.25** The 2012 Regulations set out the circumstances in which a person may not serve on an IRP, in order to avoid conflicts of interest.¹³⁸ The Statutory Guidance states that “every care should be taken to avoid bias or the appearance of bias. The local authority/academy trust should request that prospective panel members declare any conflict of interest at the earliest opportunity.”¹³⁹
- 5.26** However, we were told by IRP members that because IRPs are arranged locally, panel members will often have attended training with the head teacher from the excluding school or would know them professionally. IRP members we spoke to who had been in this situation were aware this could constitute a conflict of interest and would declare it, giving the parents an option to reconstitute. However, they noted that this raises practical issues for the arranging trust or local authority in finding panel members without such connection. In the CEN study some parents expressed concerns about the constitution of IRPs and issues of potential bias. One parent felt that they knew what the result would be because the headteacher on the review panel and the head teacher of the excluding school clearly knew each other. Another group of parents felt that their hearing was unfair because one of the panel members had been at a hearing two weeks prior defending his decision to exclude a pupil.¹⁴⁰
- 5.27** Whilst having a head teacher on the panel brings useful expertise (see paragraph 5.14 above), a head teacher interviewed for the CEN study felt that having head teachers judging other head teachers presented potential

¹³⁸ These are if they (i) are a member/director or employee of the local authority/academy trust or governing board of the excluding school; (ii) have been the head teacher of the excluding school within the past five years; or (iii) have, or at any time had, any connection with the local authority/academy trust or governing board of the excluding school or the excluded pupil or the incident leading to the exclusion, which might raise doubts about their impartiality (2012 Regulations Schedule 1 para 3(5)).

¹³⁹ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 102.

¹⁴⁰ Kulz (see n. 54 above) p. 79-80.

conflicts of interest. However, some IRP panel members we spoke to felt that head teachers on the panel were often more critical of the excluding head as they felt that they “would not have done it that way”.¹⁴¹

5.28 One IRP member we spoke to also raised the issue of potential unconscious racial, religious and/or socio-economic bias. They noted that the majority of IRP members who they had come across were white and middle class and they saw this as a potential issue in light of the high proportion of permanent exclusions amongst Black Caribbean pupils, pupils of Gypsy, Roma and Irish traveller heritage and pupils with free school meals. An exclusion officer who participated in the CEN study reported also noted that it was unlikely that panels would be ethnically diverse, and this may be alienating for parents. In addition, a lack of diversity lowers the quality of decision making as it narrows the range of experience and knowledge.¹⁴²

5.29 Another point at which a clear conflict of interest may arise is in relation to reconsideration by the governing board following an IRP direction or recommendation to reinstate. We were told by schools and governors that the same governors who made the original decision to uphold the exclusion are often the ones who reconsider the exclusions if directed or recommended to do so by an IRP. In the context of tribunals, when a decision is sent back from the Upper Tribunal or Employment Appeals Tribunal to the first instance appeals body, there are circumstances in which it is not considered appropriate for the same constituted panel to re-hear the case.¹⁴³ However, the 2012 Regulations and the Statutory Guidance are silent on this point.

The Working Party's recommendation

5.30 While we received evidence that the IRP process can function fairly and independently, the Working Party feels that there is currently too much variation in standards and expertise of IRPs and that, due to their limited

¹⁴¹ *Ibid* p. 80.

¹⁴² For further discussion on the needs for a diversity in the judiciary see JUSTICE, ‘Increasing Judicial Diversity’ (2017) available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>.

¹⁴³ It will not normally be appropriate to send the matter back to the same constituted Tribunal to hear the case in the following circumstances: (i) where there was a question of bias or risk of pre-judgement; where the first hearing was wholly flawed or there had been a complete mishandling of it; where if the tribunal has already made up its mind, on the face of it, in relation to all the matters before it. *Sinclair Roche & Temperley and others v Siân Heard and Siân Fellows* 2004 unreported, case no. UKEAT/0738/03/MH at [46].

powers, they do not provide an effective mechanism for review. As such, the Working Party considers that any exclusions review/appeal body should have the features outlined below.

- 5.31 First, the appeals body should have full appellate jurisdiction, with the power to remake the decision afresh and to direct reinstatement.** There was general support for this amongst consultees and a number of other organisations have also recommended this, both when the Education Act 2011 was being debated in Parliament, and more recently.^{144 145}
- 5.32** However, a number of consultees did not agree that an appeals body should have the power to reinstate. They felt that often the relationship between the school and pupil had broken down so badly it would not be in the best interests of either the school or the pupil for the school to be forced to take back the pupil. One head teacher told us that although they would not have a problem accepting a pupil who had been reinstated by an appeals body, other head teachers may see it as undermining their authority.
- 5.33** Nevertheless, the Working Party strongly feels that for a review system to operate effectively and for justice to be done, there must be an effective remedy, otherwise any right to appeal/review is rendered pointless.
- 5.34** We also note that in many other jurisdictions the appeals body has the power to reinstate pupils, including in Wales,¹⁴⁶ Scotland,¹⁴⁷ Northern Ireland¹⁴⁸ and

¹⁴⁴ House of Commons Education Committee (see n. 58 above) para 45; Just for Kids Law (see n. 70 above) p. 9; Coram Children’s Legal Centre, ‘Coram Submission to Exclusions Review: Call for Evidence’ p. 10 available at https://www.childrenslegalcentre.com/wp-content/uploads/2018/05/Coram_School-Exclusions_May2018.pdf; Children’s Commissioner, “‘They Never Give up on You’: School Exclusions Inquiry” (2012) 71, available at <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/They-never-give-up-on-you-final-report.pdf>; House of Lords House of Commons Joint Committee on Human Rights (see n. 117 above) p. 18.

¹⁴⁵ It is interesting to note that the rationale given by the Government for the removal of the power to reinstate in its 2010 White Paper was so “that [appeals] take less time and head teachers no longer have to worry that a pupil will be reinstated when the young person concerned has committed a serious offence.” DfE (ed), ‘The Importance of Teaching: The Schools White Paper 2010’ para 9, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/175429/CM-7980.pdf. However, the most common reason for permanent exclusion is persistent disruptive behaviour (34 per cent of permanent exclusions) rather than a “serious offence”. “Other” is the next most common reason for permanent exclusion (18 per cent). DfE, ‘Permanent and Fixed Period Exclusions in England 2017 to 2018 - National Tables’ (see n. 9 above) Table 4.

¹⁴⁶ Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations 2003, reg 7(5).

Ireland¹⁴⁹ and it does not appear to be an issue; we heard evidence from a head teacher in Wales, that they had not had any problems accepting an appeal panel's decision to reinstate a pupil.

5.35 We do recognise that there are times where it may not be in the best interests of a pupil to return to the excluding school, and we were told by those representing pupils and parents that in many cases this is not what the pupil necessarily wants either.¹⁵⁰ We were told by advisors, representatives, IRP members and young people, that the form of redress that parents and pupils most commonly wanted was the exclusion removed from the pupil's record.¹⁵¹ Parents and pupils also want a formal recognition of the failings of the school and/or acknowledgment of the unfairness of the exclusion.¹⁵²

5.36 The Working Party therefore considers that the appeals body should have the power to order remedies other than reinstatement, so that it can look holistically at the situation and decide what is in the best interests of the pupil. Such remedies may include:

- ordering the school to make an apology;
- requiring the school to allow a pupil to sit an exam;
- ordering that the head teacher and/or governors undertake training;
- requiring the school to request an EHCP review or an assessment for an EHCP; and
- removing the exclusion from a pupil's record.

5.37 Second, the Working Party considers that any exclusions appeals body should be constituted with particular expertise and powers:

- incorporate either a legally qualified panel member or clerk/advisor;

¹⁴⁷ Education (Scotland) Act 1980, s. 28H(2).

¹⁴⁸ The Education and Libraries (Northern Ireland) Order 1986, art 49(8).

¹⁴⁹ Department of Education and Skills, 'Section 29 Appeals Information Note/ FAQs For Parents and Schools' (2018) available at <https://www.education.ie/en/Parents/Services/Appeal-against-Permanent-Exclusion-Suspension-or-Refusal-to-Enrol/section-29-appeals-information-note-faqs-for-parents-and-schools.pdf>.

¹⁵⁰ See also Wolstenholme, Coldwell and Stiell (see n. 52 above) p. 24.

¹⁵¹ See also *ibid*.

¹⁵² Hodge and Wolstenholme (see n. 115 above) p. 1301.

- include a panel member with **SEND expertise relevant to the needs of the pupil;**
- preferably also include a panel member with **experience in the education sector**
- apply national **procedural rules;**
- have **case management powers**, including the ability to require parties to provide evidence; and
- be provided with **standardised training.**

First-tier Tribunal (Special Educational Needs and Disability)

5.38 The Working Party received compelling evidence that the FTT (SEND) already meets all of the above criteria. **The Working Party therefore recommends that all second stage exclusion appeals should be heard by the FTT (SEND), which should be re-named the First-tier Tribunal (Education).**

5.39 The FTT already has limited jurisdiction over certain exclusions – if parents believe that an exclusion has resulted from discrimination, they may make a claim under the Equality Act 2010 to the tribunal.¹⁵³ The tribunal normally sits as a panel of two, comprising a legally qualified judge and a specialist member with experience of special educational needs (two such members in certain circumstances, one of whom may be a social work specialist if relevant). It is governed by a set of procedural rules¹⁵⁴ and has case management powers. Both selection of judicial and specialist panel members, and their training, are run centrally – by the Judicial Appointments Commission and the Judicial College respectively. Although administered centrally by HMCTS, tribunals sit across the country and therefore it should not be any more difficult for schools and parents to attend hearings. It would also provide a simpler, single appeal route for parents and pupils, without having to choose between the FTT (SEND) and IRP or splitting elements of their case between the two.

5.40 Whilst we heard from some consultees that they thought the transfer of exclusion appeals to the FTT (SEND) would make the process more adversarial, others thought that FTT (SEND) was in fact a more accessible environment for parents, not least because panel members are trained in how

¹⁵³ The Equality Act 2010, para 3 of Schedule 17.

¹⁵⁴ Tribunal procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008.

to conduct a fair and inclusive hearing (see **Chapter 6** for further discussion of accessibility and support).

- 5.41** The main issue raised by consultees was the capacity of the tribunal to take on all exclusion appeals and concerns that they would not be heard quickly enough. Timing is particularly important in the school exclusion context as pupils remain out of mainstream education whilst their appeal is being determined. There does currently exist an expedited procedure that is used in permanent exclusion cases. Under this procedure a decision will be reached in no more than six weeks.¹⁵⁵ However, it was pointed out by a number of practitioners that the tribunal is already overburdened, and where the expedited procedure is not used, it can currently take months for the appeal to be concluded. Some practitioners questioned whether there was capacity to use the expedited procedure for all exclusion appeals.
- 5.42** If the IRPs' current case load was transferred to the FTT (SEND) this would represent around a 10 per cent increase in its case load.¹⁵⁶ Whilst this is not a dramatic increase, it is not insignificant and would require additional resources. The Working Party therefore recognises that there may be a need to recruit additional panel members. Deputy Chamber President Tudur, who has overall responsibility for the FTT (SEND), acknowledged that the tribunal would require further resources, both administrative and judicial, if exclusion appeals were to be transferred to the tribunal, but did not see any good reason why all exclusion appeals could not be heard in the FTT (SEND). Moreover, with better Statutory Guidance, implementation of the Timpson recommendations and our recommendations for an Independent Reviewer there should be significantly fewer exclusion decisions and appeals.

¹⁵⁵ We were told by practitioners that the FTT (SEND) will register the claim on the same working day that it receives it (or the next working day if received it after midday) and send a copy to the responsible body (usually the Governing Board). The tribunal will send a notification when the claim is registered and provide a date for the hearing. This registration letter will set out any relevant deadlines – there is no case management as the timetable is too tight. The responsible body must prepare a response and send it to the parents and the tribunal within 15 working days of receiving the claim. The hearing will normally be five weeks after the claim is received, with a decision on the day and written reasons either on the day or within five working days.

¹⁵⁶ In 2017/18 there were 640 reviews lodged and 599 determined by an IRP (DfE, 'Permanent and Fixed Period Exclusions in England 2017 to 2018 - National Tables' (see n. 3 above) Table 13). We were told by Judge Tudur that the FTT (SEND) is expected to have registered 6,700 appeals this calendar year.

5.43 Another advantage of exclusion appeals being heard in the FTT (SEND) is that there will be a right of appeal to the Upper Tribunal Administrative Appeals Chamber. Currently decisions of the IRP can only be challenged by way of judicial review, however this rarely happens (see paragraph 2.10 above). An appeal to the Upper Tribunal is procedurally more straightforward, is less adversarial and does not come with the same costs risks as a judicial review claim.

VI. ACCESSIBILITY AND SUPPORT

*You know, I don't think that many of the families understand the appeal process. I really feel, you know, they turn up bemused, um uninformed about what is going on and uncomfortableness, unfamiliarity with the process makes it harder for them to be fair participants. Whereas head teachers turn up, we have done it before, uh, nearly always know one or two people on the panel.*¹⁵⁷

- 6.1 Our recommendations in previous chapters would create substantial changes to the way in which the exclusion review system operates. However, the recommendations we make in this chapter are about the *experience* of unfamiliar process, legal or otherwise, and apply equally to the current system and any system reformed as we propose.
- 6.2 The JUSTICE Working Party report *Understanding Courts* examined ways in which lay court and tribunal users could be better enabled to understand and take part in legal process.¹⁵⁸ HMCTS has accepted those recommendations and is working to improve lay user experience. Similar issues to those identified in that report apply to school exclusions. This chapter contextualises many of those issues and applies the relevant recommendations to the school exclusions context.
- 6.3 We also believe that the reforms we recommend in the previous chapters, which would ensure an effective review system with teeth, would in and of themselves make the system more accessible and encourage greater participation. This is discussed specifically in respect of pupil participation in paragraph 6.41 below. For example, one of the key deterrents to parent and pupil participation in the current system is the lack of an effective remedy. We were told by consultees that many parents and pupils believe that there is no point in attending the governing board meeting as it is a ‘rubber stamping’ of the head teacher’s decision, and also that there is no point in challenging the decision via an IRP given their lack of powers to reinstate.

Understanding your rights and the review process

- 6.4 Qualitative studies of participants’ experience of the exclusions review process have found that parents find the processes governing school

¹⁵⁷ Kulz (see n. 54 above) p. 74.

¹⁵⁸ JUSTICE, *Understanding Courts* (2019) available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Understanding-Courts.pdf>.

exclusions to be complex, daunting, and difficult to understand and navigate.¹⁵⁹ Even parents who have a professional understanding of the education system, for example as a teacher, have reported finding the process uncomfortable.¹⁶⁰ Parents who have no prior knowledge of the system, don't speak English as a first language, or have low literacy levels and/or disabilities, will therefore find the exclusion process even more difficult to navigate and to fully participate in. These experiences are reflected in evidence received by the Working Party and were recognised by Timpson.¹⁶¹

- 6.5 This lack of knowledge of the process creates an inequality of arms between the school on the one hand and the pupils and parents on the other, as head teachers and governors have more experience of the process and are in a format and space they are familiar with.¹⁶²
- 6.6 In addition to finding the process for challenging exclusions difficult to navigate, parents often are not aware of what their rights are to begin with.¹⁶³ Therefore, parents may not be able to tell when a school is acting unreasonably or unlawfully, or in some cases may simply trust the school to act reasonably and in good faith.¹⁶⁴

Provision of general information

- 6.7 The provision of information, both on the processes and procedures, and parents' and pupils' substantive rights, can help give parents and pupils greater confidence in seeking to uphold their rights and navigating the review process.
- 6.8 The current Statutory Guidance is lengthy and difficult for many pupils and parents to read and understand. Although there is a non-statutory guide for parents at Annex C, organisations providing advice to parents of excluded

¹⁵⁹ Kulz (see n. 54 above) pp. 74-75; Hodge and Wolstenholme (see n. 115 above) pp. 1303-1304. This research looked at the experience of parents at the IRP and of one parent at the FTT (SEND).

¹⁶⁰ Kulz (see n. 54 above) pp. 77-78.

¹⁶¹ Timpson (see n. 12 above) p. 89.

¹⁶² Hodge and Wolstenholme (see n. 115 above) p. 1304; Kulz (see n. 54 above) p. 74.

¹⁶³ House of Commons Education Committee (see n. 58 above) para 42; Just for Kids Law (see n. 70 above) pp. 4-5.

¹⁶⁴ Children's Commissioner, "“They Never Give up on You”: School Exclusions Inquiry" (see n. 144 above) 72.

pupils told us that it is still not particularly accessible. It does not contain all the relevant information on parents' rights,¹⁶⁵ the language could be clearer,¹⁶⁶ and it does not contain details about what to expect at each stage of the review process.

- 6.9 A good example of how information can be provided to parents is the Communities Empowerment Network's Parent Portal¹⁶⁷ – an online interactive platform that provides tailored advice and information to parents depending on their child's situation. It provides template letters, for example, to request documentation in advance of governing board hearings and to request an IRP. It also has a "case builder" for both the governing board and IRP stages of the review process which allows the user to select statements that apply to their child's situation such as "I think my child has SEN" or "Did not do what they were accused of". A template set of submissions is then generated based on these statements which refer to the relevant parts of the Statutory Guidance. The portal also has videos on both the governing board review¹⁶⁸ and IRP¹⁶⁹ which show parents what to expect at each of these hearings. However, these would benefit from an update to provide clearer narration and subtitles and feature real people rather than animations.
- 6.10 A number of other organisations also provide helpful guides and information on both parents'/pupils' substantive rights and what they can expect to happen during the review process. For example, Coram Children's Legal Centre's ("CCLC") Child Law Advice information page on exclusions is particularly informative, including sections on "What will happen at a Governing Body meeting?" and "What will happen at an Independent Review Panel?"¹⁷⁰ CCLC also run a website called "LawStuff" which has child/young person-friendly information on exclusions, although this is

¹⁶⁵ For example, under the heading "For what reasons can a school exclude my child" it does not set out the test that head teachers have to apply for in respect of permanent exclusions.

¹⁶⁶ For example, there is a dense paragraph of text explaining the circumstances in which the governing board will review an exclusion which is confusing and could be worded more clearly and broken up by the use of bullet points. There is also inconsistency in the use of language relating to the £4,000 financial readjustment that we were told was confusing even for practitioners. As explained at paragraph 5.20 above, the role of SEN experts is also clearly misunderstood.

¹⁶⁷ See <https://parent-portal.cenlive.org/roadmap/>.

¹⁶⁸ See <https://parent-portal.cenlive.org/independent-review-panel/>.

¹⁶⁹ See <https://parent-portal.cenlive.org/governors-body-hearing/>.

¹⁷⁰ See <https://childlawadvice.org.uk/information-pages/school-exclusion/>.

focused on the pupils' substantive rights and not the review process.¹⁷¹ ACE Education provides comprehensive information on exclusions in clear language including tips on preparing a case for the governing board review and an explanation of how the governing board and IRP hearings will be run including who will be present and things parents may want to think about/do. There is a guide for fixed term exclusions as well.¹⁷²

6.11 However, existing resources are *ad hoc*, some are in need of updating and are not necessarily in an accessible format or easy to find. The FTT (SEND) has guides on “how to claim against disability discrimination in schools” for parents¹⁷³ and for young persons (over compulsory school age)¹⁷⁴ which explain what can be appealed and provide information on each stage of the appeals process. There is also a “How to appeal a SEN decision” guide,¹⁷⁵ including an easy read version.¹⁷⁶ The FTT (SEND) has also produced a series of videos that guide users through the process of making a SEN appeal.¹⁷⁷ The FTT for Scotland (Health and Education Chamber) has an

¹⁷¹ See <https://lawstuff.org.uk/education/exclusions-and-discipline/>.

¹⁷² For permanent exclusions see <http://www.ace-ed.org.uk/advice/exclusion-from-school/permanent-exclusion/> and fixed term exclusions see <http://www.ace-ed.org.uk/advice-about-education-for-parents/exclusion-from-school/fixed-period-exclusion?92f917d4-fd39-4325-b961-c3f5e3234d79>.

¹⁷³ The guidance is somewhat out of date as the form referenced has been amended. However, the guidance is still helpful. See HMCTS, ‘How to claim against disability discrimination in schools – a guide for parents’ (SEND4) available at https://search3.openobjects.com/mediamanager/manchester/fsd/files/how_to_bring_a_disability_discrimination_claim_1.pdf.

¹⁷⁴ HMCTS, ‘Guide to making a disability discrimination claim against a school – a guide for a young person who wants to make a claim’ (SEND4) available at <http://specialeducationalneedsbarrister.co.uk/wp-content/uploads/2018/01/Guide-to-making-a-disability-discrimination-claim-against-a-school.pdf>.

¹⁷⁵ HMCTS, ‘How to Appeal a SEN Decision (SEND37)’ available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776348/send37-eng.pdf.

¹⁷⁶ HMCTS, ‘If You Are Not Happy with a Decision about Special Educational Needs (SEN) EasyRead Version of: How to Appeal a SEN Decision (SEND37)’ available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831386/send37-easyread-eng.pdf.

¹⁷⁷ This video series benefits from its use of real people in a real hearing room, allowing appellants to get a proper sense of what it is like to attend a hearing. It also has subtitles and takes the viewer through the process step by step. However, it is clearly quite out of date (it refers to the Disability Discrimination Act), some of the language used is still too technical (for example “so we don’t have to adjourn the hearing date”) and it is difficult/confusing to simultaneously read the “key points” at the top of the screen and the subtitles. See https://www.youtube.com/playlist?list=PLORVvk_w75PxU3wF72j3jLYqGqISyMhZ4.

impressive, child-friendly website for discrimination claims.¹⁷⁸ Similar information, including videos and easy read guides, will be necessary specifically for exclusion appeals if they are to be transferred to the tribunal.

6.12 Timpson recommended that the DfE produce more accessible guidance for parents and carers.¹⁷⁹ The Working Party agrees with this recommendation and is encouraged that the Government, in its response to Timpson, agreed to update the guidance for parents as recommended.¹⁸⁰ As explained in *Understanding Courts*, **the design and presentation ought to reflect the needs and knowledge gaps of lay users, be presented in plain English and depicted in a manner that is easy to follow, for instance through decision trees, icons, maps and highlight boxes.**¹⁸¹

6.13 The DfE should also have regard to the recommendations made in *Understanding Courts* concerning the **need to publish practical information on what to expect during the exclusions review process that is clear, accessible and easy-to-understand. It must also be child-friendly. The guidance should be made available in a variety of formats, including online, hard copy leaflets and video and must include explanations of the roles of individuals involved in the hearings, typical room layout and the order of proceedings. The content, formatting and channel of presentation (paper, website, mobile app etc.) should be developed based on research and testing with user groups and draw on best practice. This is frequently referred to as “Human Centred Design”.**¹⁸²

6.14 The **updated guidance should signpost users to links and contact information for independent service advisors (including those referred to in paragraphs 6.9 and 6.10 above) and the DfE should ensure that this information is kept up to date.**¹⁸³ This should be in addition to Timpson’s

¹⁷⁸ See <https://www.healthandeducationchamber.scot/index.php/needstolearn/home>.

¹⁷⁹ Timpson (see n. 12 above) p. 89.

¹⁸⁰ DfE, ‘The Timpson Review of School Exclusion: Government Response’ (May 2019) p. 22, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800676/Timpson_review_of_school_exclusion_government_response.pdf.

¹⁸¹ JUSTICE (see n. 158 above) para 2.46.

¹⁸² *Ibid* paras 2.3-2.6.

¹⁸³ We note that the Statutory Guidance already directs parents, and provides that head teachers and governing boards should draw parents’ attention, to relevant sources of free and impartial information. It lists Coram Children’s’ Legal Centre, ACE Education, Traveller Education Services, Information

recommendation that local authorities include information about support services in their SEND Local Offer.¹⁸⁴

- 6.15 Schools should be required to provide this information with their written notification to parents of an exclusion.¹⁸⁵ This information should all also be available online.**
- 6.16** If exclusion appeals are transferred to the FTT (SEND), the obligation to provide this information in respect of that stage of the review process will fall on Her Majesty's Courts and Tribunals Service ("HMCTS"), however the **DfE and HMCTS should work together to ensure that pupils and parents are provided with one coherent set of information on the exclusions review process from start to finish.**
- 6.17** Given the subject matter, in designing such information particular thought should be given to producing child friendly versions of the information. Thought should also be given to users who have communication difficulties, such as those with learning or literacy difficulties, who speak minimal English or have visual or hearing impairments. The DfE and/or HMCTS should therefore produce easy read versions of the guidance¹⁸⁶ and translate it into a number of languages most commonly spoken amongst parents of excluded pupils.

Advice and representation

- 6.18** Whilst the recommendations above will assist with making the exclusions review process more accessible, the law surrounding school exclusions is complex, covering not just the guidance and regulations specifically relating to exclusions but also SEN provision, discrimination and equality duties as well as general principles of administrative law. The Working Party

Advice & Support Services Network, the National Autistic Society School Exclusion Service and Independent Parental Special Education Advice (DfE, 'Exclusions Statutory Guidance' (see n. 20 above) paras 38 and 82 and p. 59).

¹⁸⁴ Timpson (see n. 12 above) p. 89.

¹⁸⁵ 2012 Regulations, reg 5(1)(b) in the case of maintained schools and reg 23(1)(b) in the case of academies.

¹⁸⁶ The concept of "easy read" is an approach to writing and drafting developed to help people with language difficulties understand information more easily. It does so using short, simple sentences and pictures. See e.g. the organisation *Change*, which develops easy read documents for a variety of situations: <https://www.changepeople.org/>.

considers that access to case-specific independent advice is therefore also required for many parents. Understandably, having a child excluded is an emotionally charged issue for many parents. It can also have serious consequences for the child's future. Parents have highlighted that having access to someone who is not emotionally involved to advocate for you in the hearing is therefore invaluable.¹⁸⁷ Parents and pupils who have had access to advice and representation have also said that it made them feel less intimidated, that they were not going through the process totally alone and have seen it as crucial in identifying the issues and grounds of their case – many parents have a feeling that the exclusion is wrong but don't know, or find it hard to articulate, why.¹⁸⁸

Advice

6.19 Whilst most organisations provide step-by-step guides and general information on what constitutes a lawful exclusion and an explanation of the review process, accessing specific advice is more difficult, largely due to advice organisations lacking sufficient capacity to meet demand and funding cuts within the sector. Parents reported that in some cases they had been provided with out-of-date contact details or were told that organisations' caseloads were full. In other cases, organisations were only able to provide generic advice rather than assist with the individual case.¹⁸⁹ For example, the Statutory Guidance refers parents to the Information Advice and Support services,¹⁹⁰ however we were told by one local authority's IAS service that it does not give exclusions advice as part of its core services and by another advice provider that the IAS support provision varies significantly between local authorities. We have been told by the School Exclusion Project and

¹⁸⁷ Kulz (see n. 54 above) p. 77; Hodge and Wolstenholme (see n. 115 above) p. 1305; Wolstenholme, Coldwell and Stiell (see n. 52 above) p. 27. A number of advisors we spoke to also raised the same issue.

¹⁸⁸ Hodge and Wolstenholme (see n. 115 above) p. 1305; Kulz (see n. 54 above) p. 76-77; Wolstenholme, Coldwell and Stiell (see n. 52 above) p. 27. The young people we spoke to who had access to support during the review process made similar observations.

¹⁸⁹ Hodge and Wolstenholme (see n. 115 above) p. 1303; Wolstenholme, Coldwell and Stiell (see n. 52 above) pp. 25-26.

¹⁹⁰ It is a legal requirement under the Children and Families Act 2014 for all local authorities to ensure that children and young people with SEND and their parents have access to free and impartial Information, Advice and Support ("IAS") Services. Each local authority will therefore have an IAS Service however the services provided vary from authority to authority. They were previously known as Parent Partnership Services. See <https://councilfordisabledchildren.org.uk/information-advice-and-support-services-network/about/what-do-ias-services-do>.

Just for Kids Law that they often have to turn away parents due to capacity issues. It appears that it is the most confident/able parents who are able to access the available support.¹⁹¹ The recommendation made in paragraph 6.14 above should assist in this regard.

- 6.20 The Working Party therefore **endorses the second part of Timpson’s recommendation that “In the longer term, the government should invest resources to increase the amount of information, advice and support available locally to parents and carers of children who are excluded or placed in AP [alternative provision].”**¹⁹² However, in addition to the provision of general information on the review process and parents’/pupils’ rights, we believe that there needs to be case-specific advice and support.
- 6.21 Consultees agreed that such advice does not necessarily need to be provided by someone with legal training but must be provided by individuals who are well trained in the exclusions process and with in-depth knowledge of the procedure and substantive duties in the area. The Government should also ensure that there is a good geographical spread of such advice services and that they have sufficient capacity.
- 6.22 There are a number of organisations that already provide advice, some of which are referred to in the Statutory Guidance (see footnote 183 above). In addition, some law centres, such as Islington Law Centre, also offer education advice and support and the School Exclusion Project, Just for Kids Law and the Communities Empowerment Network also provide representation at the governing board and IRP stages of the review.
- 6.23 However, the Working Party notes that legal aid for face-to-face advice in education and discrimination cases is being re-introduced by Spring 2020.¹⁹³ This should make it easier for parents to access publicly funded advice for exclusions involving SEND and/or discrimination.¹⁹⁴

¹⁹¹ Wolstenholme, Coldwell and Stiehl (see n. 52 above) p. 26.

¹⁹² Timpson (see n. 12 above) p. 89.

¹⁹³ Ministry of Justice, *Legal Support: The Way Ahead: An Action Plan to Deliver Better Support to People Experiencing Legal Problems* (2019) p. 18, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf.

¹⁹⁴ The “education” category of legal aid covers anything relating to SEND Legal Aid Agency, ‘2018 Standard Civil Contract Category Definitions’ para 30, available at

Representation

- 6.24 Under the Working Party’s proposed reforms, Stage 1 of the process should be investigatory, akin to a conversation between the Independent Reviewer and the parents/pupil. As such, there should not be a need for representation for that stage.
- 6.25 In respect of Stage 2, the FTT (SEND), like other tribunals, is intended to provide a simple, accessible system of justice where users can represent themselves.¹⁹⁵ However, we heard concerns from practitioners and advice organisations that transferring exclusion appeals to the FTT (SEND) would result in schools being more likely to instruct a lawyer than they currently do in the IRP process. From our experience we know that schools are almost invariably represented in disability discrimination claims at the tribunal. The Working Party recognises that this would result in an inherent inequality of arms between the parties, and that schools would use public funds to appoint a lawyer. We therefore recommend that if exclusion appeals are transferred to the FTT (SEND), then parents should also have access to publicly funded legal representation. Currently there is no legal aid available as standard for representation for education law matters (including those involving special educational needs). We consider that access to representation in respect of hearings in all education disputes is in principle available via Exceptional Case Funding (“ECF”).¹⁹⁶
- 6.26 However, given the difficulties people face in applying for and obtaining ECF,¹⁹⁷ **we believe that there is a good case for second stage appeals**

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738528/2018_Standard_Civil_Contract_Category_Definitions_August_2018.pdf.

¹⁹⁵ Sir A. Leggatt, ‘Tribunals for Users – One System, One Service, Report of the Review of Tribunals’ (2001), para 7, Available at <https://webarchive.nationalarchives.gov.uk/20070815230000/http://www.tribunalsreview.org.uk/index.htm>

¹⁹⁶ Legal Aid Agency (see n. 194 above) para 32. ECF was designed to be a safety net to allow for legal aid to be granted in cases where failing to provide funding would risk a breach of someone’s human rights or a breach of European Union law. There are no separate statistics for ECF in the FTT (SEND), however recent data show that the number of ECF applications concerning either ‘discrimination’ or ‘education’ law have only totalled 17 since 2013/14. Of these 17 application, none have been granted. See ‘Legal Aid Statistics Quarterly: April to June 2019’ Table 8.2, available at <https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2019>.

¹⁹⁷ See statistics, *supra*, and also, Katy Watts, ‘PLP Research Briefing Paper: Exceptional Case Funding’ Public Law Project (May 2018) available at <https://publiclawproject.org.uk/wp-content/uploads/2018/05/Exceptional-Case-Funding-Briefing.pdf>.

before the FTT (SEND) to be within scope for legal aid representation. In making this proposal, we take into account that the impact of an exclusion on a child’s future may be as serious as that of a criminal conviction. So far as we are aware, the efficacy of publicly funded representation for young people appearing before a youth court has not been questioned.

Language and communication

- 6.27 Parents have described experiencing difficulties with the language used by governing boards and IRPs. The use of unfamiliar language and/or “jargon” by governing boards and IRPs can make parents feel intimidated and out of their depth, hindering their ability to explain their version of events.¹⁹⁸ For example, we were told by those who represent parents that reference is regularly made at IRPs to “SIMS” (school information management service), “MARS” (multi-agency request for service), “discretionary budget” and “merlin reports”. The governors and IRP members we spoke to told us that they did not receive any special training in how to communicate with vulnerable people, young persons, or those who may not be as familiar with the education system as they are, nor is it currently a requirement for them to do so.
- 6.28 The Working Party therefore adopts the recommendations in Chapter 3 of *Understanding Courts*, which suggest ways in which to improve communication with lay users in the courts and tribunals system. If exclusion appeals are transferred to the FTT (SEND) then these recommendations will be directly applicable. However, many of them are also applicable to governors and IRP members under the current exclusions review system. In particular:
- **professionals involved in the exclusion review process should be given training on how to effectively communicate with parents and pupils, including those with SEND.** Under our proposed review system the local authority should provide such training for the Independent Reviewer. With respect to the FTT (SEND) (or “(Education)” as we propose), we note that the induction training run by the Judicial College for all new judges appointed after April 2019 includes communication styles and vulnerability. In addition, a course entitled ‘Judge as a

¹⁹⁸ Hodge and Wolstenholme (see n. 115 above) p. 1304; Kulz (see n. 54 above) pp. 76-78.

Communicator’ is available to sitting judges which, includes “using language appropriate to the case and the participants”,¹⁹⁹ and

- **questioning should always be adapted to the needs and understanding of the witness/parent/pupil to ensure that they can give their best evidence and to promote comprehension on the part of participants to the hearing.**

6.29 Parents and pupils involved in the exclusions review process may need additional support to effectively participate, irrespective of how well they are informed about the process or how well professionals communicate with them. It is crucial that the system operates in a way which does not exclude them from having proper access to it.

6.30 For example, parents whose first language is not English: as one young person told us, their mother’s English was normally fine, but she found it difficult to understand the formal language used by the school and governors. The Statutory Guidance provides that where parents’ first language is not English, consideration should be given to translating the exclusions letter or taking other steps to ensure that the details of the exclusion and right to make representations to the governing board have been understood.²⁰⁰ However, this is not mandatory and there is nothing in the guidance about translating other documents or providing an interpreter during the governing board and/or IRP hearings. We heard that currently panels rely on parents having a friend or relative that they can bring to the hearing who speaks better English than them. It should therefore **be a requirement to translate key documents into the parents’ first language and provide an interpreter at hearings where this is necessary**. One of the advantages of transferring exclusion appeals to the FTT (SEND) is that it is already standard practice for an interpreter to be provided if requested.

¹⁹⁹ Judicial College, ‘Prospectus April 2019-March 2020 Courts Judiciary’ p. 16, available at <https://www.judiciary.uk/wp-content/uploads/2017/12/judicial-college-prospectus-for-courts-judiciary-2019-2020.pdf>.

²⁰⁰ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 39.

Support and reasonable adjustments

Reasonable adjustments

- 6.31** There are many people who need additional support in order to take part in the process no matter how well informed they are, how well professionals communicate with them and what advice they have had.
- 6.32** The Statutory Guidance currently refers to the need to make reasonable adjustments to support the attendance and contribution of the parties at the Governing Board and IRP hearings, however this is framed mainly in terms of physical accessibility.²⁰¹ We view reasonable adjustments more broadly so as to encompass, whatever formal or informal aid or adaptation is deemed necessary in the interests of justice for the purposes of the hearing concerned. The Statutory Guidance also contains no guidance on what types of adjustments might be made in practice, or how to identify the need for them.
- 6.33** One advantage of exclusion appeals being transferred to the FTT (SEND) is that the overriding objective of the Tribunal Procedure Rules requires so far as practicable that the parties are able to participate fully in the proceedings.²⁰² There is also a requirement under the First-tier and Upper Tribunal Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses to consider how to facilitate the giving of any evidence by a child, vulnerable adult or sensitive witness and the tribunal can adopt “any means” to do so.²⁰³ The FTT (SEND) forms ask specifically if the appellant or any other person has any special requirements, including adjustments, which may be required, although there is no guidance for appellants on what they might be able to request here.²⁰⁴ We recommend that **reasonable adjustments to enable parties to participate fully should be available at all stages of the**

²⁰¹ *Ibid* paras 61 and 93.

²⁰² Tribunal procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, r. 2(c).

²⁰³ In the FTT (SEND) this may take the form of physical adjustments, such as frequent breaks or sign language interpreters, or emotional ones, such as a friend of family member’s support (in addition to a representative).

²⁰⁴ See e.g. ‘Disability discrimination claim by parent after permanent exclusion – parent’ (Form SEND26A) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729128/send26a-eng.pdf

review process. As in the tribunals, this should include an obligation to consider whether any party or witness has a particular vulnerability or other need for adjustment and guidance on how to identify the need for, and to source, reasonable adjustments. Such guidance should also be made available to parties and witnesses as well and should be clear accessible and easy to understand (as with the updated guidance, see paragraph 6.13 above).

Support

6.34 During the *Understanding Courts* Working Party, JUSTICE heard that additional support services for lay users of courts and tribunals is required to help them prepare for the hearing and recommended that “provision should be made for practical and emotional court supporters in all courts and tribunals and for all lay participants. The court supporter’s primary role would be to provide information, help lay users think through what they might want to say, discuss their concerns, help them to find their way around the court building and court room and to attend court with them.”²⁰⁵ This is separate from legal representation and there is currently patchy support in the courts and tribunals through voluntary provision.²⁰⁶

6.35 **The Working Party endorses this recommendation in the context of the FTT (SEND). If exclusion appeals are to remain outside the tribunal system, thought should be given to what additional support services could be provided.**

Involving the pupil

6.36 The current process for challenging exclusions is structured around the parents, rather than the pupil. The right to make representations to the governors and to request and make representations at an IRP both attach to the parents (unless the pupil is 18 or over).²⁰⁷

6.37 The Statutory Guidance does make some provision for involving the pupil. It states that:

²⁰⁵ JUSTICE (see n. 158 above) para 4.25.

²⁰⁶ For example, through the Personal Support Unit and Witness Service.

²⁰⁷ 2012 Regulations regs 6(3)(b), 7(1)(a), 24(3)(b), 25(1)(b) and para 12(1)(a) of Schedule 1.

- the head teacher should give the pupil an opportunity to present their case before taking the decision to exclude;²⁰⁸
- the governing board should “identify the steps they will take to enable and encourage the excluded pupil to attend the meeting and speak on their own behalf (such as providing accessible information or allowing them to bring a friend), taking into account the pupil’s age and understanding; or how the excluded pupil may feed in their views by other means, if attending the exclusion meeting is not possible”;²⁰⁹ and
- the IRP “should support all parties to participate in the review and ensure that their views are properly heard.”²¹⁰

However, there is no absolute requirement to hear from the pupil.

6.38 The Children’s Commissioner and Just for Kids Law have found that schools do not always examine ways to ensure pupils’ views are taken into account prior to an exclusion decision being made.²¹¹ The young people we spoke to told us they knew about the governors hearing but did not attend, (although they did provide written statements) as their parents did not think it would be appropriate for them to do so. Neither did they attend the IRPs. We were also told by advisors that there have been situations in which the parents’ views have conflicted with those of the pupil. However, given the current structure of the exclusions review process, the advisors had no choice but to follow the parent’s instructions over the wishes of the pupil.

6.39 Given the huge impact that being excluded can have on a pupil’s life the Working Party believes it is crucial that young people can make their wishes and feelings known and they are therefore encouraged and enabled to participate in proceedings to the greatest extent possible.²¹²

6.40 The Children’s Commissioner has also found that the failure to seek pupils’ views as part of the exclusion decision making process and the lack of a right for the excluded child to challenge an exclusion on their own behalf is non-

²⁰⁸ DfE, ‘Exclusions Statutory Guidance’ (see n. 20 above) para 17.

²⁰⁹ *Ibid* para 61.

²¹⁰ *Ibid* para 152.

²¹¹ Children’s Commissioner, “‘They Never Give up on You’: School Exclusions Inquiry’ (see n. 144 above) paras 15-22; Just for Kids Law (see n. 70 above) p. 6.

²¹² Article 3 of the UN Convention on the Rights of the Child also states that the interests of the child must be a primary consideration in decisions made concerning that child.

compliant with the UN Convention on the Rights of the Child.²¹³ Article 12 of the Convention provides that children who are capable of forming their own views have a right to express those freely in all matters concerning them and in particular they should have the opportunity to be heard in any judicial or administrative proceedings affecting them. In Scotland, children who have capacity (which is assumed to be those over 12 years), are entitled to make a discrimination claim in the Tribunal. By comparison in the FTT (SEND) only young people over compulsory school age (normally over 16) can bring a disability discrimination claim in their own name. **The Working Party recommends that consideration should be given to lowering the age at which a pupil can appeal in their own name to the FTT (SEND) in exclusion appeals.**

- 6.41 Under our proposed changes we recommend increased pupil involvement: there will be a requirement for head teachers to hold a meeting with the pupil and parents before taking a decision to permanently exclude (see paragraph 3.15 above) and under the new Stage 1 process, the Independent Reviewer will be expected to canvass the views of the pupil. In light of the requirement to make reasonable adjustments, this interview will be less formal and intimidating than speaking to a panel under the current governing board review hearing and could, for example, be conducted at the pupil's home or other venue in which they feel comfortable. The Independent Reviewer should also have training on how to communicate effectively with children.
- 6.42 Given that tribunals tend to adopt an enabling approach and are required by the overriding objective of the Tribunal Procedure Rules so far as practicable to ensure that the parties are able to participate fully in the proceedings, the transfer of exclusion claims to the FTT (SEND) should also result in the pupil's views being better taken into account. However, **the Working Party recommends that the views of the pupil should be considered at all stages of the review process.**

²¹³ Children's Commissioner, "“They Never Give up on You”: School Exclusions Inquiry" (see n. 144 above).

VII. CONCLUSION AND RECOMMENDATIONS

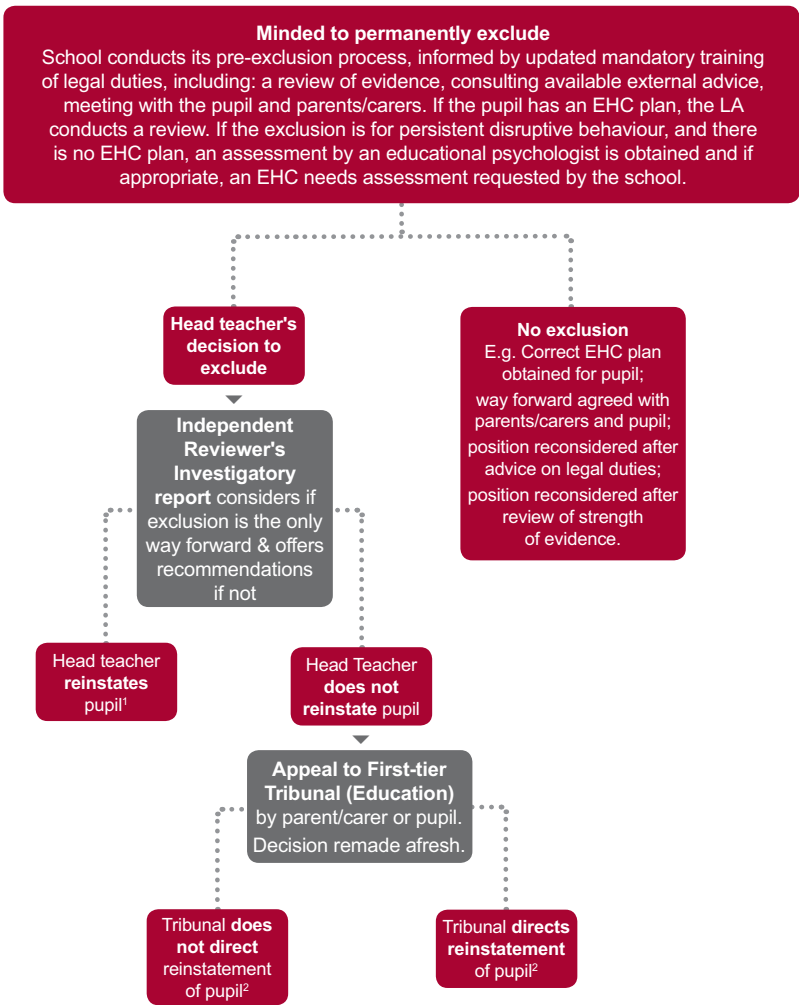
- 7.1** This Report focuses on processes used to make, confirm and review a school's decisions to exclude one of its pupils permanently ("Exclusions Process"). For the reasons given in **Chapter 1**, we believe that it is both necessary and timely, and that its recommendations, which are outlined below, will complement those made earlier this year in the Timpson Report, and will thereby contribute to the much-needed development of policy on permanent exclusion.
- 7.2** We have concluded that, at each stage, the current Exclusions Process has a number of serious weaknesses, and therefore we cannot be confident that all exclusions are, as required by the Statutory Guidance, "lawful, reasonable and fair". This should be of great concern because of the huge impact which permanent exclusion can have on a pupil's future educational and career prospects and which is often far greater than if he/she had been convicted by a Youth Court of a relatively serious offence. We have identified the following as the most significant defects of the current Exclusions Process:
- 7.3** Firstly, in making exclusion decisions school heads often have had little, if any, training in, and thus have a poor understanding of, the law which governs the use of their powers to do so; can apply behaviour policies in an overly rigid manner; fail to communicate effectively with pupils' parents; and may therefore not know of personal or psychological factors which might have motivated and/or mitigated a pupil's behaviour (**Chapter 3**).
- 7.4** Secondly, in carrying out their statutory responsibilities governor-panels, though well managed and supported in some multi-academy trusts and local education authorities: are often similarly untrained in and unaware of the applicable law; may have to proceed on the basis of large, poorly produced and presented bundles of documentary evidence, which they – and, of even greater concern, the excluded pupil's parents – are likely to have received only a couple of days before the panel hearing; may feel under enormous pressure to confirm their headteacher's decision (as may be suggested by the low percentage of decisions which are overturned); and generally will not be able to avoid the appearance of bias (**Chapter 4**).
- 7.5** Thirdly, although the IRP has an independent and trained membership, can call upon specialist (and particularly SEN) evidence and overturns over 40% of the decisions it considers, nonetheless: it can do so only on highly limited "judicial review" grounds, which are likely to prove extremely difficult for non-legally qualified members or unrepresented parents to understand; operates on the basis of procedures which vary considerably between IRPs;

and can offer only an extremely inadequate form of redress to those whose cases are successful (**Chapter 5**).

- 7.6 To remedy these defects this Report makes a number of recommendations, which are set out in detail and cover all stages of the Exclusions Process.
- 7.7 Thus, there would be measures to ensure that head teachers' initial decisions to exclude any of their pupil are more systematic and consistent; are informed by appropriate specialist guidance; are fully discussed in advance with the pupil and parents; and most importantly meet all statutory requirements.
- 7.8 Where a head teacher does exclude, the "first stage" review would no longer be conducted by governors; but instead by a suitably qualified and experienced independent reviewer who would adopt a process which is essentially investigative and mediative rather than adjudicative and potentially adversarial in nature. Their report would provide recommendations for the school to consider.
- 7.9 Where a head teacher continues an exclusion, the "second stage" IRP would be abolished. If parents wished to challenge an exclusion, they would take their case to the FTT (Education) which would be able to (re)consider the decision on the merits, and if the appeal succeeded, would have the power to order reinstatement.
- 7.10 Finally, to support all of these changes – and to enable some of them – there would have to be: well devised and targeted training for all those involved in the exclusions process; access to specialised input from educationalists and psychologists; the provision of legal services to parents who appeal to the FTT; clear and simple information on the process and appropriate support and reasonable adjustments to the hearing where required; rigorous, evidence-based monitoring by governors of the use of exclusion in their schools; and, as a legal foundation for all of this, a comprehensive overhaul of the current Statutory Guidance so that, *inter alia*, it includes templates, checklists, and model procedures to structure – and achieve as much consistency as possible in – all key decisions in the exclusions process.
- 7.11 The Working Party acknowledges that, taken together, its recommendations amount to comprehensive and even radical redesign of the whole exclusions process and would involve a certain, though relatively modest, amount of additional public expenditure.

7.12 However, it firmly believes that nothing less is required in order to address the weaknesses which this report has identified, and thus to ensure that all exclusion decisions are lawful, fair and reasonable; are transparent and properly evidenced; take proper account of pupils’ needs and rights; and where necessary can be robustly tested.

Figure 2: Proposed process



¹The reinstatement may be alongside other recommendations, such as additional support or assessments.

²The tribunal appeal body will be able to make other orders, such as the pupil being allowed to sit an exam or the school give an apology. These orders may be made alongside an order to reinstate or may be made as stand-alone orders.

Recommendations

Initial Decision to Exclude

Applying duties – training and guidance

1. Specific training on the exclusions Statutory Guidance, the application of the Equality Act 2010, the SEND Regulations and the SEND Code in the context of exclusions should be mandatory for all teachers in leadership positions within schools, including Special Educational Needs Coordinators. This knowledge should be refreshed through continuing professional development on at least a biennial basis. [3.8]
2. Endorsing the recommendation from the *Timpson Review of School Exclusions*: “DfE [the Department for Education] should update statutory guidance on exclusion to provide more clarity on the use of exclusion. DfE should also ensure all relevant, overlapping guidance ... is clear, accessible and consistent in its messages to help schools manage additional needs, create positive behaviour cultures, make reasonable adjustments under the Equality Act 2010 and use exclusion only as last resort, when nothing else will do. Guidance should also include information on robust and well-evidenced strategies that will support schools embedding this in practice.” [3.9]

Pre-exclusion procedure

3. Prior to any decision to permanently exclude, a head teacher (or another appropriately senior member of staff) should make every reasonable effort to meet the pupil and their parents/carers, in order to notify them that the school is considering permanent exclusion and should take fully into account any representations they may make. [3.15]
4. The school should hold a reintegration meeting with the parents/carers and pupil following a fixed term exclusion, and this should be used as an opportunity for intervention to discuss how best to avoid further exclusions. [3.16]
5. The Department of Education should provide tighter guidelines and training for head teachers on how to conduct reintegration interviews after fixed term exclusions, in order to ensure that they are used effectively to avoid further exclusions. [3.16]

6. Access to advice should be made available to head teachers before they reach a decision to exclude. Head teachers should seek this advice, unless there is a good reason not to. The advice should be provided by someone external to the school who has knowledge of the relevant legal obligations. The inclusion officer (or equivalent) at the local authority could be an appropriate person to fulfil this role, as could a legal advisor) or a union representative. [3.19]
7. Before a pupil with an Education Health and Care Plan (EHCP) is excluded an annual review or interim/emergency review of their plan must be conducted by the local authority. [3.21]
8. Any pupil without an EHC plan who is at risk of permanent exclusion on the basis of persistent disruptive behaviour should be assessed by an educational psychologist. If appropriate, based on the psychologist's assessment, the school should then request an EHC needs assessment. Such steps should be taken before the exclusion is finalised. [3.22]
9. Schools should have robust systems and processes in place in respect of exclusions to help ensure that head teachers have complied with their legal duties, followed a fair process and properly documented and evidenced their decision. [3.25]

Stage I of the Review Process

10. The mandatory review of exclusions should be carried out by a specialist – which we term the “Independent Reviewer” (“IR”) – who would be independent of the school concerned and have relevant knowledge, training and experience. Parents would also retain the right to request a review (now to be conducted by the IR) of fixed term exclusions totalling more than five days in a term. [4.25]
11. The IR would adopt an investigatory approach and produce a report at the end of their investigation. The head teacher would then choose whether to accept its recommendations. [4.27-4.28]
12. The governing board would retain overall responsibility for exclusions and hold the head teacher to account for their use of exclusions across the school. [4.34]
13. In respect of fixed-term exclusions, the governing board should conduct an annual audit of the use of fixed term exclusions. [4.36]

Stage II of the Review Process

14. An appeals body should conduct the second stage of review instead of Independent Review Panels. This appeals body should have full appellate jurisdiction, with the power to remake the decision afresh and to direct reinstatement [5.31] and to order remedies other than reinstatement. [5.36]
15. The appeals body should be constituted with particular expertise and powers. It should incorporate: either a legally qualified panel member or clerk/advisor; a panel member with relevant special educational needs and disability expertise; and preferably a panel member with experience in the education sector. It should apply national procedural rules; have case management powers, including the ability to require parties to provide evidence; and be given standardised training. [5.37]
16. All second stage exclusion appeals should be heard by the First-tier Tribunal (Special Educational Needs and Disability) (“FTT (SEND)”), which should be re-named the First-tier Tribunal (Education). [5.38]

Accessibility and Support

17. The DfE should produce more accessible guidance for parents and carers, as recommended by the *Timpson Review* and agreed by the Government in its response. The design and presentation of such guidance ought to reflect the needs and knowledge gaps of lay users, be presented in plain English and depicted in a manner that is easy to follow (as recommended by JUSTICE’s Working Party report *Understanding Courts*). [6.12]
18. The DfE and HMCTS should also publish practical information on what to expect during the exclusions review process that is clear, accessible and easy-to-understand. It must also be child-friendly. The guidance should be made available in a variety of formats, including online, hard copy leaflets and video. It should be developed based on research and testing with user groups. [6.13]
19. The DfE’s updated guidance should signpost users to links and contact information for independent service advisors and ensure that this information is kept up to date. [6.14]
20. Schools should provide parents with links and contact information for independent service advisors with their written notification of an exclusion. This information should all also be available online. [6.15]

Advice and representation

21. Endorsing the recommendation of the Timpson review, Government should, “in the longer term, invest resources to increase the amount of information, advice and support available locally to parents and carers of children who are excluded or placed in alternative provision.” [6.20]
22. There is a good case for second stage appeals before the FTT (SEND) to be within scope for legal aid representation. [6.26]

Language and communication

23. Professionals involved in the exclusions review process should adapt their communication style to lay users, in line with the recommendations in *Understanding Courts* for parents/carers and pupils including those with special educational needs and disabilities, and receive appropriate training. [6.28]
24. Questioning should always be adapted to the needs and understanding of the witness/parent/pupil to ensure that they can give their best evidence and to promote comprehension on the part of participants to the hearing. [6.28]
25. In current governing board or Independent Review Panel hearings, it should be a requirement to translate key documents into the parents’ first language and provide an interpreter at hearings where this is necessary. [6.30]

Support and reasonable adjustments

26. Reasonable adjustments should be available at all stages of the review process to enable parties to participate fully, encompassing whatever formal or informal aid or adaptation is deemed necessary in the interests of justice. [6.32-6.33]
27. Adopting the recommendation in *Understanding Courts*, provision should be made in the FTT for practical and emotional court supporters, whose role would be to provide information, help lay users think through what they might want to say, discuss their concerns, help them to find their way around the building, hearing room and to attend the hearing with them. If exclusion appeals are to remain outside the tribunal system, thought should be given to what additional support services could be provided. [6.35]

Involving the pupil

28. Consideration should be given to lowering the age at which a pupil can appeal in their own name to the FTT (SEND) in exclusion appeals. [6.40]
29. The views of the pupil should be considered at all stages of the review process. [6.42]

VIII. ACKNOWLEDGEMENTS

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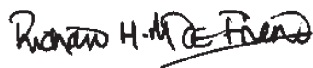
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