

EXCLUSION APPEALS

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Duties of the Governing Body

- **Must make and from time to time review a statement of discipline and good behaviour must ensure the policies are pursued Must consult the head teacher, parents of pupils and the pupils before making or revising the statement (Section 88(1) Education and Inspections Act 2006)**
- **Can direct the head teacher to draw up specific policies (Section 88(2)(b))**

Duties of the Head Teacher

The measures determined by the head teacher regarding discipline and good behaviour must be publicised in a written document and brought to the attention of parents of pupils and must be brought to the attention of all pupils, parents and persons who work at the school at least once in every school year (Section 89(6))

EQUALITY ACT 2010

- **Schools must not discriminate against, harass or victimise pupils because of their: sex; race; disability; religion or belief; sexual orientation; pregnancy/maternity; gender reassignment. For disabled children this includes a duty to make reasonable adjustments to policies and practices and the provision of auxiliary aids. (Para 9 2017 Guidance)**

GENERAL POINTS

- Pupils whose behaviour at lunchtime is disruptive may be excluded from the premises for the duration of the lunchtime period – the legal requirements in relation to exclusions apply to such exclusions.
- The behaviour of pupils outside school can be considered as grounds for exclusion.
- The head teacher may withdraw an exclusion that has not been reviewed by the governing body

Who can exclude and how long?

- Only the head teacher can exclude
- Head teacher includes “an acting head teacher.”
- If the head is absent from school then the person acting in their position can exclude
- It would be good practice for the person acting for the head teacher to be authorised in writing

LENGTH OF AN EXCLUSION

- A pupil may be excluded for one or more fixed term periods (up to a maximum of 45 school days in a single academic year), or permanently. A fixed term exclusion does not have to be for a continuous period. (Para 1 - 2017 Guidance)

LENGTH OF AN EXCLUSION

- The law does not allow extending a fixed-term exclusion or “converting” a fixed-term exclusion into a permanent exclusion. In exceptional cases, usually where further evidence has come to light, a further fixed-term exclusion may be issued to begin immediately after the first one ends; or a permanent exclusion may be issued to begin immediately after the end of the fixed period. Para 3 2017 Guidance)

THINGS NO TO DO

- It is unlawful to exclude for a non-disciplinary matter. For example it would be unlawful to exclude a pupil simply because they have additional needs or a disability that the school feels it is unable to meet, or for a reason such as: academic attainment/ability; the action of a pupil's parents; or the failure of a pupil to meet specific conditions before they are reinstated, such as to attend a reintegration meeting. However, a pupil who repeatedly disobeys their teachers' academic instructions could, be subject to exclusion (Para 13 - 2017 Guidance)

THINGS NOT TO DO

- **“Informal” or “unofficial” exclusions, such as sending pupils home “to cool off” are unlawful, regardless of whether they occur with the agreement of parents or carers. Any exclusion of a pupil, even for short periods of time, must be formally recorded. (Para 14 - 2017 Guidance)**

THINGS NOT TO DO

- JR 17's Application for Judicial Review (2010) UKSC 27 –
- School purported to suspend a pupil on “precautionary grounds” without any findings as to his guilt on the matters alleged.
- The Supreme Court held there was no provision in the legislation for such action and schools had no such power at common law. Accordingly, pupils could not be excluded on precautionary grounds.

THINGS YOU CAN DO

- **Maintained schools have the power to direct a pupil off-site for education to improve his or her behaviour (Section 29A Education Act 2002). A pupil at any type of school can also transfer to another school as part of a “managed move” where this occurs with the consent of all the parties involved, including the parents and the admission authority of the school. However, the threat of exclusion should never be used to influence parents to remove their child from school (Para 15 - 2017 Guidance)**

SECTION 29A

- This Section is usually used to direct a pupil to alternative provision or a specialist provision for a period of time and for a specific purpose.
- In *R (CHF) v Newick Primary School* (2021) EWHC 2513 the High Court held it was not appropriate to use this section where the Governors directed because of a safeguarding issue. In such circumstances the procedure for excluding the pupil should have been followed.

THE OMBUDSMAN

- **Complaint 13 005 239**
- **C has an autistic spectrum disorder and a statement of special educational needs.**
- **During the autumn term of 2012 the school asked C's mother to collect him from school on eight occasions when they could not manage his behaviour. The Council directed the school that C must return to school on a full time basis or the school should formally exclude him.**

THE OMBUDSMAN

- At a meeting on 29th January C's mother claims she was told by an SEN officer that, on the instruction of the headteacher, C must leave the school.
- C's Mother said she did not agree to this but was told by a Council officer at the meeting that it was C's last day at the school because he would probably be excluded if a further incident occurred.
- C's mother asked if he could remain at the school while another placement was identified but was told he could not.

THE OMBUDSMAN

- The school and the council told C's mother that he was not officially excluded but he could not return to school.
- The Ombudsman found the C was unlawfully excluded and that the council was at fault in not proactively seeking alternative provision or providing more support from the sixth day of exclusion. As a result of this C did not receive full time educational provision for 13 weeks and received half time provision for 5 weeks.

BEFORE EXCLUSION

- 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 schools wider duties, including the European Convention of Human Rights and the Equality Act 2010); rational; reasonable; fair; and proportionate (Para 6 2017 Guidance)

BEFORE EXCLUSION

- The head teacher must take account of their legal duty of care when sending a pupil home following an exclusion (Para 7 2017 Guidance)

BEFORE EXCLUSION

- **When establishing the facts in relation to exclusion decision the head teacher 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, rather than the criminal standard of “beyond reasonable doubt.” This means the head teacher should accept something happened if it is more likely that it happened than that it did not happen. (Para 8 2017 Guidance)**

BEFORE EXCLUSION

- **The decision on whether to exclude is for a head teacher to take. However, where practical, the head teacher should give the pupil an opportunity to present their case before taking the decision to exclude (Para 17 - 2017 Guidance)**

BEFORE EXCLUSION

- **JR 17's Application for Judicial Review (2010) UKSC 764 –**
- **The Supreme Court held that the suspension of a pupil was unlawful as the pupil had not been given the opportunity to give his account of what had happened.**

The Head has excluded

Whenever a head teacher excludes a pupil they must, without delay, notify parents of the period of the exclusion and the reason(s) for it (Para 26 - 2017 Guidance)

The Head has excluded

They must also, without delay, provide parents with the following information in writing:

- a) the reason(s) for the exclusion**
- b) The period of a fixed period exclusion or, for a permanent exclusion, the fact it is permanent**
- c) Parent's right to make representations about the exclusion to the Governing Body and how the pupil may be involved in this**
- d) How any representations should be made**

THE HEAD HAS EXCLUDED

- e) where there is a legal requirement for the governing body to consider the exclusion, that parents have a right to attend a meeting, be represented at this meeting (at their own expense) and to bring a friend (Para 27 - 2017 Guidance)

THE HEAD HAS EXCLUDED

- Written notification of the information mentioned in paragraph 27 can be provided by delivering it directly to the parents, leaving it at their usual or last known address, or by posting it to that address. Notices can be given electronically if the parents have given written agreement for this kind of notice to be sent in this way. (Para 38 2017 Guidance)

Guidance

“Appeal panels, and schools too, must keep in mind that guidance is no more than that.. It is not direction and certainly not rules.” (Lord Justice Schiemann – S v London Borough of Brent and others (17th May 2002))

Permanent Exclusion

- **The decision to exclude a pupil should be taken only**
 - a) in response to a serious breach, OR PERSISTENT breaches of the school's behaviour policy and**
 - b) WHERE allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school (Para 16 – 2017 Guidance)**

EXCLUSION

- Whilst an exclusion may still be an appropriate sanction, the head teacher should take account of any contributing factors that are identified after an incident of poor behaviour has occurred. For example, where it comes to light that a pupil has suffered bereavement, has mental health issues or has been subject to bullying (Para 18 - 2017 Guidance)

When to exclude

- Any penalty imposed must be proportionate to the offence (R v London Borough of Newham ex parte X(1995) ELR 303)

Same Incident Same Penalty?

- Pupil had fireworks in his bag
- Previous incidents involving fireworks had led to some fixed term exclusions and some permanent exclusions
- Pupil was permanently excluded for being in possession of the fireworks
- The High Court said there was no evidence that, because the pupil was permanently excluded that decision was excessive (*R (A) v Head Teacher and Governing Body of North Westminster Community School and the City of Westminster Exclusion Appeal* Panel 2003 ELR 378)

Governors in Action

- **Role = to review exclusions imposed by head (who alone has power to exclude)**
 - **Cannot increase severity of exclusion e.g. by extending period of Fixed Period Exclusion or imposing Permanent Exclusion for Fixed Period Exclusion**
- **Can**
 - **Uphold exclusion**
 - **direct reinstatement**
 - **immediately or by particular date**

GOVERNORS IN ACTION

- The Governing Body must consider the reinstatement of an excluded pupil within 15 school days of receiving notice of the exclusion if
- The exclusion is permanent
- It is a fixed term exclusion which would bring the pupil's total number of school days exclusion to more than 15 in a term
- It would result in the pupil misses a public examination or national curriculum test (Para 55 2017 Guidance)

GOVERNORS IN ACTION

- The requirements are different for fixed period exclusions where a pupil would be excluded for more than 5 but less than 15 school days in a term. In this case, if the parents make representations, the governing board must consider within 50 school days of receiving notice of the exclusion whether the excluded pupil should be reinstated. In the absence of any representations from the parents, the governing board is not required to meet and cannot direct the reinstatement of the pupil. (Para. 56 2017 Guidance)

GOVERNORS IN ACTION

- In the case of a fixed-term exclusion which does not bring the pupil's total number of days of exclusion to more than 5 in a term, the governing board must consider representations made by the parents, but it cannot direct reinstatement and is not required to arrange a meeting with the parents. (Para. 60 2017 Guidance)

GOVERNORS IN ACTION

- The governing body must take reasonable endeavours to arrange a meeting at a time that is convenient to all the parties, but in compliance with the statutory time limits. However, the governors decision will not be invalid simply on the grounds that it was not made within the time limits (Para 59 - 2017 Guidance) (Regulation 6(10) 2012 Regulations)

GOVERNORS IN ACTION

- The governors should identify the steps they will take to ensure all parties will be supported to participate in their consideration and have their views properly heard. This is particularly important where pupils under 18 are speaking about their own exclusion or giving evidence to the governing board. (Para 68 - 2017 Guidance)

GOVERNORS IN ACTION

- The governing body should ensure that clear minutes are taken of the meeting as a record of the evidence that was considered by the governing body. These minutes should be made available to all parties on request (Para 69 - 2017 Guidance)

GOVERNORS IN ACTION

- Where the governing board is legally required to consider reinstating an excluded pupil they must consider the interests and circumstances of the excluded pupil, including the circumstances in which the pupil was excluded, and have regard to the interests of other pupils and people working at the school (Para 63 - 2017 Guidance)

GOVERNORS IN ACTION

- In reaching a decision on whether or not to reinstate a pupil, the governing body should consider whether the decision to exclude the pupil was lawful, reasonable and procedurally fair, taking account of the head teacher's legal duties and any evidence that was presented to the governing board in relation to the decision to exclude (Para 71 - 2017 Guidance)

GOVERNOR'S DECISION

- Where legally required to consider reinstating an excluded pupil, the governing board must notify parents, the head teacher and the local authority of its decision and the reasons for it, in writing and without delay. Where the pupil resides in a different local authority area from the one in which the school is located, the governing board must also inform the pupil's home authority (Para 75 - 2017 Guidance)

GOVERNOR'S DECISION

- In the case of a permanent exclusion where the governing board decides not to reinstate the pupil the board's notification must also include
- The fact the exclusion is permanent
- Notice of the parents' right to ask for the decision to be reviewed by an independent review panel and the following information -

GOVERNOR'S DECISION

- a) The date by which the application for review must be made
- b) to whom the application for review must be made
- c) any application should set out the grounds on which it is being made, and, where appropriate, this should include reference to how the pupil's SEN are considered relevant to the exclusion

GOVERNOR'S DECISION

- d) that, regardless of whether the excluded pupil has recognised SEN, parents have the right to require the local authority/academy trust to appoint an SEN expert to advise the review panel
- e) details of the role of the SEN expert
- f) that parents may, at their own expense, appoint someone to make written or oral representations to the panel (Para 76 - 2017 Guidance)

GOVERNOR'S DECISION

- In addition the letter must inform parents that, in addition to the right to apply for an independent review panel, if parents believe that there has been unlawful discrimination in relation to the exclusion then they may make a claim under the Equality Act 2010 to the First-tier Tribunal (Special Educational Needs and Disability) in the case of disability discrimination or the County Court in the case of other forms of discrimination.
- Such a claim must be made within 6 months from the date of the pupil's exclusion. (Para 76 – 2017 Guidance)

GOVERNOR'S DECISION

- **R (A) v Independent Appeal Panel for Sutton (2009) EWHC 1223 (Admin)**
- **Panel upheld the exclusion of a pupil for dealing in a substance which the pupil thought was cannabis, but the panel did not reach any findings as to the true nature of the substance which was disputed. This was held to be an error of law because the true nature of the substance may have altered the panel's view of the appropriate sanction, so a factual finding had to be made.**

Appeal to Independent Review Panel

- **No appeal may be made after the 15th school day after the day in which notice in writing is given of the decision**
- **Notice stating that the parents do not intend to appeal against the decision not to reinstate a pupil is final**

Appeal to Independent Review Panel

- **A review panel shall consist of 3 or 5 members appointed by the authority from:**
 - a) a lay member to chair the panel who has not worked in any school in a paid capacity disregarding any experience as a governor or volunteer;**
 - b) head teachers who have been a head teacher during the last five years; and**

APPEAL TO INDEPENDENT REVIEW PANEL

- c) Current or former school governors (including members of a PRU management committees and directors of academy trusts) who have served as a governor for at least 12 consecutive months in the last five years, provided they have not been teachers or head teachers during that time (Para 98 – 2017 Guidance)

Appeal to Independent Review Panel

- The review hearing must take place within 15 school days of the day on which the appeal is lodged
- The clerk should identify in advance whether the pupil will be attending. Where an excluded pupil is attending the hearing, consideration should be given in advance as to the steps that will be taken to support his/her participation. If the excluded pupil is not attending it should be made clear that they may feed their views through a representative or by submitting a written statement (Para 113 – 2017 Guidance)

Appeal to Independent Review Panel

The local authority must take reasonable steps to identify a review date that all parties and any SEN expert appointed are able to attend. However, the review must begin within 15 school days of the day on which the parents application for a review was made (panels have the power to adjourn a hearing if required. (Para 92 - 2017 Guidance)

- The clerk should make reasonable efforts to circulate all written evidence to all parties 5 school days before the hearing (Para 107 2017 Guidance)**

INDEPENDENT REVIEW PANEL

- In order to review the governing board's decision the panel will generally need to hear from those involved in the incident, or incidents, leading to the exclusion. The clerk should also try to ascertain whether an alleged victim, if there is one, wishes to be given a voice at the review. This could be in person, through a representative or by submitting a written statement (Para 115 2017 Guidance)

INDEPENDENT REVIEW PANEL

- In the case of witnesses who are pupils of the school it will normally be appropriate for the panel to rely on written statements. Pupils may appear as witnesses if they do so voluntarily and, if they are under 18, with their parents' consent. In such cases, that pupil's parents should be invited to attend the meeting in support of their child (Para 116 2017 Guidance)

STATEMENTS

- **All written witness statements should be attributed, signed and dated, unless the school has good reason to wish to protect the anonymity of the witness, in which case the statement should be at least dated and labelled in a way that allows it to be distinguished from other statements. The general principle remains that excluded pupils are entitled to know the substance behind the reason for their exclusion (Para 118– 2017 Guidance)**

STATEMENTS

- One pupil's statement was neither signed or dated; another pupil's statement was signed but not dated; some statements by staff lacked a handwritten signature or date
- Should the statements be taken into account

STATEMENTS

- The High Court held “The DfES Guidance does not seek to establish a mandatory rule for the admissibility of evidence before an IAP. The “general principle” was observed in each case i.e. in each case the claimant knew the substance and source of the accusation. It was up to him to make submissions to the panel as to the weight they should attach to the statements in view of their deficiencies in form.” (Culkin v Wirral Independent Appeal Panel (2009) ELR 287)

The Role of the Local Authority

- **“The role of the local education authority in any exclusion hearing is a very sensitive one. The representations which it can properly make must be calculated to assist the committee or panel must bear the hallmark of clinical objectivity.” (R (A) v The Governing Body of Kingsmead School and another (13th March 2002))**
- **“The LEA must maintain a completely objective stance.” (S and others v London Borough of Brent and others 17th May 2002)**

ROLE OF THE REVIEW PANEL

- The role of the panel is to review the governing board's decision not to reinstate a permanently excluded pupil. In reviewing the decision the panel must consider the interests and circumstances of the excluded pupil, including the circumstances in which the pupil was excluded, and have regard to the interests of other pupils and people working at the school (Para 135 - 2017 Guidance)

ROLE OF THE REVIEW PANEL

- Complaint 21 012 795 –
- The IRP considered the interests of other pupils and people working at the school. A SEN expert took part in the review and expressed her professional views. The IRP followed the correct legal tests by addressing questions of illegality, irrationality and procedural impropriety.

ROLE OF THE REVIEW PANEL

- **Complaint 21 012 795 –**

It also addressed Miss Z's concerns about the investigation process and provided its reasons for not considering them sufficient to either issue a recommendation to the governing body to reconsider reinstatement or quash the decision.

The review complied with the Statutory Guidance.

ROLE OF THE SEN EXPERT

- The SEN expert should base their advice on the evidence provided to the panel. The SEN expert's role does not include making an assessment of the pupil's special educational needs. (Para 164 2017 Guidance)

ROLE OF THE SEN EXPERT

- **The focus of the SEN expert's advice should be on whether the school's policies which relate to SEN, or the application of these policies in relation to the excluded pupil were lawful, reasonable and procedurally fair. If the SEN expert believes that this was not the case, they should, where possible, advise the panel on the possible contribution that this could have made to the circumstances of the pupil's exclusion. (Para 165 2017 Guidance)**

ROLE OF THE SEN EXPERT

- Where the school does not recognise a pupil as having SEN, the SEN expert should advise the panel on whether they believe the school acted in a legal, reasonably and procedurally fair way with respect to the identification of any SEN that the pupil may potentially have, and any contribution that this could have made to the circumstances of the pupil's exclusion (Para 166 2017 Guidance)

ROLE OF THE SEN EXPERT

- **Complaint 14 019 934 – “The role of the SEN expert was limited to pointing out that the pupil did not yet have a diagnosis of SEN (or did have a diagnosis) and that the school’s policies relating to SEN had been properly applied.”**
- **In this case the parent complained that the SEN expert was seen chatting and laughing with the school’s representatives outside the meeting room.**

ROLE OF THE SEN EXPERT

- On this point the Ombudsman said “It is possible the SEN expert spoke to the school’s representative outside the hearing. If so, this is not appropriate behaviour. It is important the expert is not only impartial but must not act in any way to raise doubts about their impartiality. I am satisfied the clerk took suitable action by asking the SEN expert to move away. I, therefore, find no disadvantage caused to the parent by the SEN expert’s behaviour outside the hearing.”

NEW EVIDENCE

- **New evidence may be presented to the panel, though the school may not introduce new reasons for the exclusion or for the decision not to reinstate the pupil and the panel must disregard any new reasons that are introduced (Para 142 - 2017 Guidance)**

DECISIONS THE REVIEW PANEL CAN MAKE

- The panel can:
- Uphold the exclusion decision;
- Recommend that the governing body reconsiders the exclusion again;
- Quash the decision and direct that the governing body considers the exclusion again

QUASHING THE DECISION

- The panel may only quash a governing body's decision if it considers that it was flawed when considered in the light of the principles applicable on an application for judicial review (Para 141 - 2017 Guidance)

QUASHING THE DECISION

- When considering the governing board's decision in light of the principles applicable in application for judicial review, the panel should apply the following tests:
- **Illegality** – did the governing board act outside the scope of its legal powers in deciding that the pupil should not be reinstated
- **Irrationality** – did the governing board rely on irrelevant points, fail to take account of all relevant points, or make a decision so unreasonable that no governing board could have made it?
- **Procedural impropriety** – was the governing board's consideration so procedurally unfair or flawed that justice was clearly not done? (Para 159 - 2017 Guidance)

QUASHING THE DECISION

- **Procedural impropriety means not simply a breach of minor points of procedure but something more substantive that has a significant impact on the quality of the decision making process. This will be a judgment for the panel to make but the following are examples of the types of things that could give rise to procedural impropriety:**
 - **1) Bias**
 - **2) Failing to notify parents of their right to make representations**

QUASHING THE DECISION

- 3) the governing board making a decision without having given parents an opportunity to make representations
- 4) failing to give reasons for a decision
- 5) being a judge in your own cause e.g. the head teacher who took the decision to exclude were also able to vote on whether to the pupil should be reinstated (Para 160 - 2017 Guidance)

QUASHING THE DECISION

- In the case of a maintained school or PRU, where a panel has quashed the governing board's decision and directed that it reconsiders, the panel should order that a readjustment must be made to the school's budget, unless within 10 days of receiving notice of the panel's decision, the governing board decides to reinstate the pupil. (Con.)

QUASHING THE DECISION

- In the case of an academy , where the panel has quashed the governing board's decision, the panel should order that the academy trust must make a payment directly to the local authority in whose area the academy is located, unless within ten school days of receiving notice of the panel's decision, the governing board decides to reinstate the pupil. (Para 163 - 2017 Guidance)

RECONSIDER

- Where the criteria for quashing a decision have not been met the panel should consider whether it would be appropriate to recommend that a governing body reconsiders their decision not to reinstate the pupil. This should not be the default option, but should be used where evidence or procedural flaws have been identified that do not meet the criteria for quashing the decision but which the panel believe justify a reconsideration of the governing body's decision. This could include when new evidence presented at the review hearing was not available to the governing body at the time of its decision (Para 161 2017 Guidance)

Reasons for Decisions

- **The appeal panel must explain, however briefly why the exclusion has been upheld**
- **The reasons for the exclusion must be supported by evidence**

Rules of Natural Justice

- **Independent appeal panels must comply with the rules of natural justice:-**
 - a) details of the conduct complained of must have been provided**
 - b) all parties must be given an opportunity to put their case**
 - c) no person who has any involvement in the matter should be involved in the decision making process**
 - d) the proceedings must be conducted in such a way that no outsider could consider there was any unfairness or bias on the part of anyone involved**

Human Rights Act 1998

- Independent appeal panels are public authorities within the Human Rights Act 1998
- Article 2 of the First Protocol provides that no person shall be denied the right to education
- Expulsion from a school does not automatically breach Article 2 of the First Protocol but there is then a duty on the local education authority to arrange suitable education for the child/pupil (Ali v the Head Teacher and Governors of Lord Grey School (27th June 2003))

Human Rights Act 1998

THE PRINCIPLE OF PROPORTIONALITY

All appeal panel decisions must be proportionate i.e. a fair balance between the protection of individual rights and the interests of the community at large.

Are there:

- a) Relevant and sufficient reasons for the decision**
- b) Has the panel considered all the options available**
- c) Has there been a fair hearing**
- d) Is there a right of challenge to the decision**