

Following a government consultation earlier this year, the Department for Education ('DfE') has now published revised statutory guidance on exclusions for maintained schools, academies and pupil referral units in England. This article explains the key changes and how head teachers and governing boards can ensure that they are prepared to take and review exclusion decisions under the new guidance.

The 2017 guidance takes effect from 1 September 2017. Any pupil who was excluded before this date, and whose exclusion is still subject to review at this point, should be considered under the terms of the September 2012 guidance.

The DfE requires all those involved in exclusion decisions (including head teachers, governing bodies, local authorities, academy trusts, Independent Review Panel ('IRP') members, clerks and special educational needs experts) to have regard to this guidance and to follow it unless they have a good reason not to.

Whilst the legal framework and overall structure of the exclusions process remains unchanged, there has been a fundamental shift in focus, emphasising the important role of governing boards. Schools should ensure that their governing boards receive appropriate training on the framework so that they feel confident when reviewing exclusion decisions - particularly given that it is their decision which will come under scrutiny by an independent panel.

Governing board duty to consider reinstatement

Governing boards have always had a responsibility to review exclusion decisions taken by the head teacher. The current DfE guidance requires them to consider the lawfulness, reasonableness and procedural fairness of the decision in light of the head teacher's duties and to provide a fully reasoned response at the end of the review process. The requirement to undertake that role robustly and issue a clear letter is emphasised under the new guidance. There is a much greater expectation that the exclusion decision to be reviewed at an IRP hearing is the decision of the governing board rather than that of the head teacher. To date, many head teachers have taken the lead role in addressing the IRP and explaining the reasons for the exclusion, with the governor representative often having minimal input. This is set to change with the governor representative being of key importance in an IRP hearing. This means that the governing board decision needs to be legally sound and that they must be able to demonstrate that they took into account the relevant matters and applied the relevant tests before taking a decision to decline to reinstate the pupil.

The revised guidance makes clear that following an IRP decision to direct or recommend reconsideration of an exclusion decision, the governing board's duty is to reconsider reinstatement (paragraph 10). The revised section also includes

much-welcome guidance on the process for this reconsideration element. For example, the proposed guidance is explicit that the reconsideration must be undertaken 'conscientiously' and clarifies that there is no requirement to seek further representations from the other parties or invite them to a meeting.

The guidance relating to the process for any reconsideration of reinstatement is contained in paragraphs 176-180. This includes:

- the need for clear minutes
- the role of any clerk at this stage
- the need to start their reconsideration on the presumption that a pupil will return to the school
- how outcomes should be recorded on the pupil's educational record.

The governing board may still delegate to a smaller sub-committee and in the case of a maintained school this sub-committee must still consist of at least three governors. There is no such requirement for an academy, however they must only delegate as their articles of association allow i.e. with a majority of directors on any board sub-committee or to a local governing body. Multi academy trusts should ensure that whatever is decided is reflected clearly in their scheme of delegation.

Independent Review Panel

It will be the role of the IRP to review the decision of the governing board, rather than the initial decision of the head teacher. As set out in the 2012 guidance, IRPs must always make one of three fundamental decisions (paragraph 155):

- uphold the governing board's decision
- recommend a reconsideration
- quash the decision.

The decision as to whether the IPR hearing should be held in private is now for the local authority/academy trust, and not the IRP.

The proposed guidance also adds that the IRP's decision must not be influenced by any stated intention of the parents or pupil not to return to the school (paragraph 157). Further, IRPs are expected to understand the legislation and legal principles that apply in judging the lawfulness of the governing board's decision not to reinstate.

The guidance now states that Special Educational Needs ('SEN') expert advice can be provided in writing to the IRP or orally or both. This is presumably intended to give panels more flexibility, yet as there is still a right for parents to request the

attendance of a SEN expert at a review, that flexibility is somewhat limited. In addition, if a SEN expert has been requested but is not present, the panel is expected to make the parents aware of their right to request an adjournment. With this in mind, it is unlikely that parents will be content with the SEN expert's submissions to be provided in writing only as this denies them the chance to ask questions of the expert in the hearing.

Notification of exclusions

Parents may now be given an exclusion notice electronically, if they have provided written consent for notice to be sent this way. However ideally notification should be provided in person or by telephone in the first instance to allow for any initial questions or concerns.

Exclusion extensions and conversions

The guidance now clarifies that fixed-period exclusions cannot be extended or 'converted' in to a permanent exclusion (paragraph 3). It may sometimes be appropriate to issue a further fixed-period exclusion or issue a permanent exclusion (both immediately after the original exclusion), though this is limited to exceptional circumstances, usually where new information or evidence has come to light. This is not a change to the current position but the additional narrative seeks to remind schools that where the decision to impose a further fixed-period of exclusion or a permanent exclusion, is a fresh decision and needs to be treated as such in terms of process, with parents informed without delay and a new exclusions notice issued.

Cumulative exclusions

The guidance now confirms that consecutive fixed-period exclusions are regarded as a cumulative period for the purposes of the duties of the governing board (paragraph 45), reflecting the provisions of the 2014 amendment regulations (The Education (Provision of Full-Time Education for Excluded Pupils)(England)(Amendment) Regulations 2014). This means that education must be arranged for any pupil of compulsory school age from the sixth day of exclusion, regardless of whether this is as a result of one fixed period or more.

Additional payments following permanent exclusion

The guidance confirms in clearer terms that a 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 (including the £4,000 budget readjustment where applicable), or which an academy has to make under its funding agreement (paragraph 181). This means that local arrangements which require the payment of sums to the local authority following permanent exclusion,

which are in excess of the statutory maximum, are likely to be invalid unless the school has specifically agreed to make such payments in a binding agreement. This addition may be helpful for schools who have found themselves subject to exclusion 'penalties' from their local authority.

A non-statutory guide for head teachers and parents

New non-statutory guidance for head teachers at Annex B of the guidance is designed to help schools through the process of exclusions and to ensure that they have sufficient procedures in place. Guidance areas include, but are not limited to:

- behavioural policies
- taking the decision to exclude
- informing parents
- governing board review
- post exclusion action.

Although Annex C is a new guide for parents and carers, we would advise schools to also familiarise themselves with the guidance.

Guidance areas include, but are not limited to:

- reasons for exclusion
- independent advice
- receiving education after exclusion
- duties as a parent.

Conclusion

The majority of the changes contained in the revised exclusions guidance are attempts to remove ambiguity and confusion about what can be a relatively complex process, rather than representing fundamental changes to the law or policy.