

# Just for Kids Law's response to the Government's Suspension and Permanent Exclusion Guidance Consultation

March 2022

## Question 30

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

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

No, we do not agree with this change in the law. See answer below.

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

The Government has suggested that part of the reasoning behind this revision in paragraph 12 is because exclusion should only be used where it is absolutely necessary and as a last resort. However, sadly in our decades of practice at Just for Kids Law, this is often not the case and there are too many instances where exclusion is not seen or used as a last resort. In these circumstances, the power to end an exclusion after it has begun is in the best interest of the child and can protect against unjust use of school exclusions.

This change does not account for any mistakes that may be made in the exclusion process that would require a headteacher to withdraw a suspension or exclusion. It does not account for new evidence coming to light that might suggest a suspension or exclusion was the wrong decision. If there is an obvious error in the exclusion process, this change removes the ability to correct this decision. The change in paragraph 12 gives schools more power, but at a great detrimental effect to children experiencing exclusion.

In our case work, we have on a number of occasions found that once the headteacher is presented with the statutory guidance and has had an opportunity to reflect on their decision, they have withdrawn their decision. There may be many reasons for this, for example the headteacher becomes aware of their failure to follow proper process and procedure in terms of the exclusion, or of the school's failure to provide the relevant pupil support with their identified or unidentified SEND, or the failure to consider factors contributing to a pupil's behaviour such as a death in the

family, homelessness, abuse, bullying etc. We have had cases where headteachers have withdrawn their decision to permanently exclude after receiving a letter from us highlighting concerns, issues and/or failures. We have even had incidents where headteachers have been urged by the governing body panel before the hearing has started, to review their decision, leading to a withdrawal of the permanent exclusion.

Below are some examples that illustrate this:

*We represented a child who was fixed term excluded and then permanently excluded from the school for "inappropriate behaviour towards another student". We prepared submissions on the young person's behalf and arranged to attend to represent them at the governing body hearing. However, prior to the governing body hearing the headteacher agreed to withdraw the permanent exclusion and offered the child a managed move to another school.*

*We also represented a child who was involved in an incident where two friends were playing. During this time, student X was harmed through no deliberate fault of Y. As a result of the incident, our client, Y was permanently excluded from school. Our client historically had a good behaviour record and there were no concerns about Y's behaviour or that Y was a risk to the education or welfare of others. We contacted the school setting out that Y had not breached the school's behaviour policy and the test for permanent exclusion had not been met. The headteacher agreed to consider a managed move and withdraw the permanent exclusion.*

*Our client aged 8 with emotional and social difficulties had been excluded from school after attending the school for a year as they decided they could not manage her. The school failed to take the child's needs and circumstances into consideration. Our client's Education, Health and Care Plan needed amending, but the local authority refused amendments. However, at Tribunal (telephone hearing), the Tribunal judge accepted the amendments, and the school made an out of court settlement to withdraw the exclusion.*

*Finally, we supported a 15-year-old child who was in year 9 who had been permanently excluded by her headteacher for persistent physical assaults without any further information about the incidents this related to. It was the child's position that she had been assaulted by another student and she did not accept that she had assaulted anyone. The headteacher had failed to properly investigate the incident or take into account any contributing factors such as the fact that the child had been bullied in the school. We prepared submissions for the governing body hearing. The day before the hearing, the headteacher withdrew the permanent exclusion and put in place support for the young person including an education psychologist referral so that the young person could be supported in the school.*

These case studies demonstrate both the many circumstances where a headteacher may need to withdraw an exclusion and how headteachers can often get the decision to exclude wrong.

### Child Criminal Exploitation

Additionally, many children in the youth justice system have been excluded from school at some point with data from the prisons inspectorate showing that more than 8 out of 10 children in custody have been excluded.<sup>1</sup> Evidence from casework at Just for Kids Law shows that a significant proportion of these have been excluded because they have been the victims of child criminal

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<sup>1</sup> Ministry of Justice and HM Inspectorate of Prisons (2018) *HM Chief Inspector of Prisons annual report: 2017 to 2018*)

exploitation (CCE) and groomed into criminal activity, often into “county-lines” drug trafficking, which involves children and young people being used to transport drugs into different parts of the country. Exploitative gang leaders deliberately target children who have been excluded from school and are on the streets. Without the protections mainstream school affords, these children are inevitably more vulnerable.

It is important to note that many children are excluded for behaviour that is linked to their vulnerabilities and exploitation, and in a similar vein, exclusion often acts as a trigger point that pushes these children further into the hands of their exploiters. Information may come to light after a child has been excluded that exclusion has made the child or will likely make the child vulnerable to exploitation. In circumstances such as these, headteachers should have the power to bring an exclusion to an end after it has begun.

It is vital that we do not place children facing adversity at greater risk of harm by excluding them. This draft guidance is a unique opportunity to help break the cycle of exclusion and exploitation by acknowledging that this link exists, the role that schools can play in preventing CCE and by ensuring that greater protections for victims of CCE are set out in the guidance.

#### Governing Boards

We are also concerned that removing the power to withdraw an exclusion would increase the frequency of governing board meetings. Due to the increase in meetings, governing boards may rush through the process of a review and not give adequate regard to each individual case.

The Challenging School Exclusions report by JUSTICE revealed that governors are often not equipped to properly understand their schools’ duties in respect of exclusions and that they lack the knowledge, training and guidance to conduct a procedurally fair hearing.<sup>2</sup> We risk placing more children through the gruelling process of a governing board meeting, when adequate measures are not in place to ensure that governors receive the necessary training to conduct a review fairly and independent from bias.

Paragraph 77 simply lists questions that a headteacher should have regard to, to ensure a process is in place for a governing board when considering reinstatement following a permanent exclusion.

The following are two questions that are included in the list:

- *Do governors understand the suspension and permanent exclusion process to enable a review within deadlines?*
- *Would governors benefit from additional training, including on behaviour management, routines, norms and consequences, disability awareness, the Equality Act 2010, the Children and Families Act 2014 and SEN provision?*

We suggest that these should not simply be questions that a headteacher should consider, but rather the headteacher must ensure that the governing board understand the exclusion process, are adequately trained to participate in the process and have knowledge of relevant legislation and duties. This should be clearly stated in the guidance to ensure that all meetings are fair.

The associated guidance at paragraph 12 should provide greater clarity on this proposed change in law, why it is in place and the safeguards that will be put in place to ensure that permanent

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<sup>2</sup> JUSTICE (2019) *Challenging School Exclusions*, 4.8

exclusions are used as a last resort. If this guidance is amended to reflect this, the correct protections should still be in place to ensure that children are represented at governing board meetings and the correct procedures to review an exclusion are followed.

### Question 32

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

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

Yes. We agree with this change in law and believe it is a positive shift. However, we believe there is also a need for greater oversight from children's social services of children who are excluded from school, given the additional safeguarding needs they may have that often results in behaviour which leads to their exclusion. There needs to be better join up between the education services and children's services within the local authority.

Paragraph 19 from the current behaviour guidance should be incorporated into the draft guidance on school exclusions to highlight the need for join up and referrals within both services:

*'They [schools] should also consider whether continuing disruptive behaviour might be the result of unmet educational or other needs. At this point, the school should consider whether a multiagency assessment is necessary.'*

We welcome the plans announced in the Schools White Paper to create a register for children missing education and the important safeguarding reasons behind creating this, so the local authority is aware that these children are out of education. However, we believe children who are excluded from school are also missing education so should be included in this for the reasons mentioned above. Although the local authority has a duty to find education for children who are excluded from school by the 6<sup>th</sup> day of being excluded, we have had many cases at Just for Kids Law where children's exclusions have taken months and years and the parents do not wish for them to attend a PRU or home school, so they have missed out on their education and the local authority is unaware. We have had another case where a local authority refused to send a 4 year old child to a specialist nursery named by their own special educational needs panel after they were excluded, resulting in nearly a year of being out of education due to delays in the courts whilst we challenged this decision.<sup>3</sup> The local authority should be aware of these children so it has a full accurate picture of who is out of school in its borough, but also so it can investigate any safeguarding issues related to these children.

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

The guidance should provide greater clarity on the role of the social worker and the virtual school head in the process. The guidance should outline what the purpose of the school sharing information is in the process, what weight is to be applied to that information and what they should be considering when preparing what information to share. This is to ensure that the best interest of the child is central to this requirement to inform. Providing the social worker and virtual school

<sup>3</sup> Temple, A (10 February 2021) 'Fighting for the right to go to school: Jack's story' *Just for Kids Law* <https://www.justforkidslaw.org/news/fighting-right-go-school-jacks-story>

head with greater clarity on their role will ensure that the child is able to receive adequate support and care throughout the process.

During the coronavirus pandemic when school attendance was restricted, the department amended the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 to regulate the use of remote meetings for governing board considerations of reinstatement and independent reviews. We are proposing to make these rules a permanent option in any circumstances. This is a measure that would benefit governing boards, parents and pupils and enable schools to meet the statutory timescales sooner for such reviews as set out in the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012.

#### Question 34

**Do you agree with virtual meetings being made a permanent option under any circumstances? If not, please explain why.**

We agree with virtual meetings being made a permanent option. However, the Government should be mindful that remote hearings can often make participation difficult for children. Remote learning has also highlighted issues of digital inequality in the UK. If virtual meetings are to be made a permanent option, the Government need to put in place assistance to ensure that all parents and children have the means and equipment to engage in remote hearings should be that preferred. The guidance should also provide a non-exhaustive list of instances where a remote hearing might be preferred over an in-person hearing. Such instances might include:

- If the child or parents are unable to travel
- The child would find it easier to engage more in the process if held remotely
- It is easier for parents to obtain representation that may not be available within their local area, as there is a real dearth of exclusion lawyers outside of the London area.

**Do you think virtual meetings should be made at the request of the parent only? Please explain why.**

The decision to hold a virtual meeting should lie in the hands of the parent or child only and not in the hands of the school. This is to ensure that those who would find participation difficult have the option to choose in person meetings. If the decision to hold a virtual meeting lies solely in the hands of the parent and not the parent and child, the guidance needs to address the tension that might exist when a parent and child do not agree on the type of meeting that should be held. It is important to recognise pupil voice at this stage of the guidance and instances where a child might benefit from an in-person meeting, and how this might differ from the views of their parent.

#### Question 35

We have sought to provide best practice on the use of managed moves and off-site direction and how they should be used as an early intervention measure for pupils at risk of exclusion. We have set out our expectation of the process and the safeguarding measures that should be put in place for pupils in paragraphs 31-43.

**To what extent is the process outlined clear and suitable for all involved? Please explain why.**

The guidance outlines very little about the process of managed moves within the 3 paragraphs dedicated to it. The process is therefore not outlined clearly. The guidance needs to go further and

set out, for example, when a managed move should be considered, what information should be provided to the family in an accessible way, that the family, including the child, should be given options and what, if any, targets would be set and reviewed and how these targets are decided.

The guidance should also provide greater clarity on the parent's and children's rights and options when a managed move is being considered by the school. The option to move a child to a school the parent has identified should be available. We suggest that an official form should be produced for managed moves that outlines the rights of the child and parent in the process.

Some of our school exclusion campaigners at Just for Kids Law have shared that the process of a managed move and how it works is not fully explained to pupils. They have not always felt involved in the process:

*"We think for some young people managed moves might be the right option. But schools need to be better at explaining how they work and giving people the right help to transition."*

*"Schools should always explain to young people how a managed move works and involve them in the decision about whether they can stay at the new school."*

The draft guidance states: '*managed moves should be voluntary and agreed with all parties involved*'.<sup>4</sup> The Government should therefore provide greater clarity on how schools are to include all parties in the decision of a managed move to ensure consistency across schools and the involvement of pupils. It is important to recognise that although not an exclusion, a managed move has the same effect of removing that child from the school with less oversight. The guidance also needs to state that data must be kept on the managed moves.

For a managed move to be an effective intervention measure, there also needs to be greater clarity on the process for managed moves and how they are to be used by schools. Schools should also help pupils transition effectively from one school to the other. The guidance must therefore put in place a process that can ensure this and protects against managed moves being used in an unlawful manner. This should be a process beyond a school's complaints procedure as this is insufficient. The option to complain to Ofsted and for the school to be found to be inadequate does not safeguard the child or family.

Paragraph 20 and Paragraph 43 refer to parents following a school's complaints procedure if they ever feel as though they are being pressured into electively home educating their child, that the suspension or permanent exclusion procedures have not been followed or believe they are being pressured into a managed move. However, school complaints procedures are often an inadequate tool especially when it pertains to a child who is at risk of exclusion. Governors are often involved in decisions relating to these children which include deciding whether to send them off-site. Therefore, the complaint invariably might be reviewed by someone who has made the decision or supported the headteacher in their decision. School complaints procedures also often take a significant amount of time to conclude and during this time, children miss out on vital education and being in a school setting. To avoid this, the guidance should be amended to mandate that children should be allowed to remain in the school the complaint relates to while the complaints procedure is being followed. This provides for the opportunity to review a child's behaviour throughout the duration of a complaint and remain in the current school if their behaviour

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<sup>4</sup> Department for Education (2022) *Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement: Guidance for maintained schools, academies, and pupil referral units in England*, para 42 [https://consult.education.gov.uk/school-absence-and-exclusions-team/revise-school-behaviour-and-exclusion-guidance/supporting\\_documents/Suspension%20and%20permanent%20exclusion%20guidance.pdf](https://consult.education.gov.uk/school-absence-and-exclusions-team/revise-school-behaviour-and-exclusion-guidance/supporting_documents/Suspension%20and%20permanent%20exclusion%20guidance.pdf)

improves. It is important that the child's needs are met and supported throughout a complaints procedure to ensure that they are not further disadvantaged.

Complaint times can vary depending on the issues being raised and the time it takes the school and the parties to respond at each point. This is not a legal process and there are not strict deadlines as you would have in a court case. A complaint can take a month, several months or years to resolve.

*For example, a child was permanently excluded, and the family challenged the exclusion which was withdrawn by the headteacher. Subsequently, rather than being reintegrated to the school, the child was segregated and sat with a member of staff for approximately 5 months. The child has SEND and an EHC Plan. The family had complained to the school when their child was segregated, and this process was not concluded until some 8 or 9 months later. During this time the child did not receive any adequate education.*

### Question 36

Please describe both the benefits and risks of introducing stricter oversight of pupil movements between education settings, such as a revised statutory framework for all pupil movement between education settings?

We do not agree that managed moves should be a permanent measure. There may be instances where the new school is not a good fit for the pupil, or the managed move fails. In these circumstances, there should be a process, similar to a reintegration process that is robust and assesses and meets the child's needs, that allows for the child to return to their referring school. If this is the case, there must be a system in place which ensures that if a child is sent back to their referring school, the process is fair and can be discussed by all parties. In the Government's recent call for evidence, our school exclusion campaigners expressed that if the school does make a decision that a child should return to their referring school, a meeting must be had between all parties. This meeting should outline the reasons for such a decision and ensure that any return to the child's referring school is in their best interest. If the correct system is not in place, children risk being passed around from school to school, further disrupting their education and reinforcing the belief that they are unwanted.

We have seen many examples of successful managed moves, but also unsuccessful managed moves where the child is left without education despite the original school having a responsibility to provide education. For example, when a managed move has failed, and the original school has refused to allow the child to return to the school until legal action such as judicial review proceedings are threatened. Even where judicial review proceedings are threatened, the school may allow the child to return to the school, only to permanently exclude them.

#### Off-Siting

We are concerned that the process of off-siting is being merged with managed moves where a child can only be moved if they are already attending an off-site provision. While the guidance aims to make the process for managed moves clearer, this current change confuses the process and blurs the line between a managed move and an off-site direction. Off-site directions are often used to improve a child's behaviour<sup>5</sup>, whereas a managed move is intended to give the pupil a fresh start,

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<sup>5</sup> Department for Education, 2013, *Alternative Provision: Statutory guidance for local authorities*, 3 <https://www.gov.uk/government/publications/alternative-provision>

which isn't always due to behaviour issues. It is not sufficient guidance that the child must first be off-sited to improve their behaviour. We believe that the two processes should remain separate.

The draft guidance states that off-site direction is a temporary measure. However, it no longer becomes a temporary measure if pupils must first be under an off-site direction before a managed move, a permanent measure, can take place. Instead, the two intervention processes should remain separate. Safeguarding measures should be put in place to regulate and review each process to ensure the interests of the child are always at the centre of any intervention.

The guidance should not be referring to sending children with an EHC plan to alternative provision (AP) as it has in paragraph 42. There is a process in place if the needs of a student with a EHC plan are not being met or cannot be met at their current school. The guidance correctly addresses this process of an early annual review in paragraph 48. Mentioning managed moves and pupils with an EHC plan in the same paragraph may result in schools inappropriately suggesting managed moves for such pupils and not following the correct procedure. In paragraph 42, the guidance should therefore refer to the process for requesting an early annual review if a school is contemplating a managed move for a child with an EHC plan.

#### Child Criminal Exploitation

The guidance refers to the safeguarding measures that should be put in place for pupils when considering managed moves and off-site directions. At paragraph 41, the guidance states:

- *Under exceptional circumstances, such as a safeguarding concern, it may be appropriate for a pupil at any mainstream school to transfer to another mainstream school as a managed move, but this should only happen when it is in the pupil's best interest.*

However, the guidance does not indicate what safeguarding concerns should be considered in these circumstances, and when a managed move to another mainstream school might be in the child's best interest. The guidance should refer to CCE in this section, and the safeguarding concerns present when considering a managed move from one mainstream school to another. This is important if the child is vulnerable or has shown warning signs of criminal exploitation. Schools should also consider the location of any managed move. Attending a school in a particular location or travelling to the location, can often place the child at greater risk of harm from rival gangs and be a safeguarding risk.

**Paragraph 28** refers to understanding the support a child or young person needs in order to improve their behaviour, including SEND when using AP. In this section, the guidance would benefit from highlighting the potential dangers presented by AP and how exploiters target pupil referral units (PRUs). This is important so that headteachers and governing boards can consider these dangers when deciding whether to arrange alternative provision for a pupil. It is important to recognise that AP is not always in the best interests of the child. Many children are more likely to be exposed to criminal exploitation outside of mainstream school. Ofsted's most recent annual report shared concerns from alternative provision providers that more children have been put at risk of criminal exploitation during the pandemic.<sup>6</sup> The National Crime Agency also identifies placement in AP as a factor that will increase a child's risk of CCE.<sup>7</sup>

There are several reasons for this. Children in PRUs are typically supervised for fewer hours per week than those in mainstream education. Many children have also recorded how exploiters loiter

<sup>6</sup> Ofsted (2021) *The Annual Report of Her Majesty's Chief Inspector of Education, Children's Services and Skills 2020/21*

<sup>7</sup> National Crime Agency (2019) *Intelligence assessment: County lines drug supply, vulnerability and harm 2018*, paragraph 30



around PRUs waiting for children. The dangers presented by AP should therefore be highlighted throughout the statutory guidance.

### Question 38

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

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

We agree with this revision and believe that monitoring and understanding suspension and permanent exclusion data is very important. However, there needs to be greater clarity regarding how schools should monitor this data, what characteristics schools should monitor alongside this data and how this data should be used. In the previous guidance at paragraph 21, it outlines the exclusion rates for certain groups of pupils and states the following:

*'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 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.'*<sup>8</sup>

Paragraph 54 in the draft guidance is supposed to mirror this paragraph from the previous guidance, however the listing of the groups most affected by exclusion is omitted. The draft guidance states:

*'There are longstanding national trends which show that particular groups of children are more likely to be excluded from school, both for a suspension or permanent exclusion.'*

It is of great concern that the detail in paragraph 21 of the old guidance is not present in the draft guidance. The Government should seek to clarify why this is the case. For schools to adequately monitor and understand suspensions and permanent exclusion data, they need to be aware of the groups that are likely to be most affected by exclusions and suspensions. The Government's data on school exclusion shows that children eligible for free school meals<sup>9</sup>, children with special educational needs<sup>10</sup>, boys or children of Gypsy/Roma and Travellers and Black Caribbean pupils<sup>11</sup>,

<sup>8</sup> Department for Education, (2017) *Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion*, paragraph 21 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/921405/20170831\\_Exclusion\\_Stat\\_guidance\\_Web\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921405/20170831_Exclusion_Stat_guidance_Web_version.pdf)

<sup>9</sup> The permanent exclusion rate for pupils eligible for FSM is 0.16, compared to 0.04 for those not eligible. The suspension rate is also higher at 9.34 for pupils eligible for FSM, compared to 2.58 for those not eligible. Department for Education (2019-2020) Permanent and fixed-period exclusions in England <https://www.gov.uk/government/statistics/permanent-exclusions-and-suspensions-in-england-2019-to-2020>

<sup>10</sup> The permanent exclusion rate for pupils with an education, health and care (EHC) plan is 0.10, and for pupils with SEN with no EHC plan (SEN support) is 0.20, compared to 0.04 for those without SEN. The suspension rate is also higher: 11.70 for EHC pupils and 10.98 for SEN support pupils, compared to 2.43 for those without SEN. *Ibid*

<sup>11</sup> For the year ending 2020, the national rate of permanent exclusion was 0.6, the rate of fixed term exclusions was 3.76. The rate for Gypsy/Roma learners was 0.23 and 15.28 respectively. For Travellers of Irish heritage, the rates were 0.14 and 10.12. For Black Caribbean learners, the rates were 0.14 and 7.3. *Ibid*

especially Mixed White and Black Caribbean<sup>12</sup> are disproportionately affected by school exclusions and suspensions.

In the new DfE guidance the emphasis should not be on solely highlighting one Black ethnic group, but recognising that as a whole children from Black ethnic backgrounds are disproportionately excluded and are at a higher risk of exclusion.<sup>13</sup> It should also be noted that this is in part due to discipline and behaviour policies centred around black hairstyles and pupils kissing their teeth, for example.<sup>14</sup> Whilst schools are trying to address equality in education via means such as unconscious racial bias training and recognising they need to recruit more black staff in senior roles<sup>15</sup>, the reality is that children from all Black ethnic groups are at more risk of being excluded than a White British child. This is evidenced in the children that we represent at Just for Kids Law who have been excluded.

For example, we often see cases where a Black child is penalised over a White child for the same offence or involved in the same incident:

*In a recent school exclusion hearing we successfully argued that a school was disproportionate in a permanent exclusion. There were two children involved in an incident, one child was Black Caribbean and the other child White. The Black Caribbean child was permanently excluded, and the White child was given a fixed term exclusion. The school defended themselves by arguing they had no issues regarding disproportionate exclusions and understood its Public Sector Equality Duty. They were aware of the DfE guidance (paragraph 21) and believed they had no issues at the school regarding disproportionate exclusion from ethnic groups. However, the school had disproportionately excluded mixed White and Black Caribbean children according to its own statistics. The school made no correlation to the disproportionate exclusion of the mixed White and Black children and our client (Black Caribbean). Instead, the school argued these groups were different rather than considering that the school had a history of excluding children from Black ethnic groups.*

It is vital that any new guidance recognises that children from all Black ethnic backgrounds are at risk of disproportionately being excluded. Headteachers need to be aware of this in their Public Sector Equality Duty (PSED). Paragraph 21 in the 2017 Exclusions Guidance is one of the most powerful paragraphs in capturing the systemic issue that children from Black ethnicity face in education and should not be removed.

#### Data Monitoring

Clearly stating the different groups that are affected and how they are affected would allow schools to challenge and evaluate what their data is telling them about their school, as recommended in paragraph 96 in the draft guidance. The guidance should highlight how particular groups may be disproportionately discriminated against due to certain behaviours or characteristics that are specific to their ethnicity or culture, such as hairstyles, kissing their teeth and fist bumping. For boards to 'carefully consider the level of pupil moves and the characteristics of pupils who are

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<sup>12</sup> Pupils of mixed White and Black Caribbean ethnicity have the second highest rate of permanent exclusion (0.15) *Ibid*.

<sup>13</sup> Hannah Richardson (30 July 2020) Black pupils face trebled exclusion rate in some areas of England *BBC* <https://www.bbc.co.uk/news/education-53516009>

<sup>14</sup> Eleanor Busby (12 January 2020) Schools unfairly punish black students for hairstyles and for 'kissing teeth' amid racial bias, teachers say *The Independent* <https://www.independent.co.uk/news/education/education-news/school-racial-bias-black-students-kissing-teeth-teachers-a9279056.html>

<sup>15</sup> Richard Adams (9 October 2021) Not enough black headteachers in England, says Nadhim Zahawi *The Guardian* <https://www.theguardian.com/education/2021/oct/09/not-enough-black-headteachers-in-england-says-nadhim-zahawi>

moving on any permanent exclusion<sup>16</sup>, the guidance needs to refer to the statistics on school exclusions that are widely collected based on the characteristics of pupils. The Government collects this data and by not explicitly referring to the groups most affected, we risk placing these children at further risk of unfair and discriminatory treatment.

Paragraph 96 also appears to only apply to children who are formally excluded. For boards to fully understand and consider the level of pupil moves, this requirement should be extended to include the monitoring of characteristics of children who have experienced a managed move, have been off-sited and placed in isolation. This will provide a greater picture of the types of pupils most affected by disciplinary measures in schools and help schools to address and monitor the disproportion between pupils.

The language used in the guidance should be one that places a strict responsibility on schools to collect this data and doesn't leave it to the discretion of the school. Paragraph 96 states:

*Governing boards should already be challenging and evaluating what their school's data is telling them about their school or academy trust. Boards should carefully consider the level of pupil moves and the characteristics of pupils who are moving on any permanent exclusions to ensure the sanction is only used when necessary as a last resort.*

However, paragraph 96 needs to be changed to a mandatory duty that *Governing boards 'must' challenge and evaluate what their school's data is telling them about their school'...* 'Boards *'must' carefully consider the level of pupil moves...*' not just should. Effective equality monitoring is essential to ensure compliance with the PSED under section 149 Equality Act 2010. Without such monitoring, DfE will not be able to understand whether any groups are disproportionately discriminated against. If the Government truly want to address the disproportionality of students affected by school exclusions and suspensions, the guidance's position on data collection must be clear. If the Government's aim is to ensure pupils can learn in a safe, calm and supportive environment, we must ensure that if disciplinary measures are disproportionately affecting particular groups of children, there are measures in place to detect this and respond appropriately.

### Question 39

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

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

The procedures in place for involving children in the school exclusion process is not adequately outlined in the guidance. On page 7, the guidance states that specific changes to the legislation governing the disciplinary school suspension and permanent exclusion process have been made such as:

*'Further clarification on the practice of involving pupils so that any excluded pupil is enabled and encouraged to participate at all stages of the suspension or permanent exclusion process, considering their age and ability to understand.'*

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<sup>16</sup> Department for Education (2022) *Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement: Guidance for maintained schools, academies, and pupil referral units in England*, paragraph 96 [https://consult.education.gov.uk/school-absence-and-exclusions-team/revised-school-behaviour-and-exclusion-guidance/supporting\\_documents/Suspension%20and%20permanent%20exclusion%20guidance.pdf](https://consult.education.gov.uk/school-absence-and-exclusions-team/revised-school-behaviour-and-exclusion-guidance/supporting_documents/Suspension%20and%20permanent%20exclusion%20guidance.pdf)

However, the guidance fails to mention the steps that schools should put in place to ensure children are involved and able to participate at all stages of the suspension and permanent exclusion process. It is not enough to simply state that pupils should be enabled and encouraged to participate at all stages of the process without providing further clarity on what this may look like. If children are to have their participation rights respected, as set out in the UN Convention on the Rights of the Child, then it is critical that adequate steps are taken to allow children to engage effectively.

The guidance should be amended to state that children must always be asked if they would like to participate in any aspect of the process. We believe it would be beneficial to have a child friendly guide created by children of different age groups that outlines what the school exclusion process entails, their rights and where and how they might like to be involved. It is important to remember that it is the child that endures a school exclusion or suspension, so their voice should be heard and taken into account throughout the process. School exclusions and suspensions are already incredibly traumatic experiences for children, and where children wish to be included, they should have the choice. Excluding children from school and then excluding them from adequately engaging in the process further reinforces the notion that they are unwanted. We must ensure that children everywhere, regardless of their school or how their school interprets the guidance, are given adequate support, guidance and facilitation to meaningfully engage in the school exclusion and suspension process.

#### Question 40

The current limit on the total number of days a pupil can be suspended in a school year is 45 school days:

Should this limit be changed or not? Please explain how and why.

What potential impact would there be if the 45-day limit for suspensions in a school year was reduced? Please explain why.

The 45-day limit exists to help schools monitor the use of exclusions. We therefore believe that the time limit should remain the same, but the guidance should clarify the duties that schools have to make provisions for children during a fixed term exclusion (FTE). The guidance should require schools to analyse what continuous exclusions says about the effectiveness of this disciplinary method on managing and improving a child's behaviour. Schools should outline what they have done for pupils during a FTE, the steps they are taking to ensure the child's education is still a priority and the strategies that will be put in place to help them improve their behaviour when they return. We suggest that schools should put in place counselling and mentoring and a continued education for the duration of a pupils FTE. The counselling and mentoring should continue once a child returns to school to ensure that children aren't routinely suspended without adequate intervention measures in place to address behavioural concerns.

At paragraph 6, the guidance states:

*'Where suspensions are becoming a regular occurrence for a pupil, headteachers and schools should consider whether suspension alone is an effective sanction for the pupil and whether appropriate strategies need to be put in place to address behaviour.'*

Therefore, before the 45-day limit is reached, schools should have already assessed whether suspensions are being used effectively for a pupil. If the number of suspensions a child is being given continues to increase, schools should adopt other methods that seek to address their behaviour.

The guidance should make this requirement more explicit to ensure that schools are actually addressing the behaviour at hand rather than hindering a child's education through continuous suspensions. Before a child reaches the 45-day limit, schools should analyse whether exclusion is an effective tool, explore and assess the child's needs including SEND and other factors impacting them, and what support a child might need based on those needs in order to adequately support a pupil to improve their behaviour. This should be the priority in the guidance when discussing the 45-day limit.

Paragraph 19 from the current behaviour guidance, copied below, should be incorporated into the draft guidance on school exclusions.

*'They [schools] should also consider whether continuing disruptive behaviour might be the result of unmet educational or other needs. At this point, the school should consider whether a multiagency assessment is necessary.'*

Multi-agency working as an early intervention measure is essential to identify emerging problems and potential unmet needs of individual children and families.<sup>17</sup> Schools can play an important role in working with other agencies to properly safeguard the children in their care and help them access the support they need to fully benefit from the education being provided.

#### Isolation

Furthermore, isolation **in advance** is used as an alternative to fixed term exclusions. As such, there needs to be the same thresholds in place for isolation as there are for FTE: 15 days in one term, 45 in a year. While we do not agree with the use of removals for disciplinary reasons as they are detrimental to children's health and wellbeing unless the young person is exhibiting behaviour that is a danger to themselves or others, we are pleased to see that the new definition in the draft behaviour guidance states that 'removal from the classroom should be considered a serious sanction and only used when necessary.'<sup>18</sup> We believe that the DfE should work with schools to end the use of isolation as a punishment. We suggest that isolation in advance needs to count together with fixed term exclusion towards these 15 and 45 day limits. Isolation in advance is already being used as an alternative to fixed term exclusions, and there is a significant risk of isolation becoming the default option for schools seeking to avoid high numbers of suspensions in the DfE's monitoring. Having this limit would mean that schools would not be able to put children in isolation as much and would need to do something to help them and their education instead.

#### Question 42

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

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<sup>17</sup> Department for Education (2018) Working Together to Safeguard Children, para 4: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/942454/Working\\_together\\_to\\_safeguard\\_children\\_inter\\_agency\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942454/Working_together_to_safeguard_children_inter_agency_guidance.pdf)

<sup>18</sup> Department for Education, (2022) Behaviour in schools Advice for headteachers and school staff, paragraph 80

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

The guidance should not be referring to permanently excluding children for safeguarding reasons. We do not think it is a helpful distinction to separate between children excluded for safeguarding reasons and children excluded otherwise.

The draft guidance should refer to the Keeping Children Safe in Education Guidance (KCSIE) on matters regarding excluding or off-siting for safeguarding reasons. It may not be justified to remove a child from school for every safeguarding issue. Schools must show that they have explored all strategies and liaised with professionals including social services before they think about directing a pupil off-site for safeguarding reasons or excluding them. There are strategies in KCSIE guidance that should be implemented that would allow the students to remain in the school but be separated for safeguarding issues depending on the gravity of the issue. Such strategies and considerations from KCSIE are included below.

On page 114 and 115, KCSIE Guidance states:

*'It is important each report is considered on a case-by-case basis and risk assessments are updated as appropriate. As always when concerned about the welfare of a child, the best interests of the child should come first. In all cases, schools and colleges should follow general safeguarding principles as per this guidance.'*

*Where there is a criminal investigation into a rape, assault by penetration or sexual assault, the alleged perpetrator(s) should be removed from any classes they share with the victim. The school or college should also consider how best to keep the victim and alleged perpetrator(s) a reasonable distance apart on school or college premises (including during before and after school-based activities) and on transport to and from school or college where appropriate. This is in the best interests of both children and should not be perceived to be a judgement on the guilt of the alleged perpetrator(s). As per paragraph 450, close liaison with the police is essential.*

*Where the perpetrator(s) is going to remain at the school or college, the principle would be to continue keeping the victim and perpetrator(s) in separate classes and continue to consider the most appropriate way to manage potential contact on school and college premises and transport. The nature of the conviction or caution and wishes of the victim will be especially important in determining how to proceed in such cases.*

*Appropriate support should be provided to both as required and consideration given to sharing classes and potential contact as required on a case-by-case basis. In all cases, schools and colleges should record and be able to justify their decision-making.<sup>19</sup>*

It further states:

*'Taking disciplinary action and still providing appropriate support are not mutually exclusive actions. They can, and should, occur at the same time if necessary.'*

*Consider the age and the developmental stage of the alleged perpetrator(s), the nature of the allegations and frequency of allegations*

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<sup>19</sup> Department for Education, Keeping children safe in education: Statutory guidance for schools and colleges

*Consider the proportionality of the response. Support (and sanctions) should be considered on a case-by-case basis. The alleged perpetrator(s) may potentially have unmet needs (in some cases these may be considerable) as well as potentially posing a risk of harm to other children. HSB in young children may be a symptom of either their own abuse or exposure to abusive practices and or materials<sup>20</sup>*

The sections of KCSIE highlighted above demonstrate the approach that schools should take. Particularly, we suggest and would emphasise the point made in the guidance that *'taking disciplinary action and still providing appropriate support are not mutually exclusive actions'*. It is important to safeguard pupils who have experienced sexual assault, but also important to recognise the need for continued education of both parties involved. Wherever possible, if a child is excluded or off-sited for safeguarding reasons, it should be a temporary measure that allows schools to address the matter at hand and put support in place to allow both children to continue to attend school and access their education. Excluding or off-siting a child should not be the default option for safeguarding issues. Each case should be determined on a case-by-case basis as KCSIE states, where the arguments, evidence and severity of the case are analysed before a decision to exclude or off-site is made.

Further many allegations rest on police investigations. Children often have to wait a long time for the investigation to conclude before they can return back to school. Being out of school during this time can affect a child's mental health, their ability to socialise and greatly impact their education. Therefore, if the Government is to add specific measures on dealing with sexual violence or harassment, it must also include the importance of continuity of education for both parties.

At Just for Kids Law, we have supported children who have been excluded for safeguarding reasons and we have seen the detrimental effects this can have on a child in instances where the allegations have been proven to be false. There are also an increasing number of children who are excluded for sexualised behaviour, which is a wider issue that needs to be addressed by the DfE in the exclusion guidance, using the Keeping Children Safe in Education guidance as a guide. Schools still have a duty to protect and safeguard children who display harmful sexual behaviour or who are at risk of being excluded for sexualised behaviour. As highlighted above, they may potentially have unmet needs, or the behaviour could be an indicator that they are a victim of abuse. Schools must implement strategies to address or respond to this as exclusion or off-siting may not be appropriate or a sufficient safeguarding response. KCSIE recognises that *'School can be a significant protective factor for children who have displayed harmful sexual behaviour, and continued access to school, with a comprehensive safeguarding management plan in place, is an important factor to consider before final decisions are made'*.<sup>21</sup> This consideration should be included in the exclusion guidance so schools appropriately factor in their role when safeguarding issues on sexualised behaviour or sexual violence arise.

### Question 43

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

This draft guidance provides a unique opportunity for the Government to provide greater clarity on the role of the Independent Review Panel (IRP). For the process of school exclusions to be conducted in a *'lawful, reasonable and procedurally fair way'* (the Government's stated aims for

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid. 116

school exclusions), the independent review panel should have the power to reinstate a pupil following an IRP hearing. Currently, the IRP have the power to direct the board to reconsider reinstatement, however, the governing board almost always restates its original decision, even those that have been found to be flawed.<sup>22</sup> Data from the Department for Education for 2019/20 show that in most exclusion cases, schools are choosing not to follow the recommendations of the IRP. Only 20% of pupils were offered reinstatement following a recommendation from an IRP.<sup>23</sup> Only 42 pupils were offered reinstatement when reinstatement was directed by the IRP out of a total of 108.<sup>24</sup> This is not surprising given the governing board have close ties to the school and are not independent. The statistics clearly show that the £4,000 adjustment that an academy trust may have to pay to fund a pupil that has been permanently excluded, does not prove to be a deterrent for governing boards to uphold a permanent exclusion.

This brings into question the very purpose of the IRP and the review process if the power to reinstate a pupil after reviewing a board's decision does not exist. If the panel are to properly consider the interests and circumstances of the permanently excluded pupil as stated in paragraph 187 of the draft guidance, then they need to be afforded this power which existed in the guidance before the 2012 reforms.<sup>25</sup> A process that places the decision to reinstate the pupil, following a review, in the hands of those who made the initial decision to exclude, is not a process that is procedurally fair or in the best interest of the child.

Nonetheless, this is also a unique opportunity for the Government to provide greater clarity on the reconsideration hearing and what information governors should be considering, such as the weight of any points raised by the IRP and the impact of an exclusion on a child's education. The guidance should also encourage governing boards to engage with parents and the child at the reconsideration stage.

### Child Criminal Exploitation

The School Exclusions guidance is silent on the issue of CCE and its links with exclusion. Children are often excluded because of circumstances beyond their control, including children who are victims of CCE and whose behaviour is directly connected to that exploitation. However, there are many areas throughout the draft guidance where its recognition as both a contributing factor to exclusion and a result of exclusion would be supported by the sector and beneficial to be included. Below are a few recommendations for how the guidance should be revised to reflect this.

### Part Three

#### Safeguarding, including guidance concerning pupils who have abused another pupil (commonly known as child-on-child abuse)

On page 15, this section on safeguarding should introduce the issue of CCE. Where it refers to the Keeping Children Safe in Education guidance in **paragraphs 21-24**, it should directly reference the

<sup>22</sup> JUSTICE (2019) *Challenging School Exclusions*, paragraph 5.5

<sup>23</sup> Department for Education (2019-2020) Permanent and fixed-period exclusions in England  
<https://www.gov.uk/government/statistics/permanent-exclusions-and-suspensions-in-england-2019-to-2020>

<sup>24</sup> Department for Education (2019-2020) Permanent and fixed-period exclusions in England  
<https://www.gov.uk/government/statistics/permanent-exclusions-and-suspensions-in-england-2019-to-2020>

<sup>25</sup> Edward Timpson 2019 *Timpson Review of school exclusions*, 87: [http://data.parliament.uk/DepositedPapers/Files/DEP2019-0527/Timpson\\_Review\\_of\\_School\\_Exclusion\\_May\\_2019.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2019-0527/Timpson_Review_of_School_Exclusion_May_2019.pdf)



sections of KCSIE that focus on CCE. It should refer to the safeguarding process for CCE cases, in the same way as the guidance refers to KCSIE and the process for rape or assault cases in **paragraph 24**. We note how the recent Safeguarding Review of 'Child Q' expressed concern that Government guidance on 'Searching, screening and confiscation' could be strengthened by including much stronger reference to the primary need to safeguard children. We believe that a focus on safeguarding is equally important in guidance to schools on exclusions and behaviour.

#### Part Four

The guidance should prompt headteachers to consider whether exploitation is a factor for children at risk of exclusion as part of their decision. In **Part Four** of the guidance, titled *Factors to consider before making a decision*, a paragraph should be inserted under a new heading of *Child Criminal Exploitation* directing that:

*"The headteacher must consider whether there is reason to believe, on the balance of probabilities, that a child's exclusion is part of an effort to further their criminal exploitation or would likely advance the criminal exploitation of that child. In such circumstances the headteacher must avoid permanent exclusion wherever possible. The headteacher should engage the advice of social services and other relevant organisations to consider whether a referral to the National Referral Mechanism is required. The headteacher should refer to Annex (X) for a definition of child criminal exploitation and a guide to the relevant warning signs."*

When referring to the warning signs that might suggest a child is being exploited, the following documents would be useful to include in the guidance:

- The Home Office's own guidance on spotting the risk factors for child criminal exploitation. ([Criminal Exploitation of children and vulnerable adults: County Lines guidance](#))
- The list of indicators produced by The Children's Society in partnership with the National Police Chiefs Council in the report Children and young people trafficked for the purpose of criminal exploitation in relation to county lines: a toolkit for professionals ([County lines and criminal exploitation toolkit](#))
- The Youth Justice Legal Centre at Just for Kids Law have produced a practical guide to identifying CCE Child Criminal Exploitation: county lines gangs, child trafficking & modern slavery defences for children. (<https://yjlc.uk/resources/legal-guides-and-toolkits/child-criminal-exploitation>)

#### Part Seven

Governing boards should consider whether a child has been a victim of criminal exploitation when reviewing a headteacher's decision to exclude. In **Part Seven** of the guidance, after **paragraph 102**, which directs the governing board to consider the interests and circumstances of the excluded pupil, a paragraph should be inserted directing that:

- *"In the governing boards consideration of the excluded pupil's circumstances, they must consider whether the child is likely to be at heightened risk of criminal exploitation by their exclusion and will, if risk factors are identified, assess whether the exclusion is still proportionate given all the circumstances. The governors should refer to Annex (X) for a definition of child criminal exploitation and a guide to the relevant warning signs."*

## Part Eleven

In Part Eleven of the guidance, under the heading, *Guidance on the governing board's duty to reconsider reinstatement following a review*, a paragraph should be inserted directing that:

- *"In the governing board's reconsideration of a pupil's reinstatement, the board should consider whether there are any signs which suggest that a continued exclusion will expose the young person to further harm and put them at a greater risk of criminal exploitation. The board should consider any additional information that may shed light on the current conditions of the child's exclusion. They should consider whether any evidence linked to the exclusion indicates the presence of criminal exploitation, or if the child's circumstances and vulnerabilities could make them an easy target for exploiters."*

The vulnerabilities that could make a child an easy target for exploiters include, having additional needs, special educational needs or a disability, whether they have siblings or family members who are involved in criminal activity.

Finally, the guidance should provide for legal safeguards from school exclusion linked to criminal exploitation, in the same way that legal safeguards exist in the criminal courts for children who have been forced to commit criminal behaviour as a result of exploitation (section 45 defence, Modern Slavery Act 2015).<sup>26</sup>

### No Exclusion Policy

In the aims the draft guidance states:

- *'Schools and local authorities should not adopt a 'no exclusion' policy as an end in itself. This can lead to perverse incentives to schools not to exclude even when exclusion is the only real way to make sure an excluded pupil can get the support they need, while remaining engaged in education.'*

It is not clear what the reasoning behind the inclusion of schools not adopting a 'no exclusion' policy is in the aims of the guidance. Such policies may be useful for schools that have found methods beyond school exclusion that work for them or where this doesn't agree with their school ethos. No exclusion policies may be essential and effective where there are other strategies in place to support pupils in the school environment. Our aim should be to develop strategies that work towards schools being in a position where the needs of all children and young people are addressed, and where schools no longer feel that exclusions are necessary given the continuity of provision and support available to assist them to meet the needs of pupils.<sup>27</sup>

The guidance should not be advocating against schools having a no exclusion policy as it appears to encourage exclusions. Schools should be encouraged to adopt other methods of addressing poor or disruptive behaviour if exclusions are truly to be a last resort. Additionally, school exclusions are a response to misbehaviour, however the second sentence in the paragraph appears to encourage

<sup>26</sup> Home Office (2021) *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland*, Annex H

<sup>27</sup> London Borough of Hackney, Hackney Learning Trust (2015) *No Need to Exclude: A good practice guide for schools: Reducing exclusions by promoting the wellbeing of all*

schools to exclude so that a pupil can get the support they need. School exclusions should not be based on the inability of a school to meet a child's needs. SEND law and statutory guidance exist for this particular reason and exclusions should not be an incentive for this.

#### Part three: headteachers power to suspend or permanently exclude

On page 10, it states:

*'To achieve this, suspensions and permanent exclusion are sometimes a necessary part of a functioning system, where it is accepted that not all pupil behaviour can be amended or remedied by pastoral processes.'*

The guidance should include some recognition that a child may have additional needs that are not being addressed and schools have a duty to identify, assess and support a child's needs. Most especially given that the permanent exclusion rate for pupils with SEN is five times more than the rate for pupils without SEN.<sup>28</sup> It is important that schools are aware of this duty and do not apply this paragraph blanketly when they have a duty to support a child's additional needs. Further guidance also needs to be provided on how the headteacher and governing board must apply the civil standard of proof of, 'on the balance of probabilities', when establishing the facts of a suspension or permanent exclusion.

#### Reasons and recording exclusions

Further guidance must be provided for paragraph 14 which lists reasons that may warrant a suspension or permanent exclusion. The list, without any supporting guidance or further information provided is of great concern. Schools can often state a child has assaulted someone without understanding the definition of assault. At Just for Kids Law, we have had cases where a child has carried a knife by accident, where they had forgotten to take Stanley knives out of their bags after cadets. It is important that the correct processes for a permanent exclusion or suspension are followed, and the child's circumstances and the circumstances of each case are still considered despite this list. Without any supporting guidance as to how to use this list or a reiteration of the considerations and steps schools must have before they suspend or exclude, we risk children being excluded without adequate consideration being given to the circumstances of each case, as all cases should be determined on a case-by-case basis.

#### Pressure to electively home educate

Paragraph 20 states:

*'If a parent feels pressured into electively home educating their child or that the suspension or permanent exclusion procedures have not been followed, they can follow the school's complaints procedure with the governing board and in the case of a maintained school, the local authority. Ofsted considers any evidence of off-rolling and is likely to judge a school as inadequate if there is evidence that pupils have been removed from the school roll without a formal permanent exclusion or by the school encouraging a parent to remove their child from the school, and leaders have taken insufficient action to address this.'*

<sup>28</sup> Department for Education (2019-2020) Permanent and fixed-period exclusions in England  
<https://www.gov.uk/government/statistics/permanent-exclusions-and-suspensions-in-england-2019-to-2020>

This should be amended to include a recommendation that parents should seek legal advice for pressure to electively home educate their child.

#### Question 44

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

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

Paragraph 18 regarding contributing factors to poor behaviour that has resulted in exclusion has been removed and is not present in the draft guidance. This is an important paragraph which enables headteachers to look at contributing factors that are identified after an incident of poor behaviour. The paragraph states:

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

However, the draft behaviour guidance mentions that staff should, where appropriate, take account of contributing factors in paragraph 41 below:

*'Where appropriate, staff should take account of any contributing factors that are identified after an incident of misbehaviour has occurred: for example, if the pupil has suffered bereavement, experienced abuse or neglect, has mental health problems, has been subject to bullying, has needs including SEN or a disability (including any not previously identified), has been subject to criminal exploitation, or is experiencing significant challenges at home.'*

It is unclear why this has been removed from the draft exclusion guidance. The headteacher should have this same consideration throughout the exclusion process as with managing poor behaviour. This is an important consideration for headteachers to have as it would enable them to understand the context of an incident from the child's perspective, as poor behaviour and actions out of character can be due to issues not identified or addressed. Examples in our practice at Just for Kids Law include children's home life disrupted due to domestic abuse, separation of parents or becoming homeless or a death of a close family member, including extended family like an uncle or aunt who had caring responsibilities or had a big impact on the child. On other occasions we have supported children who are being bullied and have seen the negative impact this has on their behaviour and presentation at school, or children struggling in the education environment, for example because they have additional needs which have not been identified.

Further examples of the importance of this consideration and its impact on individuals with protected characteristics can be found below:

*A client aged 12 with the mental capacity of a 9-year-old and with a statement of SEN was permanently excluded from school for assault on another student. The incident was instigated by another student, who received a five-day fixed exclusion and did not have SEN. Further, on the day of the incident, the child should have had his personal advisor with him – this was not*

*the case. The school was adamant that the child could not return to the school and argued it had done all it could to support him, despite being aware of his vulnerable background, exposure to extreme violence and drugs in the home. The child has been raised by his grandmother since he was three months old. The Independent Review Panel, despite our efforts, upheld the school's decision. However, the local authority during the hearing noted the errors made and stated that it will ensure that the client will now receive the right support in the appropriate setting suitable for his needs. The client has since settled at his new placement and is doing well.*

*A child was excluded for allegedly taking a knife out of school and persistent disruptive behaviour. The school was of the view that that they had done everything it could to support the young person. The child and his mother had already been through the Governing Body (GB) process before they came to Just for Kids Law and the GB had upheld the permanent exclusion. We challenged that decision to the Independent Review Panel (IRP), highlighting that the GB had failed to follow the statutory guidance in coming to its decision including failing to set out in detail the reason for its decision, failing to apply the correct test for permanent exclusion and failing to consider the young child's circumstances and vulnerabilities. The latter included the fact that the child was from a Black Caribbean background and received free school meals that placed him at higher risk of exclusion, and that the child had special educational needs that impacted his behaviour if he was not provided with the correct support. The IRP quashed the Governing Body's decision and directed that it reconsiders it. On reconsideration the Governing Body decided to reinstate the child.*

*Finally, we represented a child aged 5 years old, who was permanently excluded from school for breaching the school's behaviour policy, a policy that he was unaware of. His mother is a young single parent aged 25 with 5 children; two of which have SEN, one being our client. The school failed to provide adequate support or allow enough time for measures to be put in place to support the child. At the Independent Review Panel, the Panel questioned the school at length and highlighted the measures/support that they should have considered for the child. As a result, the Panel asked the Governors to reconsider their decision with a view that the child is reinstated back into the school with the right support. Despite this decision, the Governing Body on reconvening upheld the permanent exclusion.*

These case studies demonstrate the need for robust measures in the guidance that address discrimination and the potential impact of this if the correct considerations are not had according to pupils protected characteristics. It is important that the Government use every opportunity within the guidance to provide clear guidance for schools to follow to ensure certain pupils are not disproportionately affected by suspensions and permanent exclusions.

This consultation is a unique opportunity to achieve this, and as this consultation relates to children, their school environment and disciplinary measures, the views children have on the matters consulted upon are vital to its improvement. However, we are disappointed that there was a lack of consultation with children but are grateful the Department for Education met with our school exclusion campaigners. A longer consultation period would have provided the opportunity to gather more views from a range of children and young people. The right to an education is vital for all children and young people. The UN Committee on the Rights of the Child notes the disproportionality in the levels of exclusions among certain groups with protected characteristics and has also recommended the following:

***Use the disciplinary measure of permanent or temporary exclusion as a means of last resort only, forbid and abolish the practice of "informal" exclusions, and further reduce the number of exclusions by working closely with social workers and educational psychologists in school and using mediation and restorative justice;*<sup>29</sup>**

We hope that the Government take our suggestions into account and the recommendations of the UN committee to ensure exclusions are reduced, the education of children and young people are prioritised and the disproportionality in exclusion levels of children with protected characteristics are addressed.

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<sup>29</sup> UN Committee on the Rights of the Child (2016) *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* <http://www.crae.org.uk/publications-resources/un-crc-committees-concluding-observations-2016/>