



Department  
for Education

# **Exclusion from maintained schools, academies and pupil referral units in England**

**Statutory guidance for those with legal  
responsibilities in relation to exclusion**

**January 2015**

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# Summary

## About this guidance

This document from the Department for Education provides a guide to the legislation governing the exclusion of pupils from maintained schools, pupil referral units, academy schools<sup>1</sup> and alternative provision academies<sup>2</sup> in England. It also provides statutory guidance. This means that recipients must have regard to this guidance when carrying out duties relating to the exclusion of pupils from school.

Except where specifically stated, the legislation and statutory guidance apply in relation to all pupils attending a school<sup>3</sup>, including those below or above compulsory school age, such as those attending nursery classes or sixth forms.

Exclusion legislation places obligations in relation to the “relevant person” – a parent or the pupil, where aged 18 or over. The definition of a parent for the purposes of the Education Act is broadly drawn. In addition to the child's birth parents, references to parents in this guidance include any person who has parental responsibility (which includes the local authority where it has a care order in respect of the child) and any person (for example, a foster carer) with whom the child lives. This guidance refers to “parents” throughout and where practicable it is expected that all those with parental responsibility should be engaged with the exclusions process.

This guidance replaces the document of the same name published in September 2012 for schools in England and applies to exclusions that occur after 5 January 2015.

## Expiry or review date

This guidance will next be reviewed in July 2016.

## What legislation does this guidance refer to?

- Section 51A of the Education Act 2002, as inserted by the Education Act 2011
- The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012
- Sections 100 to 108 of the Education and Inspections Act 2006

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<sup>1</sup> Including free schools, studio schools and university technology colleges where these are constituted as an academy school under the Academies Act 2010.

<sup>2</sup> Including alternative provision free schools where these are constituted as an AP academy under the Academies Act 2010.

<sup>3</sup> ‘School’ is used in this document to describe any school to which the guidance applies. Where the term ‘academy’ is used it refers to any category of academy to which the guidance applies.

- The Education (Provision of Full-Time Education for Excluded Pupils) (England) Regulations 2007<sup>4</sup>.

## Who is this guidance for?

This guidance is for:

- School leaders<sup>5</sup> and governing bodies<sup>6</sup> in maintained schools, pupil referral units (PRUs) academies and free schools;
- local authorities;
- academy trusts;
- independent review panel members and clerks;
- SEN experts appointed to assist independent review panels.

This guidance does not apply to: independent schools (other than academy schools or AP academies), city technology colleges or city colleges for the technology of the arts (unless they have become academy schools), sixth form colleges or 16–19 academies, which will have their own exclusion procedures. Local authorities are required to arrange educational provision for excluded pupils of compulsory school age from these institutions if they would not otherwise receive such education.

## Main points

- The overall legislation governing the exclusion process remains unchanged. Regulations have been amended to clarify that governing bodies' duty to arrange education from the sixth day of a fixed period exclusion would be triggered by consecutive fixed period exclusions totalling more than five days.
- Statutory guidance has been updated in a small number of areas, in particular to provide greater confidence to headteachers on their use of exclusion and greater clarity to independent review panels and governing bodies on their consideration of exclusion decisions.
- Good discipline in schools is essential to ensure that all pupils can benefit from the opportunities provided by education. The government supports the decisions of headteachers and they should be confident in using exclusion where they consider it to be a lawful, reasonable and fair action.

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<sup>4</sup> As amended by the by the Education (Provision of Full-Time Education for Excluded Pupils) (England) (Amendment) Regulations 2014.

<sup>5</sup> 'Headteacher' in this document also refers to the teacher in charge at a PRU and principals of academies.

<sup>6</sup> 'Governing body' in this document also refers to PRU management committees. In the case of academies, 'governing body' should be read to the proprietor ("the academy trust").

- In considering whether to exclude a pupil, headteachers should weigh up the seriousness, or persistence, of the pupil's behaviour, together with the impact of not excluding the pupil on the school as a whole and the integrity of its behaviour policy. Whilst every effort should be made to identify pupils at risk of exclusion, and to put in place strategies to address problematic behaviour, adopting a blanket approach of never excluding pupils may undermine the school's ability to maintain discipline.
- Where a school has concerns about a pupil's behaviour it should try to identify whether there are any causal factors and intervene early in order to reduce the need for a subsequent exclusion. In this situation schools should consider requesting a multi-agency assessment that goes beyond the pupil's educational needs. They should also consider whether alternative provision would help improve the pupil's behaviour.
- Schools must not discriminate against pupils on the basis of protected characteristics, such as gender, sexual orientation, disability or race. All pupils must be treated fairly and lawfully.
- All children have a right to an education. Schools should take reasonable steps to set and mark work for pupils during the first five school days of an exclusion, and alternative provision must be arranged from the sixth day. There are benefits in arranging alternative provision to begin as soon as possible after an exclusion. Schools should have a strategy for reintegrating pupils that return to school following a fixed period exclusion, and for managing their future behaviour.
- Where parents (or the excluded pupil, if aged 18 or over) dispute the decision not to reinstate a permanently excluded pupil, they can ask for it to be reviewed by an independent review panel. Where there is an allegation of discrimination (under the Equality Act 2010) in relation to a fixed-period or permanent exclusion, parents can also make a claim to the First-tier Tribunal (for disability discrimination) or a County Court (for other forms of discrimination).
- Excluded pupils should be enabled and encouraged to participate at all stages of the exclusion process, taking into account their age and understanding.

# 1. The headteacher's power to exclude

## A guide to the law<sup>7</sup>

1. The headteacher<sup>8</sup> of a school can exclude a pupil on disciplinary grounds<sup>9</sup>. The behaviour of pupils outside school may be relevant and can be considered as grounds for an exclusion decision.

2. A pupil may be excluded for one or more fixed periods (up to a maximum of 45 school days in a single academic year<sup>10</sup>), or permanently. In exceptional cases, usually where further evidence has come to light, a fixed period exclusion may, in effect, be “extended” by issuing a further fixed period exclusion or a subsequent permanent exclusion may be issued<sup>11</sup>. It would, however, be unlawful to impose a fixed period exclusion for an indefinite period of time.

3. A fixed period exclusion does not have to be for a continuous period; for example, where pupils attend more than one school then the exclusion could relate only to the days on which they attend the school at which an incident occurred. A fixed period exclusion can also involve a part of the school day; for example, if pupils' behaviour at lunchtime is disruptive, they may be excluded from the school premises for the duration of the lunchtime period. The legal requirements relating to exclusion, such as the headteacher's duty to notify parents, apply in all cases. Lunchtime exclusions are considered as half a school day for statistical purposes and also in determining whether a governing body meeting is triggered.

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

5. Headteachers must take account of their legal duty of care to a pupil when taking a decision to send a pupil home following an exclusion.

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<sup>7</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>8</sup> ‘Headteacher’ includes acting headteacher by virtue of section 579(1) of the Education Act 1996.

<sup>9</sup> The headteacher may withdraw an exclusion that has not been reviewed by the governing body.

<sup>10</sup> This total includes exclusions from previous schools covered by the exclusion legislation.

<sup>11</sup> In these circumstances the legal requirements relating to exclusion still apply, including duties to notify parties about the exclusion and the parents' right to make representations about the exclusion.

6. When establishing the facts in relation to an exclusion the headteacher must apply the civil standard of proof and not the criminal standard of “beyond reasonable doubt”. This means that if something is more likely than not to have occurred (“on the balance of probabilities”) then the standard is met.

7. Under the Equality Act 2010 (“the Equality Act”), schools must not discriminate against, harass or victimise pupils because of their: gender, race, disability, religion or belief, or sexual orientation; because of a pregnancy / maternity; or because of a gender reassignment. For disabled children, this includes a duty to make reasonable adjustments to policies and practices.

8. The public sector equality duty means that, in carrying out their functions, schools must also have due regard to the need to:

- eliminate discrimination, harassment, victimisation and other conduct that is prohibited by the Equality Act;
- advance equality of opportunity between people who share a protected characteristic and people who do not; and
- foster good relations between people who share a protected characteristic and people who do not; in particular by having due regard to the need to tackle prejudice and promote understanding.

9. These duties must be taken into account when deciding whether to exclude a pupil. Schools must also ensure that their policies and practices do not indirectly discriminate against pupils by unfairly placing them at a greater risk of exclusion than others. Provisions within the Equality Act allow schools to take action to deal with particular disadvantages that may affect a specific group, where this can be shown to be a reasonable and proportionate way of dealing with such issues<sup>12</sup>.

10. Headteachers and governing bodies must take account of their statutory duties in relation to special educational needs (SEN) when administering the exclusion process. This includes having regard to the SEN Code of Practice.

11. It is unlawful to exclude a pupil for a non-disciplinary reason. For example, it would be unlawful to exclude a pupil simply because he or she has additional needs or a disability that the school considers 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 reinstatement, such as attend a reintegration meeting. Repeatedly disobeying a teacher’s instructions to do school work could provide grounds for an exclusion decision.

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<sup>12</sup> Non-statutory advice from the Department for Education has been issued to help schools understand how the Equality Act affects them and how to fulfil their duties under the Act ([www.GOV.UK](http://www.GOV.UK)).

12. Exclusion legislation does not provide for 'informal' or 'unofficial' exclusions, such as sending pupils home 'to cool off'. Pupils of compulsory school age are entitled to a full-time education. Removing a pupil from the school without a legal basis is unlawful, regardless of whether it occurs with the agreement of parents or carers. Any exclusion of a pupil, even for short periods of time, must be formally recorded. Formally arranged part-time timetables may be necessary as a temporary measure in exceptional circumstances to meet pupils' needs but must not be used as a disciplinary sanction<sup>13</sup>.

13. Schools have powers to direct pupils off-site for education to improve their behaviour<sup>14</sup>. A pupil can also transfer to another school as part of a 'managed move' where this occurs with the consent of the parties involved, including the parents. The threat of exclusion must never be used to influence parents to remove their child from the school.

### **Statutory guidance on the decision to exclude**

14. Headteachers should be confident in using exclusion where they deem it to be a lawful, reasonable and fair sanction. The use of exclusion should reflect the importance of good behaviour for the education and welfare of all pupils. In considering whether to exclude a pupil, headteachers should weigh up the seriousness, or persistence, of the pupil's behaviour, together with the impact of not excluding the pupil on the school as a whole and the integrity of its behaviour policy. Whilst every effort should be made to identify pupils at risk of exclusion, and to put in place strategies to address problematic behaviour, adopting a blanket approach of never excluding pupils may undermine the school's ability to maintain discipline.

15. It is for the headteacher to decide whether a child's behaviour warrants permanent exclusion, though this is a serious decision and should be reserved for:

- a serious breach, or persistent breaches, of the school's behaviour policy; or
- where a pupil's behaviour means allowing the pupil to remain in school would be detrimental to the education or welfare of the pupil or others in the school.

16. Allowing pupils an opportunity to present their case before taking the decision to exclude will help ensure that the decision is fair, although this may not always be

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<sup>13</sup> All pupils of compulsory school age are entitled to a full-time education, unless this would not be in their best interests because of health needs. Departmental advice on attendance ([www.GOV.UK](http://www.GOV.UK)) is that, in very exceptional circumstances, there may be a need for a temporary part-time timetable to meet a pupil's individual needs but this must not be treated as a long-term solution.

<sup>14</sup> Maintained schools' power is provided by Section 29A of the Education Act 2002. Statutory guidance relating to this power is provided in guidance on alternative provision ([www.GOV.UK](http://www.GOV.UK)). Academies can also place a pupil in another educational setting under general powers within their Articles of Association.



practicable. Headteachers should also 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 or other emotional stress.

17. Early intervention to address underlying causes of disruptive behaviour should include an assessment of whether appropriate provision is in place to support any SEN or disability that a pupil may have. Headteachers should also consider the use of a multi-agency assessment for pupils who demonstrate persistent disruptive behaviour. Such assessments may pick up unidentified special educational needs but the scope of the assessment could go further, for example, by seeking to identify mental health or family problems.

18. Where a pupil has received multiple exclusions or is approaching the legal limit of 45 school days of fixed period exclusion in an academic year, headteachers should consider whether exclusion is providing an effective sanction.

### **Statutory guidance on the exclusion of pupils from groups with disproportionately high rates of exclusion**

19. The exclusion rates for certain groups of pupils are consistently higher than average. This includes: pupils with SEN, pupils eligible for Free School Meals, looked after children<sup>15</sup> and pupils from certain ethnic groups. The ethnic groups with the highest rates of exclusion are: Gypsy / Roma, Travellers of Irish Heritage, and Caribbean pupils.

20. In addition to the approaches on early intervention set out above, headteachers should consider what 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 the local authority, or other professionals, to help build trust when engaging with families from Gypsy/ Roma or Traveller communities.

### **Statutory guidance to headteachers on the exclusion of pupils with Education, Health and Care Plans (EHC plans) and looked after children**

21. As well as having disproportionately high rates of exclusion, there are certain groups of pupils with additional needs who are particularly vulnerable to the impacts of exclusion. This includes pupils with Education, Health and Care Plans (EHC plans)<sup>16</sup> and

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<sup>15</sup> As defined in section 22 of the Children Act 1989.

<sup>16</sup> References to pupils with EHC plans include pupils with statements of SEN whilst they remain.

looked after children. Headteachers should, as far as possible, avoid permanently excluding any pupil with an EHC plan or a looked after child.

22. Schools should engage proactively with parents in supporting the behaviour of pupils with additional needs. In relation to looked after children, schools should co-operate proactively with foster carers or children's home workers, the local authority that looks after the child and its Virtual School Head.

23. Where a school has concerns about the behaviour or risk of exclusion of a child with additional needs, including a pupil with an EHC plan or a looked after child, it should, in partnership with others (including the local authority as necessary), consider what additional support or alternative placement may be required. This should involve assessing the suitability of provision for a pupil's SEN. Where a pupil has an EHC plan, schools should consider requesting an early annual review or interim / emergency review.

## 2. The headteacher's duty to inform parties about an exclusion

### 2.1 Informing parents about an exclusion

#### A guide to the law<sup>17</sup>

24. Whenever headteachers exclude a pupil they must, without delay, notify parents of the period of the exclusion and the reasons for it.

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

- the reasons for the exclusion;
- the period of a fixed period exclusion or, for a permanent exclusion, the fact that it is permanent;
- the parents' right to make representations about the exclusion to the governing body (in line with the requirements set out in Section 4.1) and how the pupil may be involved in this;
- how any representations should be made; and
- 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.

26. Written notification of the information in paragraph 25 can be provided by: delivering it directly to the parents; leaving it at their last known address; or by posting it to this address.

27. Where an excluded pupil is of compulsory school age the headteacher must also notify the pupil's parents of the days on which they must ensure that the pupil is not present in a public place at any time during school hours. These days would be the first five school days of an exclusion (or until the start date of any alternative provision where this is earlier). Parents who fail to comply with this duty without reasonable justification commit an offence and may be given a fixed penalty notice or prosecuted<sup>18</sup>. The headteacher must notify the parents of the days on which their duty applies without delay and, at the latest, by the end of the afternoon session.

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<sup>17</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>18</sup> Sections 103 to 105 Education and Inspections Act 2006 and the Education (Provision of Full-Time Education for Excluded Pupils) (England) Regulations 2007.

28. If alternative provision is being arranged then the following information must be included with this notice where it can reasonably be found out within the timescale:

- the start date for any full-time educational provision that has been arranged for the pupil during the exclusion;
- the start and finish times of any such provision, including the times for morning and afternoon sessions where relevant;
- the address at which the provision will take place; and
- any information required by the pupil to identify the person that he / she should report to on the first day.

29. Where this information on alternative provision is not reasonably ascertainable by the end of the afternoon session it may be provided in a subsequent notice, but it must be provided without delay and no later than 48 hours before the provision is due to start. The only exception to this is where alternative provision is to be provided before the sixth day of an exclusion, in which case the information can be provided with less than 48 hours' notice with parents' consent.

30. The information in paragraphs 28 and 29 must be provided in writing but can be given to parents by any effective method (paragraph 33 provides guidance on this issue). It may, but does not have to, be combined with the information in paragraph 28, where this complies with the legal time limits.

31. The failure of a headteacher to give notice of any required information by the required time does not relieve the head of the duty to serve the notice. A notice is not made invalid solely because it has not been given by the required time.

## **Statutory guidance to headteachers on informing parents about an exclusion**

32. When notifying parents about an exclusion, the headteacher should set out what arrangements have been made to enable the pupil to continue his / her education prior to the start of any alternative provision or the pupil's return to school, in line with the legal requirements and guidance in section 3.

33. For notifications under paragraphs 27 and 28, effective methods for providing the information may include: email or text message; giving the notice directly to the parents; or sending the information home with the excluded pupil. Where information is sent home with a pupil, headteachers should consider sending a duplicate copy by an alternative method or confirming that the information has been received.

34. When notifying parents about an exclusion headteachers should draw attention to relevant sources of free and impartial information. Schools should ensure that these sources of information are checked regularly and updated as required. This information should include:

- a link to this statutory guidance on exclusions ([www.gov.uk/government/publications/school-exclusion](http://www.gov.uk/government/publications/school-exclusion));
- a link to the Coram Children’s Legal Centre ([www.childrenslegalcentre.com](http://www.childrenslegalcentre.com)), 08088 020 008; and
- where considered relevant by the headteacher, links to other information, advice and support services, such as Traveller Education Services or the local parent partnership ([www.iassnetwork.org.uk](http://www.iassnetwork.org.uk)).

35. Headteachers should ensure that information provided to parents is clear and easily understood. Where the parents’ first language is not English, consideration should be given, where practicable, to translating the letter or taking additional steps to ensure that the details of the exclusion and parents’ right to make representations to the governing body have been understood.

## 2.2 Informing the governing body and local authority about an exclusion

### A guide to the law<sup>19</sup>

36. The headteacher must, without delay, notify the governing body and the local authority of:

- a permanent exclusion (including where a fixed period exclusion is followed by a decision to permanently exclude the pupil);
- exclusions which would result in the pupil being excluded for more than five school days (or more than ten lunchtimes) in a term<sup>20</sup>; and
- exclusions which would result in the pupil missing a public examination or national curriculum test.

37. For a permanent exclusion, if the pupil lives outside the local authority in which the school is located, the headteacher must also advise the pupil’s “home authority” of the exclusion without delay.

38. For all other exclusions the headteacher must notify the local authority and governing body once a term.

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<sup>19</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>20</sup> Where a school’s academic year consists of three terms or fewer, ‘term’ in this guidance means one of those terms. Where a school’s academic year consists of more than three terms, then a reference to ‘term’ means the period falling between: 31 December to Easter Monday; Easter Monday to 31 July; or 31 July to 31 December.

39. Notifications must include the reasons for the exclusion and the duration of any fixed period exclusion.

40. In addition, within 14 days of a request, governing bodies must provide to the Secretary of State and (in the case of maintained schools and PRUs) the local authority information about any exclusions within the last 12 months<sup>21</sup>.

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<sup>21</sup> As set out in the Education (Information About Individual Pupils) (England) Regulations 2013.

### 3. The governing body's and local authority's duties to arrange education for excluded pupils

#### A guide to the law<sup>22</sup>

41. For a fixed period exclusion of more than five school days, the governing body (or local authority in relation to a pupil excluded from a pupil referral unit) must arrange suitable full-time education for any pupil of compulsory school age. This provision must begin no later than the sixth school day of the exclusion. Where a child receives consecutive fixed period exclusions, these are regarded as a cumulative period of absence for the purposes of this duty. This means that if a child has more than five consecutive days of exclusion, then education must be arranged for the sixth school day of exclusion regardless of whether this is as a result of more than one fixed period exclusion<sup>23</sup>.

42. For permanent exclusions, the local authority must arrange suitable full-time education for the pupil to begin no later than the sixth day of the exclusion. This will be the pupil's "home authority" in cases where the school is maintained by (or located within) a different local authority.

43. In addition, where a pupil has an Education, Health and Care Plan (EHC plan), the local authority must ensure that an appropriate full-time<sup>24</sup> placement is identified in consultation with the parents, who retain their rights to express a preference for a school that they wish their child to attend or make representations for a placement in any other school<sup>25</sup>.

44. Local authorities must have regard to the relevant statutory guidance when arranging the education of looked after children<sup>26</sup>.

45. Provision does not have to be arranged by either the school or local authority for pupils who are in the final year of compulsory education and do not have any further public examinations to sit.

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<sup>22</sup> Section 100 and 101 of the Education and Inspections Act 2006, section 19 of the Education Act 1996 and the Education (Provision of Full-Time Education for Excluded Pupils) (England) Regulations 2007.

<sup>23</sup> This requirement is clarified by the Education (Provision of Full-Time Education for Excluded Pupils) (England) (Amendment) Regulations 2014.

<sup>24</sup> The placement should be full-time unless the pupil's EHC plan indicates that the maximum number of hours' education per week should be less.

<sup>25</sup> Schedule 27 of the Education Act 1996.

<sup>26</sup> Latest guidance provided at [www.GOV.UK](http://www.GOV.UK).

## **Statutory guidance on the education of pupils prior to the sixth day of an exclusion**

46. It is important for schools to help minimise the disruption that exclusion can cause to an excluded pupil's education. Whilst the statutory duty on governing bodies or local authorities is to provide full-time education from the sixth day of an exclusion, there is an obvious benefit in starting this provision as soon as possible. In particular, in the case of a looked after child, schools and local authorities should work together to arrange alternative provision from the first day following the exclusion.

47. Where it is not possible, or appropriate, to arrange alternative provision during the first five school days of an exclusion, schools should take reasonable steps to set and mark work for pupils. Work that is provided should be accessible and achievable by pupils outside school.



## 4. The governing body's duty to consider an exclusion

### 4.1 The requirements on a governing body to consider an exclusion

#### A guide to the law<sup>27</sup>

48. The governing body has a duty to consider parents' representations about an exclusion. The requirements on a governing body to consider an exclusion depend upon a number of factors (a diagram illustrating these requirements is provided in Section 11).

49. The governing body of a maintained school may delegate their functions with respect to the consideration of an exclusion decision to a designated committee consisting of at least three governors<sup>28</sup>.

50. Within 15 school days of receiving notice of the exclusion, the governing body must consider whether an excluded pupil should be reinstated in the case of:

- all permanent exclusions;
- all fixed period exclusions of pupils who have been excluded for more than 15 school days in the term<sup>29</sup>, or who will have been as a result of the exclusion; and
- all fixed period exclusions that would result in a pupil missing a public examination or national curriculum test.

51. Where an exclusion would result in a pupil missing a public examination or national curriculum test there is a further requirement for the governing body, so far as is reasonably practicable, to consider the exclusion before the date of the examination or test. If this is not practicable, the chair of governors may consider the exclusion independently and decide whether or not to reinstate the pupil<sup>30</sup>. In such cases parents still have the right to make representations to the governing body and must be made aware of this right.

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<sup>27</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, as well as the School Governance (Roles, Procedures and Allowances) (England) Regulations 2013.

<sup>28</sup> Academies must have robust systems of governance in place to ensure that the process for considering the exclusion decision is lawful, reasonable and a fair procedure is followed.

<sup>29</sup> Where a school's academic year consists of three terms or fewer, 'term' in this guidance means one of those terms. Where a school's academic year consists of more than three terms, then a reference to 'term' means the period falling between: 31 December to Easter Monday; Easter Monday to 31 July; or 31 July to 31 December.

<sup>30</sup> Where the chair is unable to make this consideration then the vice-chair may do so instead.

52. For all other fixed period exclusions where a pupil would be excluded for more than five school days in the term and their parents have made representations, the governing body 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 excluded child's parents, the governing body is not required to meet and cannot direct the reinstatement of the pupil.

53. Where a fixed period exclusion would not bring a pupil's total number of days of exclusion to more than five in the term, the governing body must consider any representations made by parents, but it cannot direct reinstatement and is not required to meet the parents.

### **Statutory guidance to governing bodies on exclusions that would result in a pupil missing a public examination or national curriculum test**

54. Whilst there is no legal imperative to allow an excluded pupil to return to school in order to take a public examination or test, the governing body should consider whether it would be appropriate to exercise discretion and allow the excluded pupil back on school premises for this purpose.

## **4.2 The process for considering the reinstatement of an excluded pupil**

### **A guide to the law<sup>31</sup>**

55. Where the governing body is legally required to consider the reinstatement of a pupil the following parties must be invited to a meeting of the governing body and allowed to make representations:

- parents (and, where requested, a representative or friend);
- the headteacher; and
- a representative of the local authority (in the case of a maintained school or PRU)<sup>32</sup>.

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<sup>31</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>32</sup> Parents may invite a representative of the local authority to attend a meeting of an academy's governing body as an observer; that representative may only make representations with the governing body's consent.

56. The governing body must take reasonable steps to arrange the meeting for a date and time that is convenient to all parties, but in compliance with the relevant statutory time limits set out above. However, its decision will not be invalid simply on the grounds that it was not made within these time limits.

57. When arranging the meeting the governing body must also have regard to its duty to make reasonable adjustments for people who use the school and consider what reasonable adjustments should be made to support the attendance and contribution of parties at the meeting (for example where a parent or pupil has a disability in relation to mobility or communication that impacts upon his / her ability to attend the meeting or to make representations).

58. In deciding whether to reinstate the pupil, the governing body must consider not only the representations made but also the interests and circumstances of the excluded pupil, including the circumstances in which the pupil was excluded. It must also have regard to the interests of other pupils and people working at the school.

59. When establishing the facts in relation to an exclusion the governing body must apply the civil standard of proof and not the criminal standard of “beyond reasonable doubt”. This means that if something is more likely than not to have occurred (“on the balance of probabilities”) then the standard is met. In the light of its consideration, the governing body can either:

- uphold an exclusion; or
- direct reinstatement of the pupil immediately or on a particular date.

60. Where reinstatement is not practicable because, for example, the pupil has already returned to school following the expiry of a fixed period exclusion or the parents make clear they do not want their child reinstated, the governing body must, in any event, consider whether the headteacher's decision to exclude the child was justified based on the evidence.

### **Statutory guidance to governing bodies in preparing for the consideration of an exclusion decision**

61. The governing body's consideration should only be delayed where there are exceptional circumstances that prevent it from considering the exclusion within the statutory time limits. In these circumstances, the consideration should take place as soon as is practicable.

62. When arranging a meeting to consider the reinstatement of the excluded pupil, the governing body should:

- not discuss the exclusion with any party outside the meeting;

- ask for any written evidence in advance of the meeting (including witness statements and other relevant information held by the school, such as those relating to a pupil's SEN);
- where possible, circulate any written evidence and information, including a list of those who will be present, to all parties at least five school days in advance of the meeting;
- allow parents and pupils to be accompanied by a friend or representative (where a pupil under 18 is to be invited as a witness, the governing body should first seek parental consent and invite the parents to accompany their child to the meeting);
- identify the steps it will take to enable and encourage the excluded pupil to attend the meeting and speak on his / her own behalf (such as providing accessible information or allowing them to bring a friend), taking into account the pupil's age and understanding<sup>33</sup>; or how the excluded pupil may feed in his / her views by other means if attending the exclusion meeting is not possible.

## **Statutory guidance to governing bodies on the consideration of an exclusion decision**

63. The governing body should identify the steps it will take to ensure all parties will be supported to participate in its 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 body.

64. The governing body should ensure that clear minutes are taken of the meeting as a record of the evidence that was considered by governing body. These minutes should be made available to all parties on request.

65. The governing body should ask all parties to withdraw before making a decision. Where present, a clerk may stay to help the governing body by reference to his / her notes of the meeting and assist with the drafting of the decision letter.

66. 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 headteacher's legal duties and the evidence that was presented to the governing body in relation to the decision to exclude.

67. The governing body should note the outcome of its consideration on the pupil's educational record, along with copies of relevant papers for future reference.

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<sup>33</sup> Under section 176 of the Education Act 2002 maintained schools and local authorities must have regard to statutory guidance on listening to and involving children and young people.

68. In cases where the governing body considers parents' representations but does not have the power to direct a pupil's reinstatement, it should consider whether it would be appropriate to place a note of its findings on the pupil's educational record.

69. Claims of discrimination to the First-tier Tribunal or County Court can be made up to six months after the discrimination is alleged to have occurred. Where practicable, schools should retain records and evidence relating to an exclusion for at least six months in case such a claim is made.

### **Statutory guidance to local authorities on their participation in the governing body's consideration of an exclusion**

70. Where a local authority makes representations to the governing body about an exclusion it should act impartially and fairly. Care should be taken to avoid any perception that its role is to act on behalf of the school or the parents. The local authority's role is to provide evidence or advice on wider relevant issues; for example, it can provide advice on the use of exclusion by other schools that could inform a governing body's consideration of the handling of a particular case and whether the decision to exclude was reasonable. The local authority's role is not to prevent the lawful, reasonable and fair use of exclusion by a school.

71. The local authority's attendance would also support any future responsibility it may have to arrange suitable education for an excluded pupil, as well as its wider role in relation to education within the area. This would be particularly relevant where a local authority is attending as an observer but not making representations to the governing body.

## **4.3 Notifying people of the governing body's decision**

### **A guide to the law<sup>34</sup>**

72. Where legally required to consider an exclusion decision, the governing body must notify parents, the headteacher 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 from the one in which the school is located, the governing body must also inform the pupil's "home authority".

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<sup>34</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

73. In the case of a permanent exclusion where the governing body decide not to reinstate the pupil, the governing body's notification must also include the information below:

- that the exclusion is permanent;
- the parents' right to ask for the decision to be reviewed by an independent review panel and the following information:
  - the date by which an application for a review must be received (i.e. 15 school days from the date on which notice in writing of the governing body's decision was given to parents – see paragraph 75);
  - where and to whom an application for a review (and any written evidence) should be submitted;
  - that any application should set out the grounds on which it is being made;
  - that, regardless of whether the excluded pupil has recognised special educational needs, parents have a right to require the local authority / academy trust to appoint an SEN expert to attend the review;
  - details of the role of the SEN expert;
  - that parents must make clear if they wish a SEN expert to be appointed in any application for a review; and
  - that parents may, at their own expense, appoint someone to make written and / or oral representations to the panel and that parents may also bring a friend to the review.
- That, in addition to the right to apply for an independent review panel, if parents believe that the exclusion has occurred as a result of discrimination 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.
- That a claim alleging discrimination under the Equality Act 2010 should be lodged within six months of the date on which the discrimination is alleged to have taken place, e.g. the day on which the pupil was excluded.

74. The governing body may provide the information in paragraphs 72 and 73 by: delivering it directly to parents; leaving it at their last known address; or by sending it by first-class post to this address.

75. Notice is deemed to have been given on the same day if it is delivered directly or on the second working day after posting by first class mail.

### **Statutory guidance to governing bodies on providing information to parents following its consideration of an exclusion**

76. The governing body should set out the reasons for its decision in sufficient detail to enable all parties to understand why the decision was made.

77. Where relevant, it will be for schools to confirm the details of where the parents' application for an independent review panel should be sent. This is normally to the clerk of the independent review panel.

78. Parents should be informed that, if they believe it to be appropriate, they should include a reference about how they consider their child's special educational to be relevant to the exclusion.

79. In providing details of the role of the SEN expert, the governing body should refer to the statutory guidance provided to SEN experts in paragraphs 161 to 164 and clarify that there would be no cost to parents for this appointment.

80. Where the governing body decides to uphold an exclusion it should draw the attention of parents to relevant sources of free and impartial information that will allow them to make an informed decision on whether to seek a review of the decision and the process to be followed. Schools should ensure that these sources of information are checked regularly and updated as required. This information should be included in the letter notifying parents of a decision to uphold an exclusion and should include:

- a link to this statutory guidance on exclusions ([www.gov.uk/government/publications/school-exclusion](http://www.gov.uk/government/publications/school-exclusion));
- a link to guidance on making a claim of discrimination to the First-tier Tribunal ([www.justice.gov.uk/tribunals/send/appeals](http://www.justice.gov.uk/tribunals/send/appeals));
- a link to the Coram Children's Legal Centre ([www.childrenslegalcentre.com](http://www.childrenslegalcentre.com)), 08088 020 008; and
- where considered relevant by the governing body, links to other information, advice and support services, such as Traveller Education Services or the local parent partnership ([www.iasnetwork.org.uk](http://www.iasnetwork.org.uk)).

## 5. The headteacher's duty to remove a permanently excluded pupil's name from the school register

### A guide to the law<sup>35</sup>

81. The headteacher must remove a pupil from the school admission register if:
- 15 school days have passed since the parents were notified of the governing body's decision to uphold a permanent exclusion and no application has been made for an independent review panel; or
  - the parents have stated in writing that they will not be applying for an independent review panel.
82. Where an application for an independent review panel has been made within 15 school days, the headteacher must wait until the review has been determined, or abandoned, before removing a pupil's name from the register.
83. Where a pupil's name is to be deleted from the school admission register because of a permanent exclusion the school must make a return to the local authority. The return must give the full name of the pupil, the address of any parents with whom the pupil normally resides and the ground upon which their name is to be deleted from the admission register (i.e. permanent exclusion). This return must be made as soon as the ground for deletion is met and no later than the deletion of the pupil's name.
84. Where a pupil's name is removed from the school's admission register and a discrimination claim is subsequently made, the First-tier Tribunal or County Court has the power to direct that the pupil should be reinstated.

### Statutory guidance to schools on marking attendance registers following exclusion

85. Whilst an excluded pupil's name remains on a school's admission register, the pupil should be marked on the attendance register using the appropriate code. Where alternative provision has been made that meets the requirements of the pupil registration regulations, and the pupil attends it, an appropriate attendance code, such as Code B (Education Off-site) or Code D (Dual Registration), should be used. Pupils not attending alternative provision should be marked absent using Code E<sup>36</sup>.

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<sup>35</sup> The Education (Pupil Registration)(England) Regulations 2006.

<sup>36</sup> Additional information can be found in departmental advice on attendance for maintained schools, academies, independent schools and local authorities ([www.GOV.UK](http://www.GOV.UK)).



## 6. The local authority's / academy trust's duty to arrange an independent review panel

### 6.1 Arranging a date and venue

#### A guide to the law<sup>37</sup>

86. If parents apply for an independent review panel within the legal time frame, the local authority or (in the case of an academy) the academy trust must arrange for one at its own expense in order to review the decision of a governing body not to reinstate a permanently excluded pupil.

87. The legal time frame for an application is:

- within 15 school days of notice being given to the parents by the governing body of its decision to uphold a permanent exclusion (in accordance with the requirements in section 4.3); or
- if an application has not been made within this time frame, within 15 school days of the final determination of a claim made under the Equality Act 2010 alleging that the exclusion amounts to unlawful discrimination<sup>38</sup>.

88. Any application made outside the legal time frame must be rejected by the local authority / academy trust.

89. The local authority / academy trust must not delay or postpone arranging an independent review panel if parents also make a claim of discrimination in relation to the exclusion to the First-tier Tribunal (Special Educational Needs and Disability) or the County Court<sup>39</sup>.

90. Parents may request an independent review panel even if they did not make representations to, or attend, the meeting at which the governing body considered the exclusion.

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<sup>37</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>38</sup> The First-tier Tribunal (Special Educational Needs and Disability) and County Court have the jurisdiction to hear claims of discrimination relating to exclusions under the Equality Act 2010.

<sup>39</sup> In such circumstances, the Tribunal or Court may decide to delay their consideration until after the independent review panel process has been completed.

91. The local authority / academy trust must take reasonable steps to identify a date for the review that all parties, and any SEN expert appointed, are able to attend. However, the review must begin within 15 school days of the date on which the local authority / academy trust received the parent's application for a review (panels have the power to adjourn a hearing if required).

92. When arranging a venue for the review the local authority / academy trust must have regard to its duties under the Equality Act 2010 and consider what reasonable adjustments should be made to support the attendance and contribution of parties at the review (for example where a parent or pupil has a disability in relation to mobility or communication that impacts upon his / her ability to attend the meeting or to make representations).

93. The hearing must be in private unless the local authority / academy trust directs otherwise.

94. Where the issues raised by two or more applications for review are the same, or connected, the panel may combine the reviews if, after consultation with all parties, there are no objections.

### **Statutory guidance to local authorities and academy trusts on arranging a date and venue for a review**

95. Local authorities / academy trusts should take reasonable steps to ensure the venue for the review is appropriate and accessible to all parties<sup>40</sup>. Separate provision should be made for the panel and SEN expert to wait independently from the other parties. Where practicable, further consideration should be given to providing separate waiting areas for the school and parents.

96. Where the issues raised by two or more applications for review are the same, or connected, but the panel does not combine the reviews then the local authority / academy trust should take reasonable steps to ensure fairness and consistency of approach.

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<sup>40</sup> This is in addition to any legal duty to make reasonable adjustments.

## 6.2 Appointing panel members

### A guide to the law<sup>41</sup>

97. The local authority / academy trust must constitute the panel with either three or five members (as decided by the local authority / academy trust) representing each of the three categories below. A five-member panel must be constituted with two members from each of the categories of school governors and headteachers<sup>42</sup>.

- A lay member to chair the panel who has not worked in any school in a paid capacity, disregarding any experience as a school governor or volunteer.
- School governors who have served as a governor for at least 12 consecutive months in the last five years, provided they have not been teachers or headteachers during this time.
- Headteachers or individuals who have been a headteacher within the last five years.

98. Individuals may not serve as a member of a review panel if they:

- are a member / director of the local authority / academy trust or governing body of the excluding school;
- are the headteacher of the excluding school or anyone who has held this position in the last five years;
- are an employee of the local authority / academy trust or the governing body of the excluding school (unless they are employed as a headteacher at another school);
- have, or at any time have had, any connection with the local authority / academy trust, school, parents or pupil, or the incident leading to the exclusion, that might reasonably be taken to cast doubts on their ability to act with impartiality (although individuals must not be assumed to be impartial simply because they are a headteacher at another school); or
- have not had the required training within the last two years (see section 6.4).

99. In relation to panel members appointed by local authorities, sections 173(4) and 174(1) of Local Government Act 1972 apply when determining allowances for financial loss, travel or subsistence. It is for academy trusts to determine their own payment arrangements for panel members.

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<sup>41</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>42</sup> Headteachers and governors of maintained schools, PRUs and academies are eligible to be members of independent review panels considering an exclusion from any type of school covered by this guidance.

100. The local authority / academy trust must make arrangements to indemnify panel members against any legal costs and expenses reasonably incurred as a result of any decisions or actions connected to the review that are taken in good faith.

## **Statutory guidance to local authorities and academy trusts on appointing independent review panel members**

101. Every care should be taken to avoid bias or an appearance of bias. The local authority / academy trust should request that prospective panel members declare any conflict of interest at the earliest opportunity.

102. Where possible, panel members who are governors or headteachers should reflect the phase of education (primary / secondary) and type of school from which the pupil was excluded, for example: special school; boarding school; PRU; academy or maintained school.

103. The local authority / academy trust should consider whether the chair should be someone with a legal qualification or who has other legal experience. This is particularly important where a clerk will not be providing legal expertise to the panel.

104. In order to meet their duties within the statutory time frame, local authorities / academy trusts should identify a number of eligible individuals in each of the different categories required to constitute an independent review panel in advance of an application for a review.

## **6.3 Appointing a clerk and the clerk's role**

### **A guide to the law<sup>43</sup>**

105. The local authority / academy trust may appoint a clerk to provide advice to the panel and the parties to the review on procedure, law and statutory guidance on exclusions.

106. Where appointed the clerk must perform the following additional functions:

- make reasonable efforts to inform the following people that they are entitled to: make written representations to the panel; attend the hearing; and make oral

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<sup>43</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

representations to the panel; be represented; and (in the case of the parents), to bring a friend:

- the parents;
  - the headteacher<sup>44</sup>;
  - the governing body; and
  - the local authority (in the case of a maintained school or pupil referral unit)<sup>45</sup>.
- Make reasonable efforts to circulate to all parties, including panel members and the SEN expert, copies of relevant papers at least five school days in advance of the review. These papers must include:
    - the governing body's decision;
    - the parents' application for a review; and
    - any policies or documents that the governing body was required to have regard to in making its decision.
  - Give all parties details of those attending and their role.
  - Attend the review and ensure that minutes are produced in accordance with instructions from the panel.

107. Where a clerk is not appointed or present, the functions in paragraph 106 become the responsibility of the local authority / academy trust.

### **Statutory guidance to local authorities on appointing an independent review panel clerk**

108. The clerk should not have served as clerk to the governing body meeting.

109. In addition to the training required by law, clerks should have an up-to-date understanding of developments in case law, legislation and guidance that are relevant to exclusion.

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<sup>44</sup> Where an excluding headteacher has left the school, the panel may use its discretion in deciding whether also to invite this person to make representations.

<sup>45</sup> Parents may invite a representative of the local authority to attend a panel arranged by an academy trust as an observer. Any such representative may only make any representations with the academy trust's consent. This includes circumstances where the academy trust has arranged for the panel to be delivered by the local authority.

110. Where a clerk is not appointed, the local authority / academy trust should consider what additional steps it may need to take to ensure that the independent review panel is administered properly.

### **Statutory guidance to the clerk on preparing for an independent review**

111. In order to review the governing body's decision the panel will generally need to hear from those involved in the incident, or incidents, leading to the exclusion. The clerk should identify in advance of the meeting 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 he / she may feed in views through a representative or by submitting a written statement.

112. 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.

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

114. Where character witnesses are proposed the clerk should seek the agreement of the panel, but this should be allowed unless there is good reason not to do so.

115. 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 at least be dated and labelled in a way that allows it to be distinguished from other statements. The general principles of fairness and transparency mean that excluded pupils are entitled to know the reason for their exclusion and the evidence that led to the exclusion.

116. Parties attending the hearing have the right to be represented. Representatives may make written or oral representations to the panel. If any of the parties wish to bring more than one friend or representative, the clerk should seek the panel's agreement in advance, having regard to a reasonable limit on numbers attending the review. All parents may attend and each can make representations and be represented.

117. In addition to written witness statements, the clerk should request written evidence from the school in order to circulate it in advance of the meeting. Such evidence should include school policies and documents that the governing body would reasonably have been expected to take into account in reaching its decision on the exclusion.

118. Where the school's case rests largely or solely on physical evidence and the facts are in dispute then the physical evidence, if practicable, should be retained and made available to the panel. Where there are difficulties in retaining physical evidence, photographs or signed witness statements should be used.

119. The clerk should notify the panel if requested documents have not been provided so that the panel can take a decision on whether to adjourn the hearing to allow for the documents to be provided.

## **6.4 Ensuring that panel members and clerks are trained**

### **A guide to the law<sup>46</sup>**

120. The local authority / academy trust must ensure that all panel members and clerks have received sufficient training within the two years prior to the date of the review to know and understand:

- the requirements of the primary legislation, regulations and statutory guidance governing exclusions (which would include an understanding of how the principles applicable in an application for judicial review relate to the panel's decision making);
- the need for the panel to observe procedural fairness and the rules of natural justice;
- the roles of the chair of a review panel and the clerk;
- the relevant duties of headteachers, governing bodies and the panel under the Equality Act 2010; and
- the effect of section 6 of the Human Rights Act 1998 (acts of public authorities unlawful if not compatible with certain human rights) and the need to act in a manner compatible with human rights protected by that Act.

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<sup>46</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

## 6.5 Appointing an SEN expert

### A guide to the law<sup>47</sup>

121. If requested by parents in their application for an independent review panel, the local authority / academy trust must appoint a SEN expert to attend the panel and cover the associated costs of this appointment<sup>48</sup>.

122. The local authority / academy trust must make arrangements to indemnify the SEN expert against any legal costs and expenses reasonably incurred as a result of any decisions or actions connected to the review that are taken in good faith.

123. Parents have a right to request the attendance of a SEN expert at a review, regardless of whether the school recognises that their child has SEN.

124. Individuals may not be appointed as a SEN expert if they have, or at any time have had, any connection with the local authority, academy trust, school, parents or pupil, or the incident leading to the exclusion, which might reasonably be taken to cast doubts about their ability to act impartially. However, an individual should not be assumed to have such a connection simply by virtue of the fact that he / she is an employee of the local authority / academy trust.

### Statutory guidance to local authorities and academy trusts on appointing a SEN expert

125. The SEN expert should be a professional with first-hand experience of the assessment and support of SEN, as well as an understanding of the legal requirements on schools in relation to SEN and disability. Examples of suitable individuals might include educational psychologists; specialist SEN teachers; special educational needs coordinators (SENCOs); and behaviour support teachers. Recently retired individuals are not precluded from fulfilling this role, though the local authority / academy trust would need to assure themselves that the individual had a good understanding of current practice and the legal requirements on schools in relation to SEN.

126. Whilst individuals are not automatically assumed to be partial simply because they are an employee of, or contracted by, a local authority or academy trust, they should not have had any previous involvement in the assessment or support of SEN for the

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<sup>47</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

<sup>48</sup> Statutory guidance to SEN experts on their role is set out in paragraphs 161 to 164.



excluded pupil or siblings of the excluded pupil. The local authority / academy trust should request that prospective SEN experts declare any conflict of interest at the earliest opportunity.

127. The final decision on the appointment of a SEN expert is for the local authority / academy trust to make but it should take reasonable steps to ensure that parents have confidence in the process and the impartiality and capability of the SEN expert. Where practicable, this may include offering parents a choice of SEN expert. In order to meet its duties within the statutory time frame, the local authority / academy trust should consider maintaining a list of individuals capable of performing the role of SEN expert in advance of a request.

128. It is for the local authority / academy trust to determine the amount of any payment in relation to the appointment of the SEN expert, such as financial loss, travel and subsistence allowances.

## 7. The duties of independent review panel members, the clerk and the SEN expert in the conduct of an independent review panel

### A guide to the law<sup>49</sup>

129. Panel members and, if appointed, the SEN expert must declare any known conflict of interest before the start of the review.

130. A review can continue if a member of the panel drops out, so long as it continues to have representation from each of the three categories of members required (see section 6.2). Once a review has begun, no panel member may be substituted by a new member for any reason. Accordingly, if a panel member ceases to attend the review (e.g. through illness) and the panel no longer has the required representation, it must be adjourned until sufficient representation can be restored from the original members. If this is not practicable then a new panel must be constituted to conduct the review afresh.

131. Where a SEN expert has been requested but is not present, the panel should make parents aware of their right to request that the review is adjourned until an SEN expert can attend.

132. The panel may adjourn on more than one occasion, if necessary. However, consideration must be given to the effect of adjournment on the parties to the review, the excluded pupil and any associated victim.

133. The role of the panel is to review the governing body'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.

134. The panel must apply the civil standard of proof not the criminal standard of "beyond reasonable doubt". This means that if something is more likely than not to have occurred ("on the balance of probabilities") then the standard is met.

135. Following its review the panel can decide to:

- uphold the exclusion decision;
- recommend that the governing body reconsiders its decision, or

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<sup>49</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

- quash the decision and direct that the governing body considers the exclusion again.

136. The panel's decision does not have to be unanimous and can be decided by majority vote. In the case of a tied vote, the chair has the casting vote.

137. The independent review panel's decision is binding on the: pupil; parents; governing body; headteacher; local authority; and (in the case of an academy) academy trust.

138. 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 (statutory guidance on this consideration is provided by paragraphs 151 to 156. In deciding whether to quash a decision the panel must take account of the evidence that was available to the governing body at the time it made its decision to uphold the exclusion. This includes any evidence that the panel considers would have been available to the governing body and that it ought to have taken into account if it had been acting reasonably. A panel may use new evidence to decide to quash the governing body's decision if the new evidence shows that the governing body has made a material error, for example by misunderstanding or ignoring a relevant fact, and that error has given rise to unfairness.

139. Otherwise, if the panel is presented with new evidence that it considers the governing body could not reasonably have been expected to be aware of at the time it took its decision to uphold the exclusion, the panel should take it into account when deciding whether to recommend that the governing body reconsiders its decision. The panel must disregard any new reasons for the exclusion that a school attempts to introduce.

140. If an SEN expert is present then the panel must seek and have regard to his / her views as to whether SEN are relevant to the pupil's exclusion.

141. The jurisdiction of the First-tier Tribunal (Special Educational Needs and Disability) and County Court to hear claims of discrimination relating to a permanent exclusion does not preclude an independent review panel from considering any relevant issues of discrimination when reaching its decision.

142. If a panel directs a governing body to reconsider an exclusion then it may order the local authority to make an adjustment to the school's budget or (in the case of an academy) the academy trust to make an equivalent payment to the local authority in which the school is located if the governing body does not offer to reinstate the pupil within 10 school days of receiving notice of the panel's decision (paragraph 158 provides statutory guidance to panels on the only circumstances under which this payment should not be ordered). The sum of this adjustment / payment must be £4,000 and would be in addition to any funding that would normally follow an excluded pupil.

143. The panel does not have the power to order an adjustment or payment in circumstances where it has only recommended that the governing body reconsiders its decision.

144. Following the review, the panel must issue written notification to all parties without delay. This notification must include:

- the panel's decision and the reasons for it;
- where relevant, any order for a financial adjustment / payment to be made if the governing body subsequently decides not to offer to reinstate a pupil; and
- any information that must be recorded on the pupil's educational record to reflect the panel's decision.

145. Where a pupil has been reinstated (or would have been if practicable) or a review panel has quashed a governing body's decision not to reinstate a pupil then the information that must be noted on the pupil's educational record would include that the exclusion will not count towards the rule:

- that an admission authority may refuse to admit a child who has been excluded twice; or
- in the case of a community or voluntary controlled school, that the governing body may appeal against the decision of the local authority as the admission authority to admit the child.

### **Statutory guidance to independent review panel members on the conduct of an independent review panel**

146. The chair should outline the procedure to be followed and explain to all parties that the panel is independent of the school, the local authority and (in the case of an academy) the academy trust.

147. The independent review should be conducted in an accessible and non-adversarial manner. The panel should support all parties to participate in the review and ensure that their views are properly heard. Particular consideration should be given to the support needed by any pupils under 18 who will be participating. Parties should be given the opportunity to respond to any evidence produced, though it is for the chair to determine the most appropriate point in proceedings for this to happen.

148. Where parents are not seeking reinstatement for their child, this fact should be acknowledged by the panel but it should not affect the conduct of the panel or its decision. Recording of the panel's findings on a child's educational record and an acknowledgement by the governing body that it would be appropriate for them to offer to reinstate the pupil are both potential outcomes in these circumstances.

149. It is for the panel to decide whether any witnesses should stay for the rest of the review, but they should not be present before giving evidence. However, the SEN expert should be present for the entire duration of the review, until the point that the panel is ready to make its decision.

150. In the interests of fairness and transparency, care should be taken to ensure that no party, other than the clerk, is present with the panel in the absence of the other parties. This includes the SEN expert. The panel should ask all parties, apart from the clerk, to withdraw before making a decision. The clerk may stay to help the panel by referring to the notes of the meeting and providing advice on the wording of the decision letter.

### **Statutory guidance to independent review panel members on coming to a decision**

151. The panel's decision should not be influenced by any stated intention of the parents or pupil not to return to the school. The focus of the panel's decision is whether there are sufficient grounds for them to direct or recommend that the governing body reconsider its decision to uphold the exclusion.

152. Public law principles underpin good decision-making. All decisions of a governing body must be made having regard to public law principles. Panels are expected to understand the law that is relevant to exclusions and the principles that apply. Headteacher and governing body members are likely to have first-hand experience of the educational context that may be relevant to considerations about whether or not a decision was reasonable and fair in the circumstances.

153. When considering the governing body's decision in light of the principles applicable in an application for judicial review the panel should, in particular, address the following issues.

- Illegality – did the headteacher and / or governing body act outside the scope of their legal powers in taking or upholding the decision to exclude?
- Irrationality – was the decision of the governing body not to reinstate the pupil so unreasonable that no governing body acting reasonably in such circumstances could have made it? Was the decision based on irrelevant information or did it fail to take account of material / relevant information?
- Procedural impropriety – was the process of exclusion and the governing body's consideration so unfair or flawed that justice was clearly not done?

154. 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: bias;

failing to consider relevant facts or evidence; failing to notify parents of their right to make representations; the governing body making a decision without having given parents an opportunity to present the pupil's case or to make other representations; failing to give reasons for a decision; or being a judge in your own cause (for example, if the headteacher who took the decision to exclude was allowed to vote on whether to uphold the exclusion).

155. Where the criteria for quashing a decision have not been met, the panel should consider nonetheless whether it would be appropriate to recommend that the governing body reconsiders its decision not to reinstate the pupil. This should not be the default option, but should be used where the evidence points to this as the appropriate outcome. This could include as a response to new evidence presented at the review hearing that was not reasonably available to the governing body at the time of its decision.

156. In all other cases, the panel should uphold the exclusion.

### **Statutory guidance to independent review panel members on the financial adjustment / payment**

157. In the case of a maintained school or PRU, where a panel has quashed the governing body's decision and directed that the decision to exclude is reconsidered, the panel should order an adjustment to be made to the school's budget, unless the governing body subsequently offers to reinstate the pupil.

158. In the case of an academy, where the panel has quashed the governing body's decision, the panel should order the academy trust to make a payment directly to the local authority in which the academy is located, unless the governing body offers to reinstate the pupil.

159. The only circumstances in which a panel should not order an adjustment / payment is where a school does not have a delegated or separate budget from the local authority from which the adjustment can be made.

160. The panel should order that the adjustment or (in the case of an academy) payment is due automatically if the governing body has not offered to reinstate the excluded pupil within 10 school days of being notified of a direction to reconsider. The panel does not have to reconvene to issue this order.

### **Statutory guidance to SEN experts on their conduct during an independent review panel**

161. The SEN expert's role is analogous to an expert witness, providing impartial specialist advice to the panel on how SEN might be relevant to the exclusion. 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 excluded pupil's SEN.

162. The focus of the SEN expert's advice should be on whether the school's policies that relate to SEN, or the application of these policies in relation to the excluded pupil, were lawful, reasonable and procedurally fair (in line with guidance to panels in paragraphs 151 to 156). If the SEN expert believes that this was not the case he / she should, where possible, advise the panel on the possible contribution that this could have made to the circumstances of the pupil's exclusion.

163. Where the school does not recognise that a pupil has SEN, the SEN expert should advise the panel on whether he / she believes the school acted in a lawful, reasonable 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.

164. The SEN expert should not criticise a school's policies or actions simply because he / she believes a different approach should have been followed or because another school might have taken a different approach.

### **Statutory guidance to local authorities on their participation in an independent review panel**

165. Where a local authority makes representations to the governing body about an exclusion it should act impartially and fairly. Care should be taken to avoid any perception that its role is to act on behalf of the school or the parents. The local authority's role is to provide evidence or advice on wider relevant issues; for example, it can provide advice on the use of exclusion by other schools that could inform a panel's consideration of the handling of a particular case and whether the decision to exclude was reasonable. The local authority's role is not to prevent the lawful, reasonable and fair use of exclusion by a school.

166. The local authority's attendance would also support any future responsibility it may have to arrange suitable alternative education for an excluded pupil, as well as its wider role in relation to education within the area. This would be particularly relevant where a local authority is attending as an observer but not making representations to the governing body.

### **Statutory guidance to the clerk and local authority / academy trust on the record of the proceedings of a review panel**

167. The clerk to a review panel should ensure that minutes of the proceedings are taken, including details of attendance, voting and the decision.

168. The minutes are not public documents but should be retained by the local authority / academy trust for a period of at least five years as they may need to be seen by a court or (in the case of a maintained school) by the Local Government Ombudsman. Local authorities and academy trusts should be aware of their duties under the Freedom of Information Act 2000 and the Data Protection Act 1998 when retaining information.

### **Statutory guidance to the independent review panel and clerk on notifying parties of the outcome of the review**

169. If the panel upholds the permanent exclusion, the clerk should immediately report this to the local authority as well as notifying the parents and governing body. If the pupil lives outside the local authority in which the school is located, the clerk should make sure that the “home authority” is also informed in writing without delay of the outcome of the review. This also applies to any situation where parents withdraw or abandon their application for a review.



## 8. The governing body's duty to reconsider an exclusion decision following a review

### A guide to the law<sup>50</sup>

170. Where the panel directs or recommends that the governing body reconsiders its decision, the governing body must reconvene to do so within 10 school days of being given notice of the panel's decision. Notice is deemed to have been given on the same day if it is delivered directly or on the second working day after posting if it is sent by first class mail.

171. It is important that the governing body reconsiders its decision conscientiously, whether the panel has directed or recommended it to do so. Whilst the governing body may still reach the same conclusion as it first did, it may face challenge in the courts if it refuses to reconsider its original decision without strong justification.

172. Any stated intention that the excluded pupil does not wish to return to the school has no bearing on the duty of the governing body to reconvene and reconsider its decision.

173. It is for the governing body to decide which governors should meet to reconsider its decision. These could be governors involved in the original decision; those not involved in the decision; or a combination of both.

174. If, following a direction to reconsider, the governing body does not offer to reinstate the pupil within 10 school days of being notified of the panel's decision; an adjustment may be made to the school's budget in the sum of £4,000. In the case of an academy, the school would be required to make an equivalent payment directly to the local authority in which the school is located. This payment will be in addition to any funding that would normally follow an excluded pupil (see Section 9). If the governing body offers to reinstate the pupil within the specified timescale but this is declined by the parents, no adjustment or payment should be made.

175. The governing body must comply with any direction of the panel to place a note on the pupil's educational record (see paragraphs 144 to 145).

176. In the case of either a recommended or directed reconsideration, the governing body must notify the following people of its reconsidered decision, and the reasons for it, in writing and without delay:

- the parents;

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<sup>50</sup> Section 51A Education Act 2002 and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

- the headteacher;
- the local authority and, where relevant, the “home authority”.

## **Statutory guidance on the governing body’s duty to reconsider an exclusion decision following a review**

177. It is the responsibility of the governing body to ensure that any decision it makes is lawful, reasonable and fair. The reconsideration provides an opportunity for the governing body to look afresh at its original decision to uphold the exclusion, in light of the findings of the independent review panel.

178. In deciding which governors should participate in the reconsideration, the governing body should take account of whether the individuals will have sufficient understanding of the exclusion process and the particular case to give proper consideration to the decision. Ultimately, it is the governing body as a whole that is accountable for the reconsideration.

179. The decision on whether or not to uphold the exclusion is for the governing body to make, though it should take proper account of the panel’s findings. There is no requirement to seek further representations from other parties or to invite them to the reconsideration meeting. The governing body is not prevented from taking into account other matters that it considers relevant. It should, however, take care to ensure that any additional information does not affect the lawfulness of the decision. This could be the case, for example, where new evidence is presented or information is considered that is irrelevant to the decision at hand.

180. Whether or not a pupil will return to the school should have no bearing on the governing body’s decision whether to uphold the exclusion. The governing body should, therefore, base its reconsideration on the presumption that a pupil will return to the school, regardless of any stated intentions by the parents or pupil. Any decision of a governing body to offer reinstatement, which is subsequently turned down by the parents, should be recorded on the pupil’s educational record.

## 9. The local authority's role in overseeing the transfer of funding following a permanent exclusion

### A guide to the law<sup>51</sup>

181. The local authority cannot require a maintained school or academy to make any additional payments following a permanent exclusion, other than those set out in regulations<sup>52</sup>.

182. Local authorities will be responsible for adjusting the budget shares of maintained schools and PRUs if a pupil is permanently excluded so that funding follows the pupil.

- The local authority must recalculate the excluding school's budget share and reduce it by an amount calculated according to a formula set out in regulations. This also applies to any pupil premium payable in respect of the excluded pupil.
- If the pupil is admitted to another maintained school or PRU ("the admitting school"), the local authority must recalculate the admitting school's budget share and increase it by an amount calculated according to a formula set out in regulations. This also applies to any pupil premium payable in respect of the pupil.
- If the admitting school is maintained by a different local authority from the one that maintains the excluding school, a transfer must also be made between authorities<sup>53</sup>.
- If the pupil is subsequently reinstated at the excluding school, the local authority must also carry out re-calculations according to a formula set out in regulations.

183. A local authority may ask an academy trust to enter into an arrangement for the transfer of funding for pupils who have been permanently excluded on the same basis as if the academy were a maintained school. The academy trust may be obliged under its funding agreement to comply with such a request.

184. If a review panel has ordered a financial adjustment, the local authority will be responsible for further reducing the budget share for the excluding school by a further £4,000. If the excluding school is an academy, the academy trust must pay £4,000 to the local authority in response to an order from an independent review panel.

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<sup>51</sup> Section 47 of the School Standards and Framework Act 1998 and the annual School and Early Years Finance (England) Regulations.

<sup>52</sup> This does not include circumstances where a school has voluntarily entered into a separate legally binding agreement with the local authority.

<sup>53</sup> The requirements for the transfer of funding between local authorities are set out in Section 494 of the Education Act 1996 and the Education (Amount to Follow Permanently Excluded Pupil) Regulations 1999.

185. If a review panel has made a financial adjustment order and the excluded pupil is given a place at another school (“the admitting school”), the local authority may, if it chooses, pass any or all of the amount of the financial adjustment (i.e. up to £4,000) to the admitting school, in addition to any funding that would usually follow the pupil.

### **Statutory guidance to local authorities on overseeing the transfer of funding following a permanent exclusion**

186. The financial adjustment should be made within 28 days of notification of an order from the panel. Academy trusts should be expected to pay the local authority within the same timescale.

187. If an academy trust fails to comply with its legal requirement to pay following an order by an independent review panel then the local authority will be responsible for enforcing this requirement. However, the local authority should also inform the Education Funding Agency.

## **10. Statutory guidance to headteachers, governing bodies, independent review panel members and clerks on police involvement and parallel criminal proceedings**

188. Headteachers need not postpone taking a decision to exclude solely because a police investigation is underway and / or any criminal proceedings may be brought. In such circumstances, headteachers will need to take a decision on the evidence available to them at the time.

189. Where the evidence is limited by a police investigation or criminal proceedings, headteachers should consider any additional steps they may need to take to ensure that the decision to exclude is fair. However, the final decision on whether to exclude is for the headteacher to make.

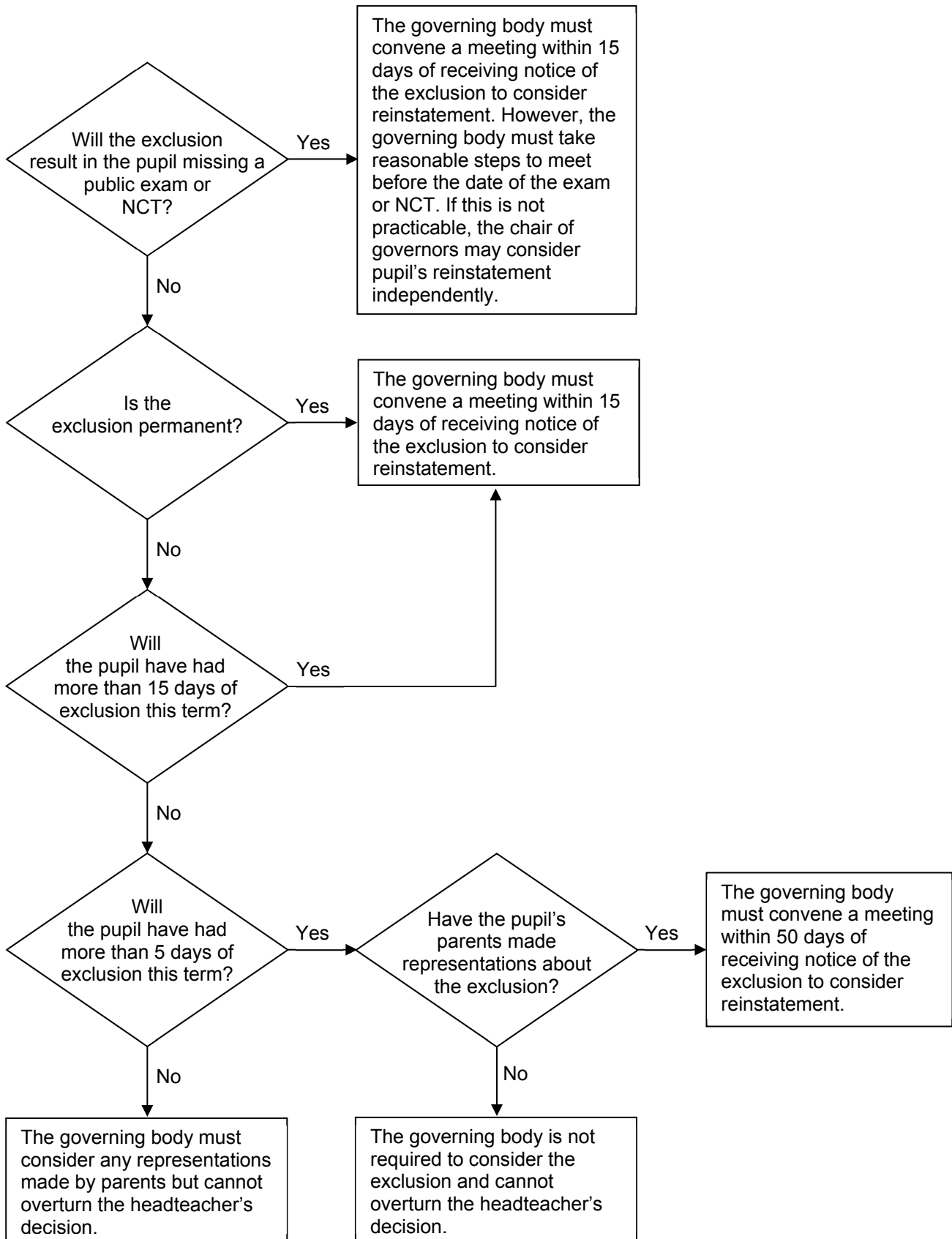
190. Where the governing body is required to consider a headteacher's decision in these circumstances it cannot postpone its meeting and must decide whether or not to reinstate the pupil on the evidence available.

191. The fact that parallel criminal proceedings are in progress should also not directly determine whether an independent review panel should be adjourned. Relevant factors for the panel to consider will include:

- whether any charge has been brought against the pupil and, if so, what the charge is;
- whether relevant witnesses and documents are available;
- the likelihood of delay if the hearing were adjourned and the effect it may have on the excluded pupil, the parents, any victim or the school; and
- whether an adjournment or declining to adjourn might result in injustice.

192. Where a panel decides to adjourn, the clerk (or local authority / academy trust where a clerk is not appointed) will be responsible for monitoring the progress of any police investigation and / or criminal proceedings, as well as for reconvening the panel at the earliest opportunity. If necessary the panel may adjourn more than once (in line with the requirements in paragraph 132).

# 11. A summary of the governing body's duties to review the headteacher's exclusion decision



The governing body may delegate its functions to consider an exclusion to a designated committee. References to days mean 'school days'.



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