

The DfE has recently published a new version of the Exclusions Guidance. There are no major changes that will impact on school or LA procedures but it is important for staff and governors to be familiar with the new guidance. I have summarised the changes below for information and have updated the LA guidance and other documents and information available on the Ealing Grid for Learning, as necessary.

## **New DfE Exclusions Guidance from September 2017**

The DfE has published new Exclusions Guidance which will apply to all exclusions imposed from September 2017 (governors' review meetings for any exclusions imposed in the 2016-17 summer term should still be conducted in line with the 2012 guidance).

<https://www.gov.uk/government/publications/school-exclusion>

Whilst there are no major changes in the new guidance, the DfE has sought to clarify a number of points (in relation to the Independent Review Panel and governors reconsidering as a result thereof and

- Has replaced reference to the governing body 'upholding' an exclusion, with their 'declining to reinstate the pupil'.
- Has replaced any reference to 'statement of SEN' with 'EHC (education health care) Plan':

### **Section 3, para 3 & Section 4.1 para 34**

The new guidance states that an exclusion cannot be extended or converted. The DfE says that 'extending' a period of exclusion involves excluding the pupil for a further period on the expiry of the original term. During the consultation period, I did suggest that the proposed wording was still somewhat confusing and in my view remains so but Ealing LA's exclusion 'pending investigation' procedure does still comply with the new guidance. A fixed-term exclusion may be imposed 'pending investigation' and additional days added if required or a permanent exclusion imposed on expiry of or at any time during the period where the pupil is out of school on the fixed-term exclusion 'pending investigation' so long as the pupil does not return to school in between, if additional days are added, the fixed-term exclusion should be recorded as one continuous period.

### **Section 3, para 8**

Civil standard of proof – 'on the balance on probabilities' it is more likely than not that a fact is true, the head teacher should accept that something happened if it is more likely that it happened than that it did not happen.

### **Section 4.1, para 29**

Confirms that parents who fail to comply with the duty to ensure that the pupil is not present in a public place during school hours for days 1-5 of an exclusion, are committing an offence and may be prosecuted or given a fixed penalty notice.

### **Section 8.5, paras 125-130**

The role of the SEN expert: the new guidance clarifies the role of the SEN expert at the Independent Review Panel and the experience/expertise the expert should have.

## **Section 9 – Independent Review Panels**

### **Para 138**

The Independent Review Panel can decide to:

- Uphold the governor's decision
- Recommend that the governors reconsider reinstatement or
- Quash the decision and direct that the governors reconsider reinstatement

#### **Para 142**

Clarifies that not only can the school not introduce new reasons for the exclusion at the Independent Review Panel, there can be no new reasons introduced for the governors' decision not to reinstate the pupil.

#### **Para 143**

The IRP can only take into account any evidence that was available to the governors at the time of their decision not to reinstate – the new guidance clarifies that this would include any evidence that the panel considers would, or should, have been available to the governors and that they ought to have taken into account had they been acting reasonably.

#### **Para 155**

This is a new addition and states: "Where parents are not seeking reinstatement for their child, this fact should be acknowledged by the IRP but it should not affect the conduct of the panel or its decision. Recording of the panel's findings on the child's educational record and an acknowledgement by the governors that it would be appropriate for it to reinstate the pupil are both potential outcomes in these circumstances."

#### **Para 156**

Revises para 141 in the previous guidance, replacing 'must' with 'should': "Where the panel cannot continue because it no longer has representation from each of the 3 categories of members required it should, having regard to the particular circumstances and the effect on the parties, victim, and pupil/parent, adjourn to allow reasonable time for enough missing members to become available".

#### **Para 157**

This is a new addition and states: "The IRP 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 to direct or recommend the governing body to reconsider their decision not to reinstate the pupil".

#### **Para 158**

This is a new addition and states: "All decisions of a governing body must be made in accordance with public law. Panels are expected to understand legislation that is relevant to exclusions and the legal principles that apply. Head teachers and governing board members of panels are likely to have first-hand experience of the education context that may be relevant to considerations about whether or not a decision was reasonable in the circumstances".

#### **Para 159**

Seeks to clarify 'irrationality': "Did the governing body rely on irrelevant points, fail to take account of all relevant points, or make a decision so unreasonable that no governing board acting reasonably in such circumstances could have made it?"

#### **Para 161**

Seeks to clarify circumstances in which a panel may decide to recommend the governors review their decision not to reinstate a pupil. "This should not be the default option but should be used where evidence or procedural flaws have been identified that do not meet the criteria for quashing the decision but which the panel believe justify a reconsideration of the governors' decision. This could include when new evidence presented at the review hearing was not available to the governors at the time of their decision".

### **The governing body's duty to reconsider reinstatement after an Independent Review**

#### **Para 172**

This is a new addition: “It is important that the governing body conscientiously reconsiders whether the pupil should be reinstated, whether the panel has directed or merely 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 reinstate the pupil without strong justification”.

#### **Para 174**

Where a pupil is not reinstated following a direction to reconsider, the exclusion does not count towards the rule that an admission authority may refuse to admit a child who has been permanently excluded twice.

#### **Para 176**

The reconsideration provides an opportunity for the governing board to look afresh at the question of reinstating the pupil, in light of the findings of the independent review panel. There is no requirement to seek further representations from other parties or to invite them to the reconsideration meeting. The governing board 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 make the decision unlawful. This could be the case, for example, where new evidence is presented or information is considered that is irrelevant to the decision at hand.

#### **Para 177**

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

#### **Para 178**

The governing board should ask any parties in attendance to withdraw before making a decision. Where present, a clerk may stay to help the governing board by reference to their notes of the meeting and with the wording of the decision letter.

#### **Para 179**

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

#### **Para 180**

The governing board should base its reconsideration on the presumption that a pupil will return to the school if reinstated, regardless of any stated intentions by the parents or pupil. Any decision of a governing board to offer reinstatement which is subsequently turned down by the parents should be recorded on the pupil's educational record. The governing board's decision should demonstrate how they have addressed the concerns raised by the independent review panel; this should be communicated in plain English for all parties to understand.

The new guidance includes **Annex A**, a flowchart summarising the governing body's duties to review the head teacher's decision to exclude. **Annex B** – exclusion process for head teachers and **Annex C**, a guide for parents/carers. Our feedback in the consultation period was that whilst these are useful, they are not as comprehensive in scope as Ealing Local Authority's own exclusion guidance and the information leaflet we ask schools to provide to parents whenever a pupil is excluded whether for a fixed-term or permanently.