Consultation on Revised Behaviour in Schools Guidance and Suspension and Permanent Exclusion Guidance

Department for Education

Response

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and equal legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This response addresses questions from the Government's consultation on new draft versions of the *Behaviour in Schools Guidance* ('New Behaviour Guidance')[1] and the *Suspension and Permanent Exclusion Guidance* ('New Exclusion Guidance').[2] JUSTICE's response is informed by its 2019 Working Party report, *Challenging School Exclusions,*[3] which considered the procedures through which exclusions are made, confirmed and reviewed in England, with a focus on permanent exclusions. The report concluded that several procedural weaknesses existed within the current system, undermining the fairness with which decisions were being made.

[1] Department for Education, *Behaviour in Schools Guidance* (2022) available at https://consult.education.gov.uk/school-absence-and-exclusions-team/revised-school-behaviour-and-exclusion-guidance/supporting_documents/Behaviour%20in%20schools%20%20advice%20for%20headteachers%20and%20school%20staff.pdf

[2] Department for Education, *Suspension and Permanent Exclusion Guidance* (2022) available at https://consult.education.gov.uk/school-absence-and-exclusions-team/revised-school-behaviour-and-exclusion-guidance/supporting_documents/Suspension%20and%20permanent%20exclusion%20guidance.pdf

[3] JUSTICE, *Challenging School Exclusions* (2019), available at: https://justice.org.uk/our-work/administrative-justice-system/challenging-school-exclusions/

Questions relating to the New Suspension and Permanent Exclusion Guidance

Paragraph 12 sets out how a headteacher may not bring a permanent exclusion to an end after it has begun. In addition, a headteacher may not end a suspension earlier than the agreed end-date once it has begun (that is, when the pupil is no longer attending school).

Question 1: Do you agree with this proposed change in the law? If not, please explain why.

3. JUSTICE has not been able to identify in the Consultation materials the policy rationale behind this change, which makes it difficult to respond fully to the proposal. However, we have concerns about the impact such a change would have on fettering the headteacher's discretion and increasing unfair decision-making.

4. JUSTICE observed in its *Challenging School Exclusions* report ('the JUSTICE Working Party report') that there were several procedural barriers to lawful, reasonable and fair decision-making prior to the initial decision to exclude. This included inconsistent and inadequate understanding by schools of their legal duties; insufficient pre-exclusion procedures; poor communication between schools, parents/carers[4] and pupils; and unmet needs going unidentified before exclusion decisions were reached. As a result, we recommended improvements in training and guidance on legal duties; availability of external advice; and fairer pre-exclusion procedures, including meeting with the pupil and the parents prior to exclusion, were required. We also recommended that EHC reviews should be mandatory prior to a permanent exclusion decision being made, and assessments should be mandatory prior to a persistent disruptive behaviour exclusion if no EHC plan exists.[5]

5. We strongly urge Government to consider these recommendations and the ways in which they can be included in this Guidance and in any accompanying secondary legislation.

6. Further and until any such improvements are in place, we cannot support a removal of the head teacher's ability to withdraw an exclusion. We consider losing that ability may do more harm than good, since it will reduce discretion and thereby access to remedial action

[4] Throughout the rest of this response, the term parents is used to reference both parents and carers of children.
[5] *Challenging School Exclusions,* p.17 onwards.

for families immediately after decision-making, in a context in which we cannot be confident that decisions are being fairly reached up to that point, in the absence of stronger pre-exclusion procedures.

7. There may also be a material change of circumstances or further information which comes to light which means that a headteacher should properly reconsider their decision. For example, a child at risk of criminal exploitation may be excluded for behaviour linked to their exploitation, but only after the decision is made information may come to light about the circumstances of their behaviour and their vulnerability. A removal of the option to withdraw in such circumstances could result in a child or young person unnecessarily being out of school or permanently excluded because of a misunderstanding; with the stress anxiety and delay of a governing board review.

8. If one of the reasons for the proposed change is to ensure all exclusions (which meet the thresholds) are reviewed by the governing body, then we are not convinced this is a sufficient reason. In JUSTICE's Working Party report, we found governing boards were providing an ineffective check on headteachers' decision-making, with extremely high rates of upholding headteachers' decisions. We also identified concerns about governors' knowledge of and training in their legal duties, problems with procedural fairness, including evidential issues, and a lack of independence. Further details of our proposals for reform in response are below in response to Question 22.

Question 2: Is the associated guidance at paragraph 12 sufficiently clear? If not, please explain why.

9. For the reasons above, JUSTICE does not consider paragraph 12 is sufficiently clear because it fails to address necessity of pre-exclusion processes in decision-making.

Paragraph 54 introduces a deadline for the headteacher to notify the parents of a pupil's suspension or permanent exclusion, the reasons for this and the period of any suspension. The obligation to do this 'without delay' will remain, but the regulations will also specify that in no case must this take longer than three days.

Question 3: Do you agree with this proposed change in the law? If not, please explain why.

10. JUSTICE is not against a maximum time-limit in principle. However, it is difficult to conclude whether this change is advisable without any data of delay, which is presumably the basis upon which the change is being made. Further information about why three days has been chosen would be useful.

11. We are concerned that there is a risk that the maximum time period ends up become the de facto standard time, rather than the maximum. However, in many circumstances taking three days to notify the pupil's parents of the exclusion would be unreasonable delay.

Question 4 Is the associated guidance at paragraph 54 and throughout sufficiently clear? If not, please explain why

12. JUSTICE has concerns with the clarity of the guidance around notice at paragraph 54 onwards. The order of the information and the methods of giving notice are confusing. Notice is mentioned without a method at paragraph 54, then in writing in paragraph 55, then a telephone conversation ahead of written notice (but not intended to delay written notice) is mentioned at paragraph 67. Furthermore, notice of hours within which a pupil must be ensured by the parents not to be in a public place during school hours, and notice of alternative provision are mentioned at paragraph 57 without a method, only for it later to say at paragraph 66 that this can be done in a variety of ways including text message and sending it home with the child. Not only are the notices and suitable methods therefore scattered around this part of the New Exclusions Guidance, but also the order in which different notices of different information should be given is not clear.

13. JUSTICE considers that it would be far clearer to set out the notice procedure in chronological order of what needs to be notified and the method(s). Such a step-by-step guide to notice would, in JUSTICE's view, ensure clarity of the guidance for head teachers and reduce risk of notice-errors being made.

14. Furthermore, the various forms of notice (telephone, written) lead to ambiguity in paragraph 67 where it states: “When notifying parents about a suspension or permanent exclusion, the headteacher should draw attention to relevant sources of free and impartial information”. Our concern is that the current drafting suggests that orally mentioning the fact that advice exists in general would be enough, for example on a telephone call with a parent. The JUSTICE Working Party report considered the difficulties of parental engagement in the process and identified more needed to be done to provide accessible information for parents.[6] We consider information about support and advice should be included within the written notice of exclusion to parents,[7] so they can go away and consider it in their own time, with all the relevant information (reasons for exclusion and information about support and advice) written all in one place.

15. JUSTICE is disappointed to see no template letter offered in this guidance, and merely reference to the fact that “letter templates might be available from the local authority”.[8] Whilst local services available will of course be different in each area, that only affects the content of some of the help links inserted into a template letter, rather than the suitability of having a national template. We think it would be beneficial to have a nationally consistent template letter for headteachers to use in this guidance, which can then be updated with the relevant local information.

16. Finally, we are concerned with the suggestion at paragraph 66 that sending information home with the pupil should be used as a way of notifying the parents. Firstly, the child should not be considered the messenger to the parents, but should be acknowledged as having a right to be notified in their own right (see further our observations and concerns about child participation in the process in response to Question 15). Secondly, this puts the child in an extremely undesirable position. Exclusion can be stigmatising and the child will likely be feeling a range of emotions, such as shame, fear and anger, not only at the exclusion decision itself but also at the prospect of communicating the decision to their parents. This will in many cases make it inappropriate to task them with communication of information about the exclusion and/or alternative provision to the parents, even if it is just handing over a letter, and may well mean the parents are not notified.

[6] *Challenging School Exclusions,* p.54 onwards.
[7] Ibid, p.59.
[8] New Exclusions Guidance, para 64.

Paragraph 68-70 expands the headteacher's duty to inform relevant professionals of their decision to suspend or permanently exclude to include social workers. As a result, if a pupil with a social worker is excluded, the social worker must be notified in writing and involved in the governing board meeting and independent review panel, where possible.

Virtual School Heads (VSH) should already be closely involved with a school if a looked after child (LAC) is at risk of suspension or permanent exclusion. Paragraphs 68-70 extend the headteacher's duty to inform a VSH if a LAC is suspended or permanently excluded. If a LAC is excluded, the VSH must be notified in writing and, where possible, involved in the governing board meeting and independent review panel.

Questions 5 and 7 Do you agree with this change in the law? If not, please explain why.

17. JUSTICE certainly supports the appropriate inclusion of professionals and corporate parents of looked after children who know the child. We agree that they can provide critical information about matters in the child's life, give context to their behaviour and bring relevant matters, of which the school is not aware, to the schools attention. We also consider that these professionals can assist the child to participate effectively in the proceedings in a way they do not currently. See our response to Question 15.

18. Further to our response to Question 1, we urge consideration of social workers and VSHs in pre-exclusion processes, rather than only informing them of an exclusion when the decision has already been made. Particularly ahead of permanent exclusions, these professionals may have highly relevant information about the child, any incident, background factors and their professional analysis of the welfare risk of exclusion to the child and any risk the child poses to others. These are all matters of which the headteacher should be aware before making a permanent exclusion decision. Rather than require social workers and VSHs to have to engage with the governing board process, and thereafter potentially an IRP, we consider the professionals' time would be better conserved with prior engagement. Aside from the obvious desirability of saving time and money for the school and the local authority looked after teams, we also have significant concerns about the accessibility, independence and efficacy of the governing board review stage (see further at Question 22).

19. Finally, alongside the inclusion of social workers and VSHs, JUSTICE would promote consideration of the role of child advocates in the process, both any child advocate a looked after child already has, as well as the potential for provision to be made for advocates to be appointed to children who do not have them yet (see Question 15).

Questions 6. and 8. Is the associated guidance at paragraphs 68-70 sufficiently clear? If not, please explain why.

20. We consider it would be helpful for there to be more clarity and guidance on what being "involved" means. Will the head teacher's statutory duty to inform relevant people[9] be amended to include the child's social worker or VSH? Will this be the case for academies also, for which there is no requirement to inform local authorities currently?

21. Furthermore, on a practical level, does their involvement mean they will be provided with documentation ahead of and review meeting? We would urge this to be the case, so they can know what the issues are and identify ahead of time, through discussions with the child and any other relevant professionals, what may be the most useful information to share. If so, it would be useful to make that clear in the guidance, for example at paragraph 75, it is not clear with respect to providing documents to "parties" if this includes social workers and VSHs, or not.

Questions 9 and 10: Do you agree with virtual meetings being made a permanent option under any circumstances? If not, please explain why; And Do you think virtual meetings should be made at the request of the parent only? Please explain why.

22. The use of remote hearings, when executed properly with the appropriate guidance and support, can for many people enable participation: participants may feel more comfortable in their own home; people who have difficulty travelling, for example because of a disability, will find it easier to attend; and some people may prefer to put their views across when not in the same room as the panel and/or school. We have been told that virtual hearings held during the pandemic in the First-tier Tribunal (Special Educational Needs and Disabilities) have been popular with families for similar reasons.

[9] Reg 5, School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012

23. We discuss in relation to Question 22 our concerns with the independence of the governing board review scheme. In consultation we were frequently told that parents and pupils often do not turn up to hearings, in particular governing board hearings, because they feel that there is no point in going to the effort to do so when it is highly likely that the governors will uphold the exclusion. Whilst the current system still exists, we consider that having the option of attending remotely from their own homes may increase the likelihood that parents and pupils choose to participate in governor and IRP hearings.

24. As such, we agree that virtual hearings should be made a permanent option. However, this should not be "in any circumstances". The option of a virtual hearing should be available only in circumstances when to hold the hearing virtually would provide a fairer and more accessible process for the parents and pupil.

25. There is a significant imbalance of power between families and schools in these circumstances, not assisted by the lack of independence felt in governing board reviews. In order for remote hearings to enhance, and not undermine, the fairness of proceedings, it is essential that they are not governed by the preferences of the governing board or IRP members, but reflect the preferences and needs of the family subject to the process.

26. We consider that parents and pupils should be offered a range of options, including in person or remote, with an appreciation from organisers that a child may have a different preference or comfort-level attending remotely than their parents, which should be accommodated wherever possible. Whilst this is somewhat reflected in the current guidance, which provides that the governing board or arranging authority should make sure that pupils and their families know that they do not have to have a remote hearing if they don't want to, it stipulates they should make families aware that if they do not consent to a remote meeting it is likely to be delayed. This may lead to families feeling pressured to accept a remote hearing in circumstances where they are not able to fully participate in it. It also suggests that remote hearings will be a "default" or presumed option, with the burden then being on the parents to object. Due to the lifting of Covid restrictions, a warning about delay incurred by preferring an in-person hearing should no longer be required. Furthermore, the proper approach should be an open inquiry with the parents and pupil, with the mode of hearing being agreed in light of their preferences and any participatory support they may need, rather than through a presumption of remote unless the parents or pupil object.

27. In addition to any preference for remote expressed by the family, there should be consideration of whether a remote hearing can be held fairly and transparently,

considering:

a) Do participants have any vulnerabilities that are likely to make it more difficult for them to engage in a remote hearing, for example blind and deaf people, those with mental health problems, those with neurodiverse conditions?

b) Do parents/ carers have sufficient internet / phone connectivity and are they able to pay for the internet / phone charges?

c) Do parents/ carers have an appropriate space free from other distractions to enable them to participate fully? If not, can the impacts of this be mitigated to allow full participation?

d) Will participants be able to familiarise themselves with the technology ahead of the hearing?

e) Virtual court and tribunal hearings benefit from technical support from court and tribunal staff, this is vital to allay fears regarding the use of technology and help the hearing run smoothly. Will any technical support be available? This could be provided by the arranging authority for IRP hearings or the school's IT technician for governor hearings.

f) Are participants able to access all the relevant documents? Will they be posted in hard copy? If not, are participants able to receive and read the documents electronically? Are they organised electronically in usable and easily navigable format? Will participants be able to access any additional documents that are referred to on the day of the hearing? For example, if they are being provided by email do parents have access to the internet and a separate computer / tablet on which to the view them during the meeting? Or is there a screen sharing function on the video call platform that will be used?

g) If a parent/ carer wants a representative / friend to support them is the representative / friend able to co-locate with the parent or are they otherwise able to communicate privately between themselves during the hearing?

h) If a video hearing is not an option, is it possible to proceed fairly where the governors / panel members will not be able to see the pupil, in particular when the pupil's point of view / evidence is of particular importance – for example where there are competing versions of events?

28. If in principle it is decided that a remote hearing can be held, further guidance is also required for governors/ trustees and IRP members as to how to conduct a remote hearing fairly.[10] We are concerned that there is not even any guidance on how to conduct a fair in-person hearing. During the JUSTICE Working Party's consultations, we were told that many hearings are unstructured, with uneven questioning of parents and head teachers and/or parents and pupils not given sufficient chance to present their case. We are concerned that holding governing board meetings remotely without specific guidance on how these should be conducted may accentuate many of the existing issues with such meetings.

29. Guidance on how to conduct a fair remote hearing should include:

    a) Participants should receive detailed instructions as to how the hearing will work in a virtual space and how to prepare for the hearing, including preparing the room they join from. This should be available in a step-by-step guide produced in advance of the hearing in simple language.

    b) Sufficient time needs to be built in for participants to join prior to the actual start time so that they feel comfortable with how the technology works.

    c) The Chair should set out how the meeting will proceed and provide instructions/ ground rules at the start.

    d) Participants should be informed about what will happen in the event of a technology failure. For example, will the hearing proceed by telephone and, if so, who will initiate the call and do they have everyone's numbers?

    e) The Chair of the IRP / governing board panel should check-in frequently as to whether any technical issues have arisen and whether participants have been able to effectively stream the hearing and understand it. The Chair should set out a convention for raising problems at the beginning of the hearing (e.g. raising a hand or a sending a message in the chat function).

[10] The guidance currently provides only that "If a meeting is held via remote access, every effort should be made by the chair to check the participants understand the proceedings and can engage with them, to ensure the meeting is conducted fairly. If, once the meeting starts, the meeting cannot proceed fairly (for example, because a participant cannot access the meeting), the governing board or IRP should adjourn the meeting." Department for Education, Changes to the school exclusion process during the coronavirus (COVID-19) outbreak (29 May 2020), available at https://www.gov.uk/government/publications/school-exclusion/changes-to-the-school-exclusion-process-during-the-coronavirus-outbreak

f) It is important that participants do not feel distracted or anxious about joining because they feel as if they will be judged by the background of their accommodation or intimidated by displays of wealth in other users' backgrounds. Guidance should be provided ahead on ensuring that backgrounds are plain and neutral, as well as appropriate lighting and positioning in front of the camera.

g) It has been regularly reported to us that remote hearings can be extremely tiring. Short, regular breaks should be scheduled, and all parties should be told at the start of a hearing that regular breaks will be a feature of the remote hearing.

h) It is important that the chair checks in frequently with the parents/ pupil to ensure that they are following the process.

i) The Chair must make clear whether the meeting will be recorded and, if so, what will happen to the recording.

Question 13: Following a period of suspension or off-site direction, what are the best approaches to reintegrating a pupil into a mainstream setting? Please explain why and copy and paste any relevant information.

30. The JUSTICE Working Party report stressed the importance of communication between the school and the parents and pupil before, during and after any exclusion procedures. We recommended that every reasonable effort be made to meet the pupil and parents to discuss the exclusion decision and hear representations *prior* to the exclusion decision being made.[11] However, given the shorter timescales involved in fixed-term exclusions, and off-site directions, we acknowledged it would not always be practical to have such an opportunity to meet. As such, we highlighted the importance of the reintegration meeting after the fixed-term exclusion as an important opportunity for the school and the family to discuss how best to avoid further exclusions.[12]

31. We therefore recognise and support the further guidance given in the New Exclusions Guidance at paragraphs 25 and 26, which identifies the reintegration meeting as being of particular importance within schools' reintegration strategies, and how it can be used as an opportunity for intervention to discuss how best to avoid further exclusions.

[11] *Challenging School Exclusions,* p.22.
[12] Ibid, pp.22-23

32. We do note however that paragraph 26, which provides some new guidance about the meeting, is largely one-sided, focusing on the child's behaviour targets and the impact of their behaviour on others. Whilst we acknowledge the place of such discussions, we consider that the most effective reintegration approach relies on using reintegration meetings as a two-way discussion about how best to avoid further exclusion. This not only involves the pupil's behavioural improvements, but also an open discussion about the circumstances which led up to the fixed-term exclusion/off-site direction, and possible supports and strategies which the school could put in place for the pupil, as well as behavioural change from the pupil. Such considerations are essential when behaviours are related to a pupil's special educational needs ('SEN') and/or disability ('SEND') and underlying difficulties of the pupil need to be addressed, in accordance with the school's Equality Act and SEND legal duties. Amending paragraph 26 in such a way would therefore improve the effectiveness of reintegration meetings held, in our view, but also support schools to meet their legal duties.

33. Finally, we note that the New Exclusions Guidance says schools "should" hold a reintegration meeting. We seek clarification therefore of whether it is intended for reintegration meetings to be a legal requirement, as they used to be within England[13] and still are in Wales.[14] We would support such change and have recommended it in our Working Party report.[15]

[13] 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.
[14] The Education (Reintegration Interview) (Wales) Regulations 2010.
[15] Para 3.16 pp22-23

The guidance emphasises the importance of monitoring and understanding suspension and permanent exclusion data. Schools, local authorities, and local forums should work together to track and review the information on children who leave schools, by exclusion or otherwise, to establish a shared understanding of how the data on the characteristics of such children feeds local trends. Where patterns indicate possible concerns or gaps in provision, we expect headteachers and other local leaders to use this information to ensure they are effectively planning to meet the needs of all children.

Question 14. Do you agree with this revision? If not, please explain why.

34. We agree that more needs to be done to collect, monitor, understand and act upon the data relating to exclusions and behaviour management. We consider this role fits well with the governance role of governing boards, and is in fact a more appropriate way for them to have oversight of exclusions, rather than being involved in individual decisions through review meetings. (See further our concerns with the governing board review mechanism and our recommendations for an independent reviewer in response to Question 22.

35. Additional data that we consider to be necessary for an accurate understanding of exclusions, beyond that mentioned in the guidance, are:

    a) Consistent data on governing board reviews - In order to get an overall picture of what was happening at governing board reviews during the course of our Working Party, we made freedom of information requests for governing board outcome data to all English local authorities. Not only was this incredibly time consuming, but the data collection was also inconsistent. Whilst some local authorities do collect data on the outcomes of governing board meetings, what data is actually collected and in what format varies significantly between local authorities. Some local authorities collect data for maintained schools only (as the local authority only needs to be notified in the case of exclusions / suspensions from maintained schools some on), others for both maintained and academies. Most collect data only in relation to governing board reviews of permanent exclusions, not suspensions.

    b) “children who leave schools, by exclusion or otherwise” – the consultation at Question 14 refers to the data being “on children who leave schools, by exclusion or otherwise”. However, this phrase is not used in the New Exclusions Guidance. Instead, paragraph 44 is titled “Variation in exclusion rates” and refers only to local and national monitoring of trends in “suspension or permanent exclusion”. We

consider that schools, local authorities and the Department for Education should also be gathering data and monitoring the characteristics of pupils who are withdrawing, 'agreeing' to managed moves and being directed off site for behavioural reasons. These are used as alternatives to formal suspensions and permanent exclusions, such that data only on suspensions and exclusions will give an incomplete picture. A failure to understand the equalities disparities in other exclusionary practices means that schools, local authorities and the Department for Education cannot truly understand the extent of the equalities disparities in formal exclusions and take appropriate remedial action.

36. We agree that local cooperation between schools and local authorities is important, since SEND students are reliant on such cooperation for effective support, and are the most disproportionately excluded group. Whilst we consider, local authorities are in a good position to lead in data monitoring and coordinating action plans based on learning from the data evaluation, and we note the important role of the Department for Education in working with local authorities to build a national picture. We also note the importance of cooperation of academies as well to ascertain accurate local understanding and ensure consistency when addressing concerns and gaps in provision which have been identified in the data.

Throughout the revised guidance we have set out when and where pupils should be included in the suspension and permanent exclusion process.

Question 15.Is this sufficiently clear? If not, please explain why.

37. JUSTICE considers the guidance about pupil's participation in their own exclusions processes to be inadequate in many respects.

38. The United Nations Convention on the Rights of the Child, to which the UK is a signatory, states at Article 12 that:

> 1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either

directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

39. Article 28 further confirms the State's obligation "to ensure that school discipline is administered in a manner consisted with the child's human dignity and conformity with the present Convention." Whilst Article 3 states that the interests of the child must be a primary consideration in decisions made concerning that child. Given the huge impact that being excluded can have on a pupil's life, we consider it is crucial that children and young people subject to exclusions decision-making are supported and enabled to participate in proceedings the greatest extent possible.

40. Further clarity on Article 12 in practice is given in the UN Committee on the Rights of the Child General Comment on Article 12 (2009). It cites challenges to school exclusions specifically when listing the types of proceedings that engage Article 12.[16] It further clarifies that effective and meaningful participation does not mean "hearing" the child as a one off event, but a process of participation in which the child is respected as a rights holder. This includes:

    a) preparing the child through information provision;

    b) hearing them;

    c) taking their voice into account, in light of their age and understanding;

    d) providing them with feedback about how their views have factored into any decision made; and

    e) giving the child access to review and redress mechanisms.[17]

41. The JUSTICE Working party was concerned with the way in which the current process marginalises the child. The young people we spoke to told us they knew about the governors hearing but did not attend or have the opportunity to address them in person (although they did provide a written statement) because their parents understood this to be inappropriate. Nor did they attend the IRP hearings. We were also told by advisors that there have been situations in which the parents' views have conflicted with those of the

[16] Committee on the Rights of the Child, Fifty-First Session, Geneva, 25 May-12 June 2009. General Comment No. 12 (2009) 'The Right of the Child to Be Heard', para 33.
[17] Ibid, para 40 onwards.

pupil, however within the current structures of the review process the advisors were left with no choice but to follow the parent's instructions.[18]

42. We are not alone in raising these concerns. The Children's Commissioner for England and Just for Kids Law have both found that schools do not always examine ways to ensure pupils' views are taken into account prior to an exclusions decision being made.[19] Such concerns were partly behind our recommendations to make it a mandatory duty for schools to offer meetings to the parents *and the pupil* before any permanent exclusion decision, and to offer reintegration meetings after fixed-term exclusions. We were also clear that the role of the Independent Reviewer, which we recommended replace the governing board review (see further at Question 22), be a less formal and intimidating process than a panel hearing, and involve collaborative work to identify the best way forward with the pupil as well as the parents and the school.

43. As such, we consider much more needs to be done to ensure effective participation of the pupil in the process. Within the context of the New Exclusions Guidance, we are disappointed that there is no separate child-friendly guidance or information for children and young people. Whilst separate guidance for parents is referenced, albeit not included, we would strongly urge the Department for Education to consider the child's right to information and address this. We note an example of good practice from the Child and Family Court Advisory and Support Service (Cafcass) who have separate information available for children, parents and professionals about family separation, including but not limited to court proceedings.[20] Their information for children includes videos and stories from children themselves.

44. In addition to the absence of accessible general information, there is no adequate consideration or guidance about how schools can and should provide children with information regarding their exclusion, the reasons for it, or whether they will be able to sit any national curriculum tests or public examinations during any exclusion period. The only way in which the child is directly given information about their exclusion in the current guidance is as a courier to their parent, about which we have expressed our concern (see above in response to Question 4).

45. Hearing the child and giving them an opportunity to make representations about their exclusion is critical to the fairness of the head teacher's decision, any governing board

[18] *Challenging School Exclusions,* p.67.
[19] Children's Commissioner, *"They Never Give up on You": School Exclusions Inquiry* (2012), paras 15-22; Just for Kids Law, 'School Exclusions Review: Submission from Just for Kids Law', p6.
[20] Available at https://www.cafcass.gov.uk/young-people/

review and any IRP review. We are extremely concerned that the following sentence has been removed from the New Exclusions Guidance "where practical, the head teacher should give the pupil an opportunity to present their case before taking the decision to exclude."[21]

46. After a decision has been made, we acknowledge that the New Exclusions Guidance states steps should be identified to support pupils to participate[22] with two examples given for governing boards: "providing accessible information or allowing them to bring a friend". However, what that accessible information may look like and contain is not addressed. More guidance is required about how schools and local authorities can ensure this is done fairly, in a manner conducive to the child's best interests, and the considerations and preparations involved in doing so. This should include in our view:

    a) Communication to the child about what they are entitled to give their views on, both in terms of relevant evidence to factual matters which are to be determined, and their wishes and feelings;

    b) How the child's preferences should be elucidated in terms of how their views will be communicated (for example guidance to head teachers in having that discussion);

    c) How to ensure the child is given adequate opportunity to indicate if their position differs from that of their parents;

    d) The role of social workers and VSHs in facilitating the participation of children. As currently drafted they are only included in the New Exclusions Guidance as possible sources of information about the child's circumstances; their role in communicating the voice of the child should be explicitly acknowledged;

    e) Examples of accommodations which can and should be made to pre-exclusion, governing review and IRP processes to provide children with the opportunity to give their views in comfortable surroundings;

    f) A template letter for children which gives free text space to communicate factual information in relation to any incident being determined, any representations about

[21] See the current guidance: Department for Education, Exclusion from maintained schools, academies and pupil referral units in England Guidance (2017), para 17, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921405/20170831_Exclusion_Stat_guidance_Web_version.pdf

[22] New Exclusions Guidance, para 100 with respect to governing boards, and para 163 with respect to IRPs.

the exclusion decision they wish to make, and space for the child to share their wishes and feelings including their wellbeing;

g) If there is a factual determination to be made regarding an incident, the careful consideration of how the child's evidence will be taken about that, the proportionality of any questioning of the child and the impact that will have on their welfare; and alternatives to live questioning such as sufficiency of other evidence to not require such questioning, or giving the child written questions about an incident to respond to ahead of time;

h) Support which can be given to the parents to assist them in their role of communicating their child's views and feeding back outcomes;

i) Information to parents that the pupil's involvement is not inappropriate or discouraged, which is the impression given as we heard from pupils in our consultation.

47. We acknowledge that governors and IRP members may be reluctant to involve children due to their lack of skills in speaking to or involving children. We of course agree that care needs to be taken. However, lack of confidence should be addressed with training, support, and consideration of how it can be done well by suitably qualified professionals, rather than being allowed to persist as a reason for not giving children the opportunity to be involved. Our Working Party report's recommendation for an Independent Reviewer to replace the governing board review would have such skills and training.

48. We further acknowledge that the New Exclusions Guidance has been written with a view to the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, which speak of a "relevant person" being invited to make representations, which is the child if over 18 or, if under 18, the parent. We would support consideration of a change to these regulations so that they acknowledge children under 18 as "relevant persons", for the purpose of the right to make representationas and receive information, and also to challenge exclusions in their own right.[23] We note the First Tier Tribunal (SEND) can accept applications from those aged 16 and over when considering disability discrimination appeals.[24]

[23] The right to review is included in the UNCRC General Comment on Article 12 (2009), para 46.
[24] However we recommended consideration of lowering this age limit in our report, see *Challenging School Exclusions,* p.68.

49. However, such reform is not necessary to embed the child's right to participate in the current guidance; schools should be strongly encouraged to provide information and opportunities to give representations as a matter of good practice. Whilst children should not be burdened with stress or administration of mounting a challenge to their own exclusion if there are others more appropriate to do it for them – often parents – this must not be a bar to those *at any age* who i) differ in their perspective and approach from their parents; and/or ii) wish to have their voice distinctly heard even when their parents are engaged and putting forward representations on their behalf.

50. After being heard, there is also no guidance or acknowledgement of the duty to give a child's views due weight, in accordance with their age, maturity and understanding, and the child's right to feedback about how their voice was considered in the decision made.[25] Whilst the New Exclusions Guidance notes the requirement for governing boards and IRPs to notify parents in writing of their decisions and reasons, the guidance only recognises at paragraph 168 that the "general principle that permanently excluded pupils are entitled to know the substance behind the reason for their permanent exclusion". Nothing is mentioned about feeding back to the child i) to confirm that they were heard by the process; and ii) that their views were taken into account, and what weight was given to them.[26]

51. Finally, we urge wider policy consideration by the Department for Education of the role of children's advocates in exclusion processes. The National Standards for the Provision of Children's Advocacy Services define advocacy as follows: 'Advocacy is about empowering children and young people to make sure that their rights are respected and their views and wishes are heard at all times. Advocacy is about representing the views, wishes and needs of children and young people to decision-makers, and helping them to navigate the system.'[27] There is statutory provision for their role in many administrative decision-making processes:

    a) 16 and 17 year olds who are homeless

    b) 16 and 17 year olds who lack mental capacity

    c) Care leavers

    d) Children and young people in custody

[25] Both fundamental parts of the child's right to participation, per the UNCRC General Comment on Article 12 (2009), paras 28 and 44.
[26] Ibid, para 45.
[27] Department of Health, 'National standards for the provision of children's advocacy services' (2002)

e) Children and young people in England who are detained under the Mental Health Act

f) Children and young people in receipt of social care services (including child protection) who wish to make a representation (including a complaint, and those subject to child protection processes)

g) Children and young people living in children's homes

h) Children in receipt of health services who wish to make a complaint,

i) Children who may continue to need care and support in adulthood

j) Children with special educational needs and disabilities

k) Looked after children and young people who go missing

l) Looked after children whose care and progress are being reviewed

m) Young carers.[28]

52. Firstly, the New Exclusions Guidance makes no note at all of children's advocates even as the law currently stands: children whose exclusions are being reviewed may well have access to a professional advocate services if they fall within one of the above categories. However, the Guidance is silent on the inclusion of any existing advocates children may have in the process.

53. Secondly, we urge consideration of exclusion becoming an additional category of statutory eligibility for advocacy services. One of the main impacts of advocacy is being listened to, about which we have real concern having spoken to children who have been through the exclusion process. This is often intrinsically linked to children feeling respected in a process, respect of course being a key feature of good behavioural policy as described in the New Behaviour Guidance.[29] For example, one looked after young person who had had an advocate in their local authority meeting explained:

[28] Children's Commissioner for England, 'Advocacy for children: Children and young people's advocacy in England' (2019), see appendix at p.30 for details of the statutory footing of the above. Available at https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/06/CCO-Advocacy-for-children-June-2019.pdf

[29] New Behaviour Guidance, para 14: "Everyone should treat one another with dignity, kindness and respect."

> [My advocate] has helped me a lot, and I felt like I was an outcast in meetings and like cos I didn't know how to say my words, everything like that I felt like a little person…. so she showed me how to stand out and really they listened to me more.[30]

54. The Children's Commissioner for England has directly referred to the need for advocacy services in exclusion procedures in her 2019 report: "Children who are excluded or off-rolled from school, for example, are unlikely to be able to fully participate in the process and challenge decisions at the highest level. For the most vulnerable children, their families may also be ill-equipped to challenge effectively complicated systems."[31] She gives the example of "the child facing exclusion from school after a violent outburst whose teachers don't realise he witnesses domestic abuse most nights at home."[32] It would be inaccurate to assume all such children would have a social worker, indeed many will not, nor will they be likely to have their full circumstances explained by their parents within an exclusion process.

55. Advocacy can therefore provide a vital safeguard to children's welfare and wellbeing, as well as recognising children's agency and their right to participate in decisions about them.

[30] The Centre for Children and Young People's Participation at the University of Central Lancashire in partnership with the National Children's Bureau Research Centre, 'Independent advocacy. Impact and outcomes for children and young people' (2016).
[31] Children's Commissioner,'Advocacy for children', p8.
[32] Ibid, p.2.

Recently, a High Court case considered the legal position for mandatory off-site education for the purpose of keeping pupils apart for safeguarding reasons. This case involved allegations of child-on-child sexualised behaviour by young pupils in a primary school setting. We need to consider, following the court's decision, whether it is right to suspend or permanently exclude based on safeguarding reasons rather than just disciplinary reasons. We would like to know how this will affect practice in schools and whether there is any further need to clarify or change the law or guidance in this area.

Question 21. Do you think it is positive or negative that the Court has made it clear that pupils can be temporarily excluded for safeguarding reasons as described in the judgement? Please explain why.

56. We are concerned with the conflation of temporary and permanent exclusions in the consultation paragraph preceding Question 21. It stated that there is a "need to consider, following the court's decision, whether it is right to suspend or permanently exclude based on safeguarding reasons rather than just disciplinary reasons." JUSTICE do not consider that the case referenced, *R (On the Application Of CHF and CHM) v Newick Ce Primary School & Anor* [2021] EWHC 2513 (Admin) ('*CHF & CHM*'), does present such a "need" with respect to permanent exclusions.

57. *CHF & CHM* clarifies the position in relation to temporary separations for safeguarding purposes after consideration of a very specific question of legality: whether there is a power in section 19 to impose Mandatory Off-Site Schooling as a Safeguarding Separation, whether in fact that would be *ultra vires* to the legislation, and whether there exists otherwise in the school's general management powers an ability to direct a Safeguarding Separation.

58. As Mr Justice Fordham observed in that case that such general management powers were very different from the question of exclusion:

> there is a carefully designed statutory framework in relation to exclusion. Exclusion is deliberately framed as an action taken on disciplinary grounds. On the one hand, exclusion triggers rights: the right to the statutory notification with the prescribed information; the right to a decision applying a prescribed civil standard of proof; the right to reconsideration by the governing body; the right to the independent review panel; the right not to have fixed period

> exclusion used indefinitely denying independent review. On the other hand, exclusion may involve an identifiable stigma, which remains on the pupil's record, and which may be particularly undesirable – if avoidable – in the case of a young child.[33]

59. Whilst safeguarding separation may be used as a temporary management power of schools, there is no suggestion in the judgment that safeguarding should also become an alternative reason for suspensions or permanent exclusions. We consider this is correct and the current treatment of exclusion as a disciplinary matter is the right approach.

60. The fact it is a disciplinary matter means the conduct relied upon has to be proven, and the child has to be proven to be responsible for that conduct. This evidential requirement is not there when acting on safeguarding concerns and disclosures. Whilst acting on the latter for temporary safeguarding purposes may be necessary, it cannot be justifiable to suggest exclusion could proceed based on unproven safeguarding concerns. Safeguarding concerns must be followed up, evidence sought, and a decision made about whether it can be shown, on the balance of probabilities, to be attributable to the child and their behaviour. This requirement is essential for the protection of children's right to education; protection from the stigma and other far-reaching consequences of exclusion; and protection from arbitrary and unfair decision-making.

Question 22. Are there any particular issues you feel are not covered in the revised Suspension and Permanent Exclusion Guidance?

61. JUSTICE considers the revised Guidance to have missed several opportunities to make the process fairer and the Guidance clearer.

Children's participation and separate child-friendly guidance

62. In response to Question 15, we highlighted the need to recognise better the child's agency and right to participate in the process. Directly related to the content of the New Exclusions Guidance is the failure to provide separate child-friendly guidance, and the lack of any detailed consideration of practical guidance, by way of examples, suggestions or step by step guides, of what can be done at each stage to facilitate and promote pupils' effective and meaningful participation in their own exclusion processes.

[33] *CHF & CHM*, at [26].

Understanding of legal duties

63. We also consider more can be done in the Guidance to improve schools' sometimes inconsistent and inadequate understanding of their legal duties. One common error we found in the process of our Working Party Report was a misinterpretation of the public sector duty under the Equality Act 2010 not to discriminate against disabled pupils. We heard from the National Autistic Society and the Council for Disabled Children that, too often, schools were treating this as a requirement to treat all pupils the same, when in fact almost the opposite is true: the duty requires schools to make reasonable adjustments to policies and practices which would put the disabled child at a disadvantage.[34]

64. Zero tolerance behaviour polices are particularly problematic in this regard, since they do not by their design accommodate difference in behaviours arising from children's special educational needs and disabilities (SEND). We are disappointed to see there is no substantial change to the quality, clarity or accessibility of the information in the guidance about the Equality Act 2010 and other legal duties of schools, despite Timpson's recommendation, which we endorsed, 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 a 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.[35]

65. We consider that more needs to be done to both the New Behaviour and Exclusions Guidance documents to help schools manage additional needs, create positive behaviour cultures, make reasonable adjustments under the Equality Act 2010 and use exclusion only as a last resort, when nothing else will do. Furthermore, there are no robust or well

[34] S.20 of the Equality Act 2010

[35] Timpson, 'Timpson review of School Exclusion' (2019), p.60, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807862/Timpson_review.pdf

evidenced strategies of support included, which would be a significant improvement, per Timpson's recommendation.

66. The short paragraphs on the Equality Act have been inaccessibly placed at the end of the "What's new" second section. We discuss Equality and Diversity issues with the New Exclusions Guidance further below in answer to Question 23. We also highlight a failure to ensure consistent messaging in overlapping safeguarding guidance particularly with respect to children at risk of criminal exploitation below.

Fair, accessible and transparent processes

67. There continues to be very little in the New Exclusions Guidance about what procedures to follow prior to an exclusion decision being reached. Whilst there are later references to retaining physical evidence on which "the school's case rests",[36] there is no guidance about how such a "case" should be established fairly (for example how evidence could or should be collected, shared, or representations made about it) when the head teacher is considering exclusion.[37] Furthermore, there is no guidance about communication between the parents, pupil and the school *ahead* of an exclusion decision. An absence of such guidance can risk pupils and parents not having the opportunity to give their account of any incidents, any relevant context that the school is unaware of, for example issues at home, and the opportunity to identify support or strategies to avoid the exclusion.[38] This contrasts with the law in Ireland and Northern Ireland[39] where it is a requirement to offer a meeting prior to permanently excluding a pupil.

68. We also note there is no change to the New Exclusions Guidance to strengthen the requirements, prior to exclusions, to consider any unmet needs. Whilst the Guidance does advise schools to consider reviews of EHC plans ahead of exclusion, we consider this should be strengthened to create a duty on schools to do so. We also consider that any child who is at risk of persistent disruptive behaviour, but does not have an EHC plan, should be assessed before the exclusion is finalised.

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[36] New Exclusions Guidance, para 172.

[37] This is despite previous versions having contained more detail, such as the directions to i) ensure a thorough investigation; consider all evidence available to support the allegations; allow and encourage a pupil to give their version of events; check whether the incident may have been provoked; if necessary, consult with others; keep a written record of actions taken including any interview with the pupil concerned. See Department of children, schools and families, 'Improving Behaviour and Attendance: Guidance on Exclusion from Schools and Pupil Referral Units' (2008) para 23.

[38] Evidence of which we heard during our Working Party, see *Challenging School Exclusions,* pp.21-22.

[39] In Ireland, see 'Developing a Code of Behaviour: Guidelines for School' p.84. In Northern Ireland, see Reg 3(g) of the Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995.

69. We consider the statutory guidance is an ideal place for step-by-step guides, template documents and checklists which could assist such fair processes and systems. We note, in respect of behaviour, the Government's endorsement of checklists as a method of ensuring complex tasks and processes do not miss simple but essential elements.[40] The absence of pre-exclusion checklists or guides for head teachers in the New Exclusions Guidance is a missed opportunity to make the Guidance more accessible and useful to those making the decisions and to increase fair decision-making.

70. Such guidance about fair, accessible and transparent processes is also critical to review, both by governing boards and IRPs. Whilst some guidance is given about the conduct of governing board reviews at paragraph 100 onwards, and of IRPs at paragraph 205 onwards, we consider more is needed to help schools and local authorities to create and conduct fair procedures of review. More detailed information and guidance should be available, including how evidence should be shared and the importance of such disclosure ahead of time,[41] the questioning of witnesses, including adaptations necessary to allow the witness/parent/pupil to give their best evidence, and examples, good practice and suggestions of other measures to facilitate the effective participation of parents and pupils. Again, checklists and step-by-step guides would be helpful in this regard.

A guide for parents

71. We further note that whilst the New Exclusions Guidance references a guide for parents, that has not been included in the consultation. We stress the necessity of this guidance being more accessible than the previous Annex C, as also recommended by Timpson.[42] We are disappointed to not have the opportunity to comment on any such guidance, but in lieu we draw attention to the JUSTICE Working Party's recommendations[43] for clear, accessible and easy to understand guidance.

    a) The design and presentation ought to reflect the needs and knowledge gaps of lay users, be presented in plain English and depict the information in a manner that is easy to follow, for instance through decision trees, icons, maps and highlight boxes.

    b) It should be 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

[40] Department for Education, 'Getting the simple things right: Charlie Taylor's behaviour checklists' (2011).
[41] The guidance of circulating written evidence five days ahead of a meeting "where possible" is weak in this regard, New Exclusions Guidance, para 100.
[42] Timpson, p.89.
[43] *Challenging School Exclusions,* p.58 onwards.

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, frequently referred to as Human Centred Design.[44]

c) Updated guidance should signpost users to links and contact information for independent service advisors and the DfE should ensure it is kept up to date;

d) There should be a requirement to translate key documents, including the parental guidance and documentary evidence relied upon, into the parent's first language and provide an interpreter at hearing where necessary.

Welfare impacts of exclusion

72. We also consider the New Exclusion Guidance to be missing adequate reference to the negative impacts of exclusion on children's welfare, particularly the risks it poses to children's mental health[45] and criminal exploitation.[46]

73. This is particularly disappointing since the New Exclusions Guidance makes references to the new Keeping Children Safe in Education 2021 Guidance ('KCSIE'). KCSIE specifically highlights the needs of children at risk of criminal exploitation, children with SEN, children with disabilities or other health needs including mental health needs, and schools welfare and safeguarding duties towards those children. It further references other specialist guidance such as the 'Criminal exploitation of children and vulnerable adults: county lines Guidance',[47] which itself identifies the acute vulnerability of excluded pupils to criminal exploitation by gangs. However, the New Exclusions Guidance makes no reference to criminal exploitation at all or the country lines guidance. Furthermore, all references to

[44] See JUSTICE, *Understanding Courts* (2019), paras 2.3-2.6, available at https://justice.org.uk/our-work/understanding-courts/

[45] See recently the work of the mental health charity MIND, *Not Making the Grade* (2021) Available at https://www.mind.org.uk/media/8852/not-making-the-grade.pdf. See also 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 2008', *Psychological Medicine* (25 August 2017).

[46] Just for Kids Law, 'Excluded, exploited, forgotten: Childhood criminal exploitation and school exclusions' (August 2020), available at https://justforkidslaw.org/sites/default/files/fields/download/JfKL%20school%20exclusion%20and%20CCE_2.pdf . See also House of Commons Home Affairs Committee, 'Serious Youth Violence: Sixteenth Report of Session 2017-19' (2019) paras 163-171; and Timpson, p8.

[47] Home Office, 'Criminal exploitation of children and vulnerable adults: county lines', available at https://www.gov.uk/government/publications/criminal-exploitation-of-children-and-vulnerable-adults-county-lines/criminal-exploitation-of-children-and-vulnerable-adults-county-lines

KCSIE in the New Exclusions Guidance are in relation to the risk *posed by* the pupil, with little acknowledgment of the vulnerability of the excluded child.[48]

74. It is noted that at paragraph 246 it is suggested there may be later updated guidance on KSCIE. It is unhelpful that any such guidance is not included within this consultation, nor is there any indication of whether it will be separate or included within this guidance. JUSTICE would strongly urge better inclusion of safeguarding duties to the pupil at risk of exclusion in this New Exclusions Guidance, so that head teachers can understand how to approach situation holistically, in light of a firm understanding of how their different duties and powers interrelate, rather than going from one guidance document to another.

75. Safeguarding and welfare approaches should be at the heart of any pre-exclusion decision, for the pupil in question and for any other pupil involved, such as an alleged victim, witness, or otherwise. It is vital that such safeguarding duties are not siloed, but head teachers supported to understand the interlinked nature of their duty to safeguard and support children and their duty to provide an education.

Root and branch reform

76. Finally, it is important to identify that redrafting the Statutory Guidance cannot address many of the more fundamental issues we uncovered with the current procedures used to make, confirm and review exclusions during our Working Party. By consulting on a redrafting of the Guidance only, and not considering more root and branch reform, we consider this to be a missed opportunity to make the whole process fairer, more robust, more accountable, and more independent.

77. The JUSTICE Working Party found significant issues with the effectiveness of the current review mechanisms in place for exclusions, focusing mostly on permanent exclusions. Of particular concern was the low rate at which governing boards overturn head teachers' decisions. We received responses from 90 local authorities to our freedom of information requests: in each year we analysed, a third of the local authorities recorded that governing boards upheld exclusion decisions 100 per cent of the time. For most of the rest, the rate was at 95 per cent.[49] This cannot, unfortunately, be attributed to good initial decision making, given far lower rate at which IRPs uphold schools' decisions.[50] In addition, we

[48] One non-specific reference to the excluded child's vulnerability to harm is included at para 49. However, this is only in relation to looked after children.
[49] *Challenging School Exclusions*, pp.27-28 and fn.83.
[50] At the time of our report it was a rate of 61%, which has since further dropped to 55%. See Department for Education, 'Permanent Exclusions and Suspension in England', Academic Year 2019/20, Table B6,

found there was inconsistent knowledge of governors' legal duties, including a lack of SEND knowledge and expertise; insufficient guidance about running a fair, accessible and transparent process; and significant concerns about governors' independence. The most common phrase we heard to describe the governing board review, including from some governors, was "rubber-stamping".[51]

78. We proposed that the mandatory review currently conducted by the governing board should instead be carried out by an independent specialist – the Independent Reviewer ('IR'). In our model, the IR would adopt an investigatory approach, reviewing documentation and consulting with all relevant people in a non-adversarial manner. The result would be a report setting out the best way forward, which could include withdrawal of the exclusion decision; assessment by a professional for example an educational psychologist; a review of the pupil's EHC plan or a request for a needs assessment; further support or adjustments; alternative provision; or a manged move (if genuinely, in their independent opinion, in the best interests of the child and agreed by the parents and pupil). Such a report would then be available to the head teacher, to accept the recommendations or not.[52]

79. We also considered the role of the IRP in effectively reviewing exclusions decisions. Whilst their lower rate of upholding schools' decisions suggests they do not share governing boards' issues with independence, we also found serious concerns with the adequacy of review they can offer. Principally, our main concern was that IRPs do not have the power to reinstate pupils. Instead, they can recommend or direct the governing board considers reinstatement, but the governing board can always, in response, refuse to reinstate. At this point the IRP have no further power but to order an adjustment of £4,000.

80. This therefore means that, for children who are wrongly excluded, and for whom the IRP finds that the school has acted unlawfully, they can still be refused back to school. 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, and in many cases will be less than the cost of the support required by the child. This is supported by the statistics, which show that reinstatement occurs after it has been directed in only 39% of cases, and in only 20% of cases in which reinstatement was recommended.[53] We do not consider any scheme which effectively allows schools to "pay

available at https://explore-education-statistics.service.gov.uk/find-statistics/permanent-and-fixed-period-exclusions-in-england/2019-20#dataDownloads-1

[51] *Challenging School Exclusions*, p.27.

[52] *Challenging School Exclusions,* p.34 onwards.

[53] Permanent Exclusions and Suspension in England', Academic Year 2019/20, Tables C4 and C8.

to exclude" can be said to be providing effective scrutiny and protection for children from unlawful exclusions.

81. Aside from this key concern, we also identified issues restricting IRPs to judicial review principles; their application of those judicial review principles;[54] the training and constitution of the panel; the role of SEN experts in attendance; and the lack of robust procedural rules and unfairness as a result.

82. We concluded that IRPs were not providing an effective review mechanism and recommended as a result that the pupils and parents have access to an appeals body. The appeals body responsible would be able to hear all the evidence and remake the decision, and furthermore would have wider remedial powers upon successful appeals. Other than being able to order reinstatement, we also agreed the appeals body should be able to order schools to make an apology; let a pupil sit an exam; order training at the school; order EHC or other assessments; and remove the exclusion from the pupil's record. We identified that such appeals could be heard by the First Tier Tribunal (SEND), which currently hears disability discrimination exclusion appeals.[55]

83. We acknowledge such recommendations would require substantial statutory reform beyond the scope of the current consultation. However, urge consideration of them and underline the need for fair and proper processes to balance the power to exclude with the child's right to education.

[54] Particularly in light of such scant explanation of such principles in the Guidance, which remains unchanged.
[55] We recommended it would be renamed the First Tier Tribunal (Education). See further detail in *Challenging School Exclusions*, at p.51 onwards.

Under the Equality Act 2010, schools must not discriminate against, harass or victimise pupils because of: sex; race; disability; religion or belief; sexual orientation; pregnancy/maternity; or gender reassignment. The Suspension and Permanent Exclusion Guidance sets out how this must be taken into consideration when suspending or permanently excluding a pupil.

Question 23.What do you consider to be the equalities impacts of the revised guidance on individuals with particular protected characteristics?

84. We are disappointed to see there is no substantial change to the amount of information in the guidance about the Equality Act 2010 and other legal duties of schools. The short amount of information there is also inaccessibly placed at the end of "Part Two: What has changed in this edition?".

85. One example has been added to the information about the Equality Act, duties of the school, simply "if reasonable adjustments have not been made for a pupil with a disability that can manifest itself in breaches of school rules if needs are not met, a decision to exclude may be discriminatory."[56] Whilst we agree with this statement, we consider far more is needed, by way of examples and good practice guidance, to assist schools to understand what is practically required of them, on the ground, when exclusion powers in light of their equality duties. We are also concerned to see that the footnoted reference to the non-statutory guidance on schools' Equality Act Duties as been removed.[57]

86. We refer again to Timpson's recommendation which we endorsed:

> 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 a last resort, when nothing else will do. Guidance

[56] New Exclusions Guidance p9.
[57] Current Guidance, p.9 at fn.4.

should also include information on robust and well evidenced strategies that will support schools embedding this in practice.[58]

87. In terms of impacts on those with protected characteristics, particularly those protected groups who are disproportionality excluded, the New Exclusions Guidance makes them considerably less visible, as paragraphs 21 and 22 of the current Guidance have been deleted. These old paragraphs were far from comprehensive about the significant inequalities which exist for pupils who are being excluded in England. For example, they would have been improved by giving more detail of existing inequalities, such as the proportions by which each cohort are disproportionately represented in the exclusions data. It is relevant for example that pupils with SEND are not just at a slightly elevated risk of exclusion; they continue to be significantly disproportionately excluded in comparison with their peers.[59]

88. However, the paragraphs did state the disproportionate exclusion risk of pupils with SEN; pupils eligible for free school meals; looked after children; and Gypsy/Roma, Travellers of Irish Heritage, and Caribbean pupils. Paragraph 22 furthermore gave guidance that "extra support might be needed to identify and address the needs of pupils from these groups in order to reduce their risk of exclusion. For example, schools might draw on the support of Traveller Education Services, or other professionals, to help build trust when engaging with families from Traveller communities." Again, whilst this guidance was not perfect, and could have referred to the need to identify and address the schools' needs, such as training, to reduce exclusion rates in disproportionately excluded groups, the paragraph at least promoted specific consideration of the needs of such groups and engagement with minoritised communities.

89. However, the New Exclusions Guidance has removed any reference to the particular characteristics themselves, as listed above. It has also eliminated any mention of Traveller Education Services or extra support for the needs of pupils from such groups. Paragraph 44, which replaces the old paragraphs 21 and 22, makes only a general reference to "longstanding national trends which show that particular groups of children are more likely to be excluded". Whilst we agree that "it is important that schools, local authorities and

[58] Timpson, p.60.
[59] The permanent exclusion rate for pupils with an education, health and care (EHC) plan is 0.10, and for pupils with SEN with no EHC plan (SEN support) is 0.20, compared to 0.04 for those without SEN. See Permanent Exclusions and Suspension in England', Academic Year 2019/20, Pupil Characteristics Table.

local partners work together to understand what lies behind local trends", we cannot see the benefit of erasing the disproportionately affected groups from the Guidance.

90. As to whether any of the intended data collection and monitoring will assuage this impact is unknown as there simply is not sufficient information about how that data will be used to affect change. However, the loss of visibility in the Guidance for the most disproportionately affected groups, coupled with the failure to implement the Timpson recommendation to clarify Equality Act and other legal duties in the Guidance, leads us to conclude that the redraft of the Guidance has negatively impacted those with protected characteristics.

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Questions relating to the New Behaviour in schools Advice for headteachers and school staff Guidance

Question 9. Paragraphs 13-15 outline how schools should adopt a whole school approach to behaviour so it can be consistently and fairly implemented across the whole school, with all staff adhering to the same expectations. Do you agree with this approach? If not, please explain why.

91. JUSTICE considers paragraphs 13 to 15 do not fully address what a "fair and consistent" approach means, with serious risk of misinterpretation leading to unfair and potentially unlawful conduct by schools.

92. It important to understand that a fair approach does not mean blanket or rigid "consistency" to the extent that individual children, their needs and circumstances, cannot be taken into account and responded to. As Timpson explained:

> If a child has broken school rules, there should be consequences but, in the best schools, these consequences differ based on what each child will understand most and learn from. Consistency and fairness are not at odds with reacting to children differently and as individuals.[60]

[60] Timpson, p.68.

93. In JUSTICE's Working Party report, we heard from the National Autistic Society and the Council for Disabled Children that it was a common error for schools to misinterpret their duties under Equality Act 2010 not to discriminate against disabled pupils, wrongly understanding this to be a requirement to treat every pupil the same. To the contrary, the Equality Act requires schools to make reasonable adjustments to school policies and practices that may put disabled pupils at a disadvantage.[61] This very point was also reported by Timpson, with reference to First Tier Tribunal documents he reviewed showing schools breaching their Equality Act Duties in such circumstances.[62]

94. As such, we consider the New Behaviour Guidance needs to be amended to reflect this important nuance in understanding what impact "fairness" must have on schools' understanding of "consistency", namely that it means sometimes treating individuals differently.

Question 4. Paragraphs 33-37 set out the approach to behaviour expectations for pupils with SEND so that everyone can feel they belong in the school community and expectations are not lowered for any pupils. Do you agree with this approach? If not, please explain why.

95. We consider that the paragraphs 33 to 37 could do more to assist schools to understand and meet their legal duties towards children with SEND. Timpson's recommendation, which we endorsed, stated that behaviour guidance should be updated alongside exclusions guidance to be "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".[63] Paragraph 37 provides a short list of four possible measures to prevent triggers of behaviour. Whilst these examples are welcome, we do not consider this to be sufficient guidance to help schools meet their legal duties nor create positive behaviour cultures for children with SEND. Schools duties to SEND children go beyond anticipating triggers of behaviour; they are also required to adapt *their* approach to dealing with and responding to behaviour that occurs due to the child's SEND.

96. We would encourage further guidance and examples of flexible and supportive behaviour strategies for this cohort of children in this section of the New Behaviour Guidance. We

[61] S.20 of the Equality Act 2010.
[62] Timpson, p.68.
[63] Timpson, p.60.

also note, however, that Guidance can only do so much if teachers are not supported through training to understand their legal duties. As such, we also recommended that specific training on the Equality Act 2010 and SEND duties should be mandatory for leadership teachers, to be refreshed through continuing professional development on at least a biennial basis.[64]

Question 15. Paragraphs 77-78 outline the support that schools may want to provide to pupils following behaviour incidents or a pattern of incidents. This includes engagement with the pupil or parents or inquiries into circumstances at home, conducted by the Designated Safeguarding Lead or a deputy. What other pastoral support should schools consider when trying to support students following behaviour incidents?

97. We agree with the suggestion at paragraph 78 that designated staff should be appropriately trained to deliver these interventions, which should be part of a wider approach that involves the wellbeing and mental health of the pupil. However, more clarity and detail about how such interventions can work as part of such wider wellbeing and mental health approaches would better equip such designated staff.

98. In relation to support, paragraph 77 references the initial intervention section below, which includes guidance to consider the need for multi-agency assessments and EHC plan reviews in light of behavioural concerns, to "address underlying factors leading to misbehaviour". We support this approach, and consider such support to be so important to post-sanction practice that we consider it would be helpfully included in paragraphs 77 and 78 in short form, as well as in the initial intervention section later in the document.

99. At the initial intervention section, the wording in paragraphs 99 and 100 could be strengthened to ensure such assessments and reviews are sought *before* behaviour concerns become an issue of exclusion. In our Working Party report, we recommended that a EHC plan must be reviewed before the pupil is excluded, and potential exclusions for persistent disruptive behaviour of pupils without EHC plans should be subject to assessment before exclusion.[65] Whilst we support the focus on early intervention at paragraphs 99 and 100, we consider the guidance could be strengthened if both

[64] *Challenging School Exclusions,* para 3.8.
[65] *Challenging School Exclusions,* paras 3.21 -3.22.

paragraphs ended in a sentence such as “Such a review/assessment should always be required before considering suspension or exclusion of the child”.

Question 25. Paragraph 108 also outlines how schools should re-integrate pupils back to mainstream lessons, including holding meetings and considering what support pupils may need to help them return to mainstream education. In what additional ways should pupils be re-integrated back into mainstream lessons?

100. We note that the New Exclusions Guidance has recognised the importance of reintegration meetings and amended its guidance on them, albeit we consider that guidance could be further strengthened. However, the New Behaviour Guidance is not consistent with the amendments to the New Exclusions Guidance. See our response to Question 13 of the New Exclusions Guidance.

101. Paragraphs 77 and 78 do not mention reintegration meetings, but list conversations with the pupil and the parents as two separate options. At paragraph 108, reintegration meetings are mentioned but no guidance given about their value to the pupil, parents and the school in identifying strategies to support future good behaviour. This should include not only a one-way conversation about how the pupil’s behaviour in the future can change, but a two-way conversation about support that the school can give or arrange which could bolster such future behaviour, including consideration of the school’s Equality Act and SEND duties, as well as its safeguarding duties and wellbeing responsibilities.

102. The JUSTICE Working Party considered such reintegration meetings to be of great value after consultation with the sector, and recommended there be a mandatory duty on a school to offer them after a fixed-term exclusion.[66] We urge consideration of such a duty, as used to be the case in England and still is in Wales, and furthermore seek more comprehensive guidance on the conduct and value of reintegration meetings in the New Behaviour Guidance.

Question 28.Are there any particular issues you feel are not covered in the revised Behaviour in Schools Guidance?

[66] *Challenging School* Exclusions, para 3.16.

103. JUSTICE is concerned that the guidance about schools' legal duties towards children are vague and do not provide effectively clear and useful guidance to schools to support them to make lawful decisions. Simple statements such as "a sanction will be lawful if […] it does not breach any other legislation (for example in respect of equality, special educational needs and human rights)" is of little use to school leaders, since it does little more than quote statute.[67] This does nothing to help schools understand what kind of sanction *would* breach such legislation, nor the specifics of schools' duties. See further our response to Question 23 of the New Exclusions Guidance, as well as Question 29 of the New Behaviour Guidance below.

Question 29.Under the Equality Act 2010, schools must not discriminate against, harass or victimise pupils because of: sex; race; disability; religion or belief; sexual orientation; pregnancy/maternity; or gender reassignment. What do you consider to be the equalities impacts of the revised guidance documents on individuals with particular protected characteristics?

104. Certain cohorts of children are disproportionately excluded, which is of course relevant to the behaviour guidance as it is to the exclusion guidance, given that exclusion is a behaviour sanction. This is not only pupils with SEND, which it is acknowledged are dealt with separately in the New Behaviour Guidance (although, see below) but also pupils eligible for free school meals; looked after children; and pupils from certain ethnic groups. The current Exclusions Guidance acknowledged such disproportionately affected ethnic groups, namely pupils with Gypsy/Roma, Traveller and Caribbean heritage. We have noted our concern at such specific groups being deleted from the New Exclusions Guidance (see above Question 23 of the New Exclusions Guidance) and we similarly recommend that there should be acknowledgment of groups who are disproportionately affected by behavioural measures in this guidance, which will benefit schools' awareness of discrimination.

105. Regarding the use of sanctions against children with SEND, we do not agree with the wording of paragraph 53, which states the test to be applied in consideration of the lawfulness of any sanction imposed on a pupil with SEND. The paragraph states "To do

[67] Paragraph 47. It is a reference to s. 91(3)(a) of the Education and Inspections Act 2006, which stipulates that sanctions must "not be in breach of any statutory requirement or prohibition."

this schools should consider whether the pupil understood the rule or instruction and whether the pupil was unable to act differently as a result of their SEN or disability."

106. We consider this to be a misstatement of the law. Children with disabilities or SEN often understand a rule or instruction, but their lack of compliance is not as simple as saying their SEND made them "unable" to comply. A pupil's SEND may not prevent them from being able to understand and comply with instructions sometimes, but this does not mean they are not less likely than others to be able to *always* comply, as a result of their SEND. For example, a child may understand an instruction to sit quietly in class, and be able to do so regularly, but may still be less likely than others to do so in particular circumstances, for example due to loud or distracting sensory input on a particular day. The test as it is worded does nothing to acknowledge that the reasonable adjustments that schools must consider for children with SEND must be specific to the child and the circumstances. Instead, it treats the impact of the child's SEND on their behaviour to be black and white – either their SEND makes them able or unable – which belies the reality for many children with SEND.

107. As such, we consider the paragraph could, as currently drafted, lead to some schools taking an example of a SEND pupil's ability to comply in the past and mistakenly thinking that allows them to sanction them without any consideration of reasonable adjustments. Such an interpretation would be a misstatement of the duty to make reasonable adjustments, and we recommend the paragraph is redrafted.

JUSTICE

31st March 2022