

# School Exclusion and the Law: A Literature Review and Scoping Survey of Practice

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All errors are our own.

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# Summary and key findings

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The recent law on school discipline and exclusion is characterised by both significant change and ongoing critical debate. Notable developments include a Government White Paper in 2010, important changes to the legal framework in 2011-12, and three reports by the Office of the Children's Commissioner (OCC) in 2012-13, and a lower threshold for exclusion introduced in 2015. The purpose of this review is to evaluate the law and practice on exclusion, as well as to test the coherence of the relationship between law and practice.

Non-lawyers implement the law on permanent exclusion, particularly school management teams, with the support and guidance of local authority (LA) officers. Divergence between law and practice is not of itself a ground for criticism of the actions of non-lawyers, but instead suggests that the law might not be fit for purpose. The law should support 'best practices' and restrain practice that is not in the "best interests" of either the individual child at risk of exclusion and/or of other children and staff in the school.

Our discussion focuses on recent research and secondary literature, as well as our own scoping survey of permanent exclusion in schools across four LAs in the same Department for Education (DfE) Statistical First Release (SFR) region.

The second section outlines the current law, presents statistical changes in the rate of exclusions and appeals lodged over time and analyses how reforms to the law and legal framework may have affected the statistics. Since independent appeal panels were replaced with independent review panels in 2012, there has been a significant decrease in the number of parents formally challenging permanent exclusion decisions. However, an analysis of the period from 1994 to 2015 shows that changes in permanent exclusion and appeal rates have not always corresponded with changes in the law.

The third section evaluates the values that underpin the legal framework, particularly autonomy, equality, "best interests", and participation and procedural rights. We highlight the importance of individual values for particular stakeholders. Discussion in the Government White Paper and recent law reform have focused on empowering schools, whereas teachers are most concerned with the excluded child's "best interests"; academic commentators and the OCC concentrate on respect for and protection of children's rights.

The fourth section examines current knowledge of the way in which the law has been understood by various groups of non-lawyers in the exclusion process. This section also draws on findings from our scoping survey, conducted between July and September 2014. Our survey highlights the potential significance of school and LA culture within this legal discretionary framework in determining the likelihood that a pupil will be excluded. In particular, analysis of individual schools' responses regarding exclusions against publicly available data on their pupil-level risk factors and indicators of school culture suggest that school culture and disposition toward the governing law has a role to play in determining the likelihood that a pupil will be excluded. This role has not been examined to date, and our survey results reveal it is a complex one, which may also be interwoven with the LA culture and disposition towards the governing law. This is the most significant gap, which we have identified, in the current understanding of education law in practice. Further, our survey reveals LA inclusion and exclusion officers as central to schools' understanding of the law and work within the legal framework, as well as a critical source of advice for parents. Further research is needed into the role of these LA officers.

Other organisations working with pupils who are at risk of drop-out include: Chance UK, Home-School Support and Just for Kids Law.

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In addition, we also highlight the following, more discrete issues for further research:

1. The reason(s) for the significant decline in the number of reviews lodged against permanent exclusions in 2012/13 compared with appeals brought in 2011/12.
2. How often IRPs order that, should a school uphold an exclusion despite a direction to reconsider, the school should pay £4,000 towards that pupil's continuing education; of that number, how many schools uphold the exclusion and in fact pay that sum.
3. The impact, if any, of the categories according to which schools classify the 'reason for exclusion'.
4. The possible benefits, if any, of law reform targeted at pupils, other than those with SEN, who are at greatest risk of exclusion based on pupil-level risk factors.
5. IRP members' understanding of the governing law and legal framework, and the evidence for and against introducing a legally-qualified panel member or clerk.
6. Why there have been so few applications for judicial review of permanent exclusions from school.
7. Parents' understanding of the IRP process, and the extent to which increased understanding would affect the likelihood that parents lodged reviews of permanent exclusions.
8. Parents' understanding of the role of SEN experts in the IRP process, and their reasons for requesting a SEN expert.
9. The impetus for, prevalence and impact of school-level or local area 'zero exclusion' policies.
10. How commonly parties seek legal advice, and the underlying reasons why parties do or do not seek legal advice.

#### Abbreviations

<b>AJTC</b>	Administrative Justice and Tribunals Council	<b>LA</b>	Local Authority
<b>BME</b>	Black and minority ethnic	<b>LASPO</b>	Legal Aid, Sentencing and Punishment of Offenders Act 2012
<b>CCCU</b>	Canterbury Christ Church University	<b>NFER</b>	National Foundation for Education Research
<b>DfE</b>	Department for Education	<b>OCC</b>	Office of the Children's Commissioner
<b>ECHR</b>	European Convention on Human Rights	<b>OFSTED</b>	Office for Standards in Education
<b>FtT</b>	First-tier Tribunal	<b>PRU</b>	Pupil Referral Unit
<b>IAP</b>	Independent Appeal Panel	<b>SEN</b>	Special Educational Needs
<b>IRP</b>	Independent Review Panel	<b>UNCR</b>	United Nations Convention on the Rights of the Child
<b>JCHR</b>	Joint Committee on Human Rights		

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## Glossary

### Legal definitions

<b>Judicial review</b>	The process by which the legality of a decision of a public body can be challenged in court.
<b>Principles of judicial review</b>	The three principles which determine whether or not the decision of a public body was lawful: irrationality, illegality, and procedural impropriety (per Lord Diplock, <i>CCSU v The Minister for the Civil Service</i> [1985] AC 374):  <b>Irrationality</b> A decision will be deemed irrational or unreasonable if: <ul style="list-style-type: none"><li>• It does not take into account all relevant considerations;</li><li>• It takes into account irrelevant considerations; or</li><li>• It is a decision that is so unreasonable no reasonable person properly directing himself could have taken it.</li></ul> <b>Illegality</b> A decision made by a public body that it did not have the power to make. Also referred to as ultra vires.  <b>Procedural impropriety</b> A decision made that does not comply with the correct procedure.
<b>Tribunal</b>	A specialist judicial body that decides disputes in particular areas of law - usually against a public body. Tribunal judges are legally qualified.
<b>First-tier Tribunal</b>	The first level in the tribunal system. Appeals from the First-tier tribunal (FtT) are made to the Upper Tribunal.
<b>SENDIST</b>	The tribunal that dealt with Special Educational Needs and Disability prior to 2008. These cases are now heard by the Special Educational Needs and Disability division of the First-tier Tribunal.

### Educational Practice Definitions

<b>Academy</b>	A state school funded directly by central Government and therefore free of control by the local authority. These include sponsored academies, convertor academies, and free schools.
<b>Maintained School</b>	A state school funded and controlled by local Government (LAs).
<b>Managed move</b>	A process whereby the pupil's current school, with the support of its LA, organises the relocation to another school of a pupil, whom might otherwise be excluded. The pupil's parents or carers must provide their consent.
<b>Pupil Referral Unit (PRU)</b>	An establishment to educate children who cannot attend mainstream school (for reasons such as exclusion or poor health).
<b>Special Educational Needs (SEN)</b>	A learning difficulty or disability that calls for special educational provision.

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# Introduction

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The recent law on school discipline and exclusion is characterised by both significant change and ongoing critical debate. Notable developments include a Government White Paper in 2010,<sup>1</sup> important changes to the legal framework in 2011-12,<sup>2</sup> three reports by the Office of the Children's Commissioner (OCC) in 2012-13<sup>3</sup> and a lower threshold for exclusion introduced in 2015.<sup>4</sup> The purpose of this review is to evaluate the law and practice on exclusion, as well as to test the coherence of the relationship between law and practice. References to law include the governing statutes, regulations, case law, and statutory guidance.

We assess current knowledge of how the law is perceived, valued, and employed by different stakeholders in order to highlight gaps in this knowledge and recommend areas for further research. In particular, we are concerned with the extent to which, if at all, various practitioner stakeholders, particularly teachers, local authority officers and lawyers, share a common understanding of the nature of law and the role of the governing legal framework in relation to their exercise of professional judgment. We are also interested in the extent to which, if at all, the governance culture of individual schools and local authorities affects the decision-making processes and outcomes in relation to exclusion from school. Education law 'serves to construct a normative "ideal child"'.<sup>5</sup> The way that local authority and school-level practitioners mediate the law may apply, develop, adapt, and interrogate any such idealised vision of the child. Divergence between law and practice is not of itself a basis for criticising the actions of non-lawyers, but instead suggests that the law might not be fit for purpose. The law should support 'best practices' and restrain practice that is not in the "best interests" of either the pupil at risk of exclusion and/or other pupils and staff in the school.

The second section outlines the current law, presents statistical changes in the rate of exclusions and appeals lodged over time and analyses how reforms to the law and legal framework may have affected the statistics. The third section evaluates the values that underpin the legal framework, particularly autonomy, "best interests", equality, and participation and procedural rights. We highlight the importance of individual values for particular stakeholders. The fourth section examines current knowledge of the way in which the law has been understood by various groups of non-lawyers in the exclusion process. This section also draws on findings from our scoping survey, conducted between July and September 2014. The final section draws together our findings, highlights gaps in the literature, and recommends areas for further research. A mixture of primary and secondary sources have been used, including quantitative data from the Department for Education's (DfE) statistical first releases, qualitative data from research conducted by other institutions, official papers, and broader secondary literature.

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<sup>1</sup> Department for Education and Skills, *The Importance of Teaching, The Schools White Paper 2010* (White Paper, Cm 7980, 2010) [DfES, White Paper].

<sup>2</sup> See section 2.1, below.

<sup>3</sup> Office of the Children's Commissioner, *They never give up on you: Office of the Children's Commissioner School Exclusions Inquiry – Full report* (2012) [OCC, *They never give up on you*]; *Always Someone Else's Problem – Office of the Children's Commissioner's Report on illegal exclusions* (2013) [OCC, *Always Someone Else's Problem*]; *They Go the Extra Mile – Reducing inequality in school exclusions* (2013) [OCC, *They Go the Extra Mile*].

<sup>4</sup> Department for Education, *Exclusion from maintained schools, Academies and pupil referral units in England* (DFE-00001-2015, 2015) [DfE statutory guidance 2015] [15].

<sup>5</sup> Daniel Monk, 'Children's rights in education – making sense of contradictions' (2002) 14 *Child & Family Law Quarterly* 45 (unpaginated) [Monk, 'Children's rights'].

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# An outline of the legal framework and statistics on exclusion

This section outlines the current law and compares significant legal developments from 1994 to 2015 to statistical evidence on exclusions from 1994-95 to 2012-13.

## 2.1. The current legal framework

The current law on exclusion is set out in the Education Act 2002 (including s51A inserted by Education Act 2011), the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, and accompanying statutory guidance (Department for Education, *Exclusion from maintained schools, Academies and pupil referral units in England*, (2015)):

- Only a headteacher can make the decision to exclude;<sup>6</sup> the exclusion must be on disciplinary grounds<sup>7</sup> and can be either fixed-term or permanent.<sup>8</sup> The decision to exclude 'should be reserved for:
  - [A] serious breach, or persistent breaches, of the school's behaviour policy; or
  - [W]here a pupil's behaviour means allowing the pupil to remain in school would be detrimental to the education or welfare of the pupil or others in the school'<sup>9</sup>
- In doing so, the headteacher must 'have regard' to the statutory guidance (see box).<sup>10</sup>
- The headteacher must then notify the parents of the pupil.<sup>11</sup>
- In certain cases, the governing body must consider reinstatement. These are: permanent exclusions; fixed-term exclusions which would bring the pupil's total number of school days of exclusion to more than 15 during one term; and fixed-term exclusions that will lead the pupil to miss a public exam or national curriculum test.<sup>12</sup>

### What does "have regard" mean?

The 2015 statutory guidance contains no definition of 'have regard'. Previously, this was defined in the 2012 statutory guidance as follows: 'The phrase "must have regard", when used in this context, does not mean that the sections of statutory guidance have to be followed in every detail, but that they should be followed unless there is a good reason not to in a particular case' (p2).

This phrase has also received judicial attention. Prior to the need to 'have regard' to the statutory guidance (introduced by the School Standards and Framework Act 1998 (see below)), the High Court confirmed that statutory guidance (at the time DfEE circulars) should be 'taken as a highly material consideration' by appeal panels (*R v Northamptonshire CC, ex p W* [1998] ELR 391). The importance of having regard to statutory guidance was later emphasised by the Court of Appeal (*R (X) v Y* (LTL 1/9/2005 - unreported)).

<sup>6</sup> Education Act 2002, s51A(1); The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012, SI 2012/1033 [21] [Exclusions and Reviews Regulations 2012]; DfE statutory guidance 2015 (n 4) [1], [15]; this came into force on 5 January 2015 and replaces the Department for Education, *Exclusion from maintained schools, Academies and pupil referral units in England*, (DFE-57501-2012, 2012) ([DfE statutory guidance 2012]) [1], [16].

<sup>7</sup> Education Act 2002, s52(10); Exclusions and Reviews Regulations 2012 (ibid) [21(5)]; DfE statutory guidance 2015 (n 4) [1], [11].

<sup>8</sup> Education Act 2002, s51A(1).

<sup>9</sup> DfE statutory guidance 2015 (n 4) [15]. In section 3.1.2, we compare the current test for exclusion to its predecessors.

<sup>10</sup> Education Act 2002, s51A(8)(b).

<sup>11</sup> Education Act 2002, s51A(3)(a); Exclusions and Reviews Regulations 2012 (n 6) [5(3)(a)], [3(3)(a)]; DfE statutory guidance 2015 (n 4) [24].

<sup>12</sup> Education Act 2002, s51A(3)(b); Exclusions and Reviews Regulations 2012 (n 6) [6(1)-(2)], [24(1)-(2)]; DfE statutory guidance 2015 (n 4) [50].

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- If the governing body does not reinstate the pupil, parents may then apply for an Independent Review Panel (IRP) to review the decision.<sup>13</sup>
- If the parents apply, the local authority (LA) or Academy trust, for maintained schools and Academies respectively, is under a duty to arrange an independent review panel.<sup>14</sup>
- The parents are able to request that a SEN expert be appointed to the IRP review.<sup>15</sup>
- The IRP can then either:
  - Uphold the exclusion; or
  - “Recommend” reconsideration by the governing body; or
  - Quash the decision of the governing body and “direct” that it reconsiders the exclusion. This option is available only if one or more of the three grounds for judicial review is/are made out (i.e. irrationality, illegality, or procedural impropriety).<sup>16</sup>
- If the IRP directs reconsideration and the governing body subsequently upholds the exclusion, the panel *may*:
  - Order that the school pays £4,000 towards the continuing education of the excluded pupil.<sup>17</sup> For maintained schools, this is an adjustment of the school’s budget; for academies, this is a direct payment to the LA. This is added to any additional funding that will follow an excluded pupil; *and/or*
  - Order a note to be placed on the pupil’s record to record that reconsideration was directed.<sup>18</sup> This means the exclusion will not count toward the rule that a school may refuse admission to a pupil who has twice been excluded.<sup>19</sup>

#### How is “recommend[ing]” reconsideration distinct from “direct[ing]” reconsideration?

- In both cases, the governing body must meet to reconsider the decision within 10 days.
- The only difference is that when the governing body is *directed* to reconsider, the panel is able to order a payment of £4,000 or place a note on the child’s record.
- A *direction* may be made only if the panel considers the decision was flawed in light of the principles of judicial review (DfE statutory guidance 2015 [138]).

#### How does the new approach to appeals / reviews differ from the former position?

**Disability discrimination:** Under the pre-2012 position, there was a dual system of appeals if the parents felt there had been disability discrimination:

- for fixed-term exclusions, parents were able to lodge a claim with the FtT; and
- for permanent exclusions, parents had to bring the claim to the IAP, which may not have had the relevant expertise.

Under the new law, the FtT hears all disability discrimination claims.

**SEN expert:** Under the pre-2012 legislation, SEN experts were not available at appeals.

**Powers of IAPs and IRPs:** Previously, the Independent Appeal Panel (IAP) considered the exclusion afresh and had the power to:

- uphold the exclusion;
- direct reinstatement; or
- decide that the pupil would have otherwise been reinstated but that, due to exceptional circumstances (for example, they were better suited to another school), it would not be practicable to do so.

In *R (CR) v Independent Review Panel of the London Borough of Lambeth [2014]* EWHC 241 (Admin), Collins J described the 2012 amendments as ‘substantial’ because they removed these powers in respect of reinstatement ([16]). How is “recommend[ing]” reconsideration distinct from “direct[ing]” reconsideration?

<sup>13</sup> Education Act 2002, s51A(3)(c); Exclusions and Reviews Regulations 2012 (n 6) [7(1)].

<sup>14</sup> Exclusions and Reviews Regulations 2012 (n 6) [7(1)(a)]; DfE statutory guidance 2015 (n 4) [86].

<sup>15</sup> Exclusions and Reviews Regulations 2012 (n 6) [7(1)(b)], [24(6)(b)(iii)], [25(1)(b)]; DfE statutory guidance 2015 (n 4) [112].

<sup>16</sup> Education Act 2002, s51A(4); DfE statutory guidance 2015 (n 4) [5], [135].

<sup>17</sup> Education Act 2002, s51A(6)-(7); Exclusions and Reviews Regulations 2012 (n 6) [7(5)(b)], [21(4)], [25(5)(b)]; DfE statutory guidance 2015 (n 4), [142] (inapplicable to recommendations), [174].

<sup>18</sup> Exclusions and Reviews Regulations 2012 (n 6) [7(5)(a)], [25(5)(a)].

<sup>19</sup> DfE statutory guidance 2015 (n 4) [145].

- If the relevant principles apply, the parents may apply for judicial review. Usually, this will need to be after the parents have exhausted their statutory rights (see Glossary, above, and section 4.9, below).
- In addition, if relevant, the parents may also bring a claim under the Equality Act 2010 to the First-tier Tribunal (FtT) (for disability discrimination) or County Court (for other types of discrimination).<sup>20</sup>

## 2.2. Statistics on permanent exclusion from English schools

School Year	Number of permanent exclusions from English schools	Exclusions as a percentage of the school population (Figure 1)	Number of appeals/reviews (Figure 2)	Appeals/reviews as a percentage of the number of exclusions (Figure 3)
1994/95	11080	-	1,240	11.21
1995/96	12480	-	1,340	10.73
1996/97	12670	-	1,460	11.49
1997/98	12300	0.16	1,290	10.49
1998/99	10440	0.14	1,220	11.69
1999/2000	8320	0.11	950	11.42
2000/01	9210	0.12	1,100	11.94
2001/02	9590	0.12	1,130	11.78
2002/03	9340	0.12	1,070	11.46
2003/04	9990	0.13	1,130	11.31
2004/05	9570	0.13	1,090	11.39
2005/06	9330	0.12	1,060	11.36
2006/07	8680	0.12	1,050	12.10
2007/08	8130	0.11	780	9.59
2008/09	6550	0.09	640	9.77
2009/10	5740	0.08	520	9.06
2010/11	5080	0.07	480	9.45
2011/12	5170	0.07	420	8.12
2012/13	4630	0.06	180	3.89

Table 1: Numbers of exclusions and appeals/reviews lodged in primary, secondary and special schools (Source: *Tables 1, 13a and 13b, Permanent and fixed-period exclusions in England: 2012 to 2013*)

<sup>20</sup> DfE statutory guidance 2015 (n 4) 5, [73].

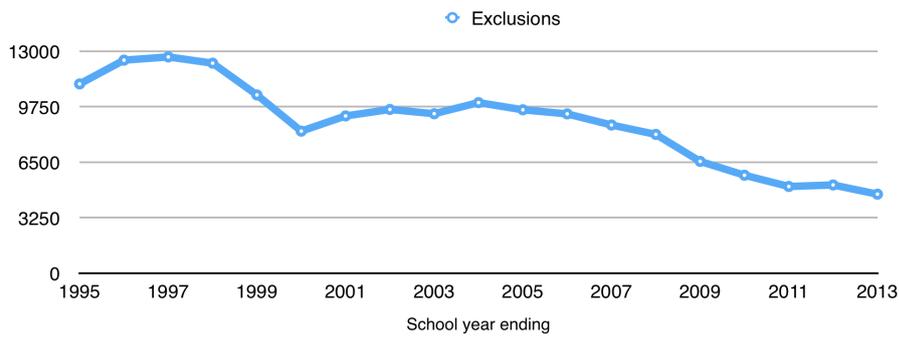


Figure 1: Number of permanent exclusions per year from English schools

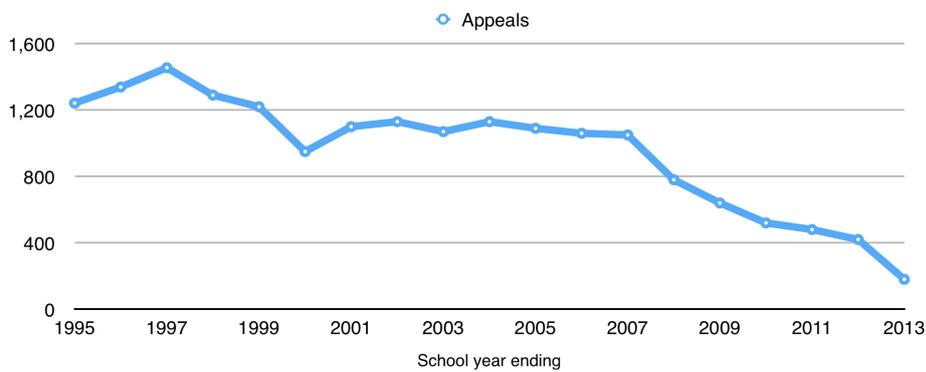


Figure 2: Number of appeals from / reviews of permanent exclusion lodged per year

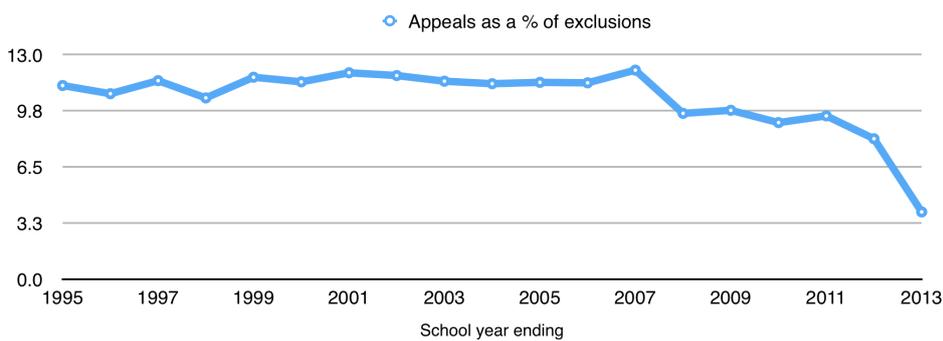


Figure 3: Number of appeals (figure 2) shown as a percentage of the number of exclusions (figure 1)

### 2.3. Significant legal and statistical developments in comparison

Legal development	Period	Significant variations in number of exclusions or appeals lodged
	1995-1997	<b>Number of exclusions:</b> Peak in 1996/97
<b>School Standards and Framework Act 1998</b>  New DfE Circular 10/99 on exclusions	1997-2000	<b>Number of exclusions:</b> 1998/99: 15% decrease; 1999/2000: 20% decrease
<b>Education Act 2002</b>  <b>The Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002</b>  New DfE statutory guidance 2003 on exclusions New DfE statutory guidance 2004 on exclusions New DfE statutory guidance 2006 on exclusions	2000-2007	<b>Appeals lodged:</b> <b>As a percentage of exclusions –</b> Remained broadly consistent from 1994/95 to 2006/07, though there was a slight increase in 2006/07
New DfE statutory guidance 2008 on exclusions  <b>Equality Act 2010</b>	2007-2012	<b>Number of exclusions:</b> Steady decrease  <b>Appeals lodged:</b> <b>Number –</b> 2007/08: 26% decrease; 2008-2012: Steady decrease of approx. 7-18% annually <b>As a percentage of exclusions –</b> Declined in 2007/08, but then remained broadly similar till 2010/11
<b>Education Act 2011, s4</b> (inserts s51A into Education Act 2002)  <b>School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012</b>  New DfE statutory guidance 2012 on exclusions  <b>LASPO 2012</b>  <b>Children and Families Act 2014</b>  New DfE statutory guidance 2015 on exclusions	2012-2015	<b>Appeals lodged:</b> <b>Number –</b> 2012/13: Decrease from appeals to reviews by 56% <b>As a percentage of exclusions –</b> 2012/13: halved

Table 2: Legal developments (1994 to 2015) compared to statistics on exclusion (1994/95 to 2012/13)

#### 1994-1997:

The highest rates of permanent exclusions and appeals were recorded in this period, peaking in the academic year 1996/97.

#### 1997-2000:

Changes in this period include a sharp reduction in the number of exclusions from their record

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high in 1996/97; the passing and implementation of the School Standards and Framework Act 1998; and the introduction of new DfE statutory guidance.

A report by the Social Exclusion Unit in 1998<sup>21</sup> set an overarching target that exclusions be reduced by one third by 2002. Various methods were set out in the report to achieve this, one of which was entitled 'Clear rules'<sup>22</sup> and recommended that statutory guidance have statutory force. Other suggestions included strengthening the statutory guidance with a greater focus on prevention and asking the Office for Standards in Education (OFSTED) to conduct special inspections of schools with high exclusion rates.<sup>23</sup>

As a result, the School Standards and Framework Act 1998 introduced a duty for headteachers, governing bodies, local education authorities and appeal panels to 'have regard to any guidance given from time to time by the Secretary of State'<sup>24</sup> (see above for its definition and origins). Harris comments that this reform was significant as it allowed central Government to 'exert increasing influence over an area of practice in which schools and teachers enjoyed traditionally virtual autonomy'.<sup>25</sup> This statutory development may have influenced the sudden reduction in exclusions during this period. No firm conclusion can be drawn, however, as this change to the legal framework was only one aspect of the Government's efforts to achieve its exclusions target.

#### 2000-2007:

The number of exclusions and appeals did not change significantly in this period. The Government target was abandoned in 2001<sup>26</sup> but there were no notable reforms to the legal framework. The Education Act 2002 was given royal assent during this period; whilst this repealed the 1998 Act, s52 confirmed teachers' powers and duties under that Act, now found in regulations.<sup>27</sup> Sutherland notes that lobbying by the Advisory Centre for Education (ACE) included a push for legally qualified chairs or clerks on appeal panels and allowing appellants to be legally represented under the Community Legal Services Fund;<sup>28</sup> these efforts were to no avail (see more below, 4.5).

#### 2007-2012:

In the academic year 2007/08, there was a 26% reduction in the number of appeals lodged. This was followed by a steady decrease of between 7 and 18% per year from 2008/09 to 2011/12. As there were no significant changes to the law on exclusion in this period, it is unclear to what extent, if at all, and how the declining permanent exclusion rate relates to the legal framework. There was one minor change in the governing law in relation to appeals from exclusion: new DfE statutory guidance (*Improving Behaviour and Attendance*, 2006) came into force on 6 September 2006. This statutory guidance introduced both mandatory legal training for members and clerks of IAPs and the right for headteachers to be represented at IAP hearings.

The Equality Act 2010 was passed towards the end of this period. This rationalised all previous discrimination legislation and introduced only minor substantive changes to the law.<sup>29</sup> Under the Act, direct disability discrimination and failure to "make reasonable adjustments" are no longer justifiable; further, the duty on schools now includes a duty to provide auxiliary aids and services. The Act also adopts a less restrictive definition of disability as it does not list day-to-day activities

<sup>21</sup> Social Exclusion Unit (Great Britain), *Truancy and School Exclusion Report* (Cm 3957, 1998).

<sup>22</sup> *ibid* 23.

<sup>23</sup> *ibid* 29.

<sup>24</sup> School Standards and Framework Act 1998, s68 [emphasis added].

<sup>25</sup> Neville Harris, 'Legislative Response to Indiscipline in Schools' (2002) 14(1) *Education and the Law* 57, 61 [Harris, 'Legislative Response'].

<sup>26</sup> Harris, 'Legislative Response' 71; BBC, 'Pupil exclusion targets dropped' (BBC, 4 May 2001). <<http://news.bbc.co.uk/1/hi/education/1312572.stm>> accessed 20 October 2014.

<sup>27</sup> Education Act 2002, s52(3)-(9).

<sup>28</sup> Ingrid Sutherland, 'Advances in Exclusions Law' [2002] *Education Law Journal* 216, 222.

<sup>29</sup> Previously, the most relevant legislation for exclusions had been the Disability Discrimination Act 1995.

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a person must be unable to do to be classed as disabled. There was no significant impact on the ongoing steady decline in the rate of both permanent exclusions and appeals in the period immediately following the coming into force of the Equality Act 2010. One might infer that the change in the law did not affect practice. Yet, one might equally conclude that renewed focus on discrimination law, with new training and statutory guidance, may have caused schools to be more cautious in their decisions to exclude.

Finally, the Government began a three-year trial (2011-14) in 180 schools across 11 LAs, which made schools responsible for the continuing education of pupils they permanently excluded (more detail below, 3.1.1).

### 2012-2015:

The three most recent academic years have seen notable changes in the exclusion process. Section 4 of the Education Act 2011, together with the accompanying 2012 regulations, replaced IAPs with IRPs. New review panels cannot direct a school to reinstate a pupil but can only recommend or direct a school to reconsider an exclusion. Other changes include the ability for parents to request that a SEN expert be appointed to the IRP review<sup>30</sup> and, if they believe there has been discrimination, to bring a claim under the Equality Act 2010 to the FtT or County Court (see section 2.1, above, for detail). In September 2012, the DfE published new statutory guidance to reflect the changes in the governing primary legislation. The DfE most recently amended the required approach to exclusion via its 2015 statutory guidance, which lowers the threshold for exclusion.

Two other significant legal developments comprise the reforms in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the Children and Families Act 2014.

LASPO 2012 removes the right to legal aid for exclusions cases except where there is an Equality Act 2010 appeal to the Upper Tribunal or a judicial review claim. The only area of education law in which legal aid is still available is the SEN context, under Part 4 Education Act 1996. There remains a possibility for legal aid via 'Exceptional funding' under s10. However, there were only two applications made for exceptional funding in education law in 2013/14 (not exclusions specifically) and both were refused.<sup>31</sup> Only three organisations are now able to obtain legal aid under an education law franchise: Maxwell Gillott, Coram, and the National Youth Advocacy Service.<sup>32</sup> These LASPO reforms came into force on 1 April 2013

The Children and Families Act 2014 has given greater powers to the Children's Commissioner to 'promote and protect the rights of children',<sup>33</sup> which suggests a fresh focus on children's rights; this has the potential to lead to further positive changes in the law (see further below, 3.6). Statistics recorded since this Act came into force have yet to be released.

Recently-released statistics from the DfE show a 56% decrease in the number of reviews lodged in 2012/13, compared with appeals in 2011/12. This is the most significant change in the appeals statistics since 1994. The explanation for this significant decline in the number of reviews can only be speculated upon, particularly because our preceding analysis highlights that legal developments do not always self-evidently impact exclusion and appeal rates. It is reasonable to suggest, however, that such marked reform to the appeal/review process and the availability of legal advice and representation is likely to affect schools' and parents' behaviour. Yet, there is currently insufficient statistical evidence and analysis thereof to determine if the 2012-15 period marks part of a long-term significant decline in the rate of reviews.

<sup>30</sup> Exclusions and Reviews Regulations 2012 (n 6) [7(1)(b)].

<sup>31</sup> Ministry of Justice, 'Legal aid statistics in England and Wales, Legal Aid Agency' (Legal aid statistics, updated 25 September 2014) Figure 22 <<https://www.gov.uk/government/statistics/legal-aid-statistics-april-2013-to-march-2014>> accessed 17 October 2014.

<sup>32</sup> Elaine Maxwell, 'Armageddon and the Development of Education Law: The Impact of Legal Aid Reform' [2013] *Education Law Journal* 15, 16 [Maxwell, 'Armageddon'].

<sup>33</sup> Children and Families Act 2014, s107.

# Underlying aims and values

This section evaluates the values that underpin the legal framework, particularly autonomy, “best interests”, equality, and participation and procedural rights. We highlight the importance of individual values for particular stakeholders, notably headteachers, pupils, and pupils’ parents and carers.

## 3.1. Autonomy and empowering schools

Harris notes that the ‘reforms of recent years have ... promoted the interests of schools ... over pupils who misbehave’.<sup>34</sup> Recent changes mark a new focus on giving headteachers greater authority and discretion. These two values will be examined in turn.

### 3.1.1. Headteachers and authority

The DfES, in the White Paper that preceded the Education Act 2011,<sup>35</sup> highlighted poor behaviour in schools as the most common reason for young people not to become teachers and a cause for teachers to leave the profession.<sup>36</sup> Poor classroom discipline can also detrimentally impact on the academic success of well-behaved pupils, who comprise the majority of pupils.<sup>37</sup> As a result, the Government recently sought to restore teachers’ authority<sup>38</sup> as regards respect for schools’ decisions on exclusion. In the White Paper, the Government argued that IAPs had become ‘unduly adversarial’.<sup>39</sup> Hence, the 2011 Act replaced independent appeal panels (IAPs) with independent review panels (IRPs); crucially, unlike IAPs, IRPs accord headteachers *final* authority on exclusion decisions.

This reform went beyond what was originally proposed. In its list of intended actions in the White Paper, the Government had said it would ‘change the current system of independent appeal panels...[to] ensure that pupils who have committed a *serious offence* cannot be re-instated’.<sup>40</sup> Yet, the new review process does not distinguish between serious and less serious offences; the weakening of the IRP’s powers thus affects all pupils, whether they have been excluded for low-level continued poor behaviour or a one-off serious offence. Given that the most common reason for exclusion is “persistent disruptive behaviour”, the removal of the IRP’s power to reinstate disproportionately impacts pupils in less serious cases.

Writing prior to these reforms, Monk had been critical of earlier developments that enhanced headteachers’ powers in respect of exclusion.<sup>41</sup> Whilst the concerns identified by the DfES were significant, the Children’s Commissioner disagreed with the Government’s response. The Parliamentary Joint Committee on Human Rights (JCHR) also questioned the need for this response; it asked the Government for statistical evidence on the number and percentage as a proportion of the total number of exclusions of cases in which the IAP ordered reinstatement. The Government reported that the number had fallen from 100 in 2006/07 to 60 in 2008/09, or less than 1% of all permanent exclusions.<sup>42</sup> The OCC was similarly concerned that any reforms

<sup>34</sup> Neville Harris, ‘Getting a grip? The role of the law in response to behaviour concerns relation to pupils in school’ [2014] *Education Law Journal* 99, 114 [Harris, ‘Getting a grip?’].

<sup>35</sup> DfES, *White Paper* (n 1).

<sup>36</sup> *ibid* [3.2].

<sup>37</sup> *ibid* [3.2].

<sup>38</sup> *ibid* [3.4].

<sup>39</sup> *ibid* [3.29].

<sup>40</sup> *ibid* [3.6] [emphasis added].

<sup>41</sup> Daniel Monk, ‘(Re)constructing the Headteacher: Legal Narratives and the Politics of School Exclusions’ (2005) 32(3) *Journal of Law and Society* 399 [Monk, ‘(Re)constructing the Headteacher’].

<sup>42</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Education Bill and other Bills* (Thirteenth Report Session 2010-11, HL 154, HC 1140) [1.31] [JCHR, *Legislative Scrutiny*].

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were proportionate to the extent of any disciplinary problems.<sup>43</sup> The OCC recommended that the IAP process remain undisturbed.<sup>44</sup> Emphasising the importance of a right of appeal, the OCC's formal submission on the Education Bill contended that the IRP process would not meet this need because of the panel's lack of power to require reinstatement.<sup>45</sup>

Headteachers' authority has been further emphasised by the DfE's 2012 and 2015 statutory guidance, which explicitly notes the government's 'support' for headteachers' decision-making on exclusion. The 2012 statutory guidance noted that the government supported decisions to exclude 'as a sanction where it is warranted'.<sup>46</sup> The 2015 statutory guidance arguably goes further in stressing the role for headteachers; the DfE reasons that '[t]he government supports the decisions of headteachers and they should be confident in using exclusion where they consider it to be a lawful, reasonable and fair action'.<sup>47</sup> This concluding emphasis on headteachers as the arbiters of the justifiability of exclusion is particularly noteworthy.

The focus on greater authority is balanced by greater responsibility. The DfE has recently completed a three-year trial (2011-14)<sup>48</sup> for permanent exclusions in which participating schools remained responsible for providing alternative provision for pupils they excluded. This was made possible by transferring the relevant funding from LAs to schools. The approach also empowered schools by allowing them to make the long-term, post-exclusion decisions about pupils they knew well.

The IoE and NFER's evaluation of the trial was broadly positive. Participating schools took increased moral and practical responsibility for pupils at risk of exclusion, which in turn meant that they were working to place young people in the most appropriate provision.<sup>49</sup> Notable changes included an increased collaboration between schools for managed moves, an increase in early intervention programmes to prevent exclusions and enhanced quality assurance, accreditation systems and service level agreements for providers of alternative provision.<sup>50</sup> Trial schools also made better use of LA services, such as traveller education or the Looked-After Children team, and fewer children were permanently excluded from trial schools than comparator schools.<sup>51</sup>

However, whilst the *qualitative* data demonstrated improvements in outcomes for young people at risk of exclusion,<sup>52</sup> the *quantitative* data (measuring attainment in KS3 and KS4, absences and numbers of fixed period exclusions) did not.<sup>53</sup> This may be because measurable improvements in attainment take longer to secure than experiential, qualitative benefits.<sup>54</sup> Finally, it must be noted that although the outcomes of the trial seem positive, they must be seen in context of other recent reforms and emphasis on inclusion in education. The report notes that the comparison schools used in the pilot were also investing in a wide range of in-school support, not connected with the trial.<sup>55</sup>

<sup>43</sup> Office of the Children's Commissioner, 'Formal Submission of Evidence to the Education Bill Committee' (March, 2011), 7 [OCC, 'Formal Submission'].

<sup>44</sup> *ibid* 4.

<sup>45</sup> OCC, 'Formal Submission' (n 43) 4, 9-10.

<sup>46</sup> DfE statutory guidance 2012 (n 6) 4.

<sup>47</sup> DfE statutory guidance 2015 (n 4) 4 [emphasis added]; see also [14]

<sup>48</sup> The Institute of Education (IoE) and the National Foundation for Educational Research (NFER), *School exclusion trial evaluation* (Research report, July 2014) <<http://www.nfer.ac.uk/publications/APSR01/APSR01.pdf>> accessed 21 October 2014. See also the interim report: Department for Education, *Exclusion trials - first interim report* (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/190908/DFE-RR284.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190908/DFE-RR284.pdf)> accessed 21 October 2014.

<sup>49</sup> IoE and NFER (*ibid*) 16.

<sup>50</sup> *ibid* 41.

<sup>51</sup> *ibid* 16.

<sup>52</sup> *ibid* 94.

<sup>53</sup> *ibid* 93. More precisely, there was no statistically significant difference between pupils in trial and comparison schools.

<sup>54</sup> *ibid*.

<sup>55</sup> *ibid* 117. This is also cited as a possible explanation for the absence of statistically significant difference in attainment between pupils in trial and comparison schools, as comparison schools are also making such investments: 93.

### 3.1.2. Headteachers and discretion

The 2012 statutory guidance on exclusion removed central aspects of detail present in the 2008 statutory guidance; this empowered headteachers by affording them greater discretion in practice. The 2015 statutory guidance adds critical significance to this increased discretion by lowering the threshold for exclusion.

The 2008 statutory guidance provided a list of the type of offences that would lead to permanent exclusion. These were: supplying drugs, sexual assault or abuse, carrying an offensive weapon, serious actual or threatened violence toward a member of staff or pupil and persistent and defiant misbehaviour.<sup>56</sup> By contrast, the 2012 guidance simply stated two requirements that must be satisfied for disciplinary exclusion to be warranted: first, the pupil has breached or persistently breached the school's behaviour policy;<sup>57</sup> and, second, allowing the pupil to remain in school 'would seriously harm the education or welfare of the pupil or others in the school'.<sup>58</sup>

The 2012 test has been amended in three significant ways in the 2015 guidance: Firstly, the two limbs are now posited as alternative not cumulative requirements.<sup>59</sup> Secondly, the 'serious harm' threshold has been replaced by a requirement of mere 'detriment[ ]'.<sup>60</sup> Thirdly, the broader context for the test has been amended – the 2015 statutory guidance no longer refers to exclusion as a matter of 'last resort';<sup>61</sup> further, reference to the fact that the decision to exclude is the headteacher's to make is no longer coupled to the countervailing concern that the pupil be heard prior to the decision being made but instead prefaces the test for exclusion.<sup>62</sup>

The 2012 increased discretion was not aimed solely at empowering headteachers. More pragmatically, and as mentioned in the parliamentary debate, the Government also wanted to simplify the statutory guidance so those involved in the exclusion process 'actually read it'.<sup>63</sup> However, it is difficult to see the 2015 reforms as other than aimed at increasing headteachers' authority and discretion.<sup>64</sup> This is supported by the DfE's framing of its amendments in terms of 'provid[ing] greater confidence to headteachers on their use of exclusion'<sup>65</sup>: the former position was at least as clear, which would ensure 'confidence', the threshold was simply higher.

Despite the increased discretion in categories for decision-making about permanent exclusion, when a headteacher records a permanent exclusion for the School Census,<sup>66</sup> they must provide a single "reason for exclusion" from a list of provided options. This list is more extensive than that in the 2008 statutory guidance. The full list of current Census categories of reason for exclusion is as follows: bullying, damage, drug and alcohol related, persistent disruptive behaviour, physical assault against an adult, physical assault against a pupil, racial abuse, sexual misconduct, theft, verbal abuse/threatening behaviour against an adult, verbal abuse/threatening behaviour against a pupil, and other. The Census Guide indicates that the category "other" should be used 'sparingly'.<sup>67</sup> Thus, whilst the statutory guidance affords significant discretion

<sup>56</sup> Department for Education and Skills, *Improving behaviour and attendance: guidance on exclusion from schools and Pupil Referral Units* (DCSF-00573-2008, 2008) (DfES statutory guidance 2008) [17].

<sup>57</sup> DfE statutory guidance 2012 (n 6) [15].

<sup>58</sup> *ibid.*

<sup>59</sup> DfE statutory guidance 2015 (n 4) [15].

<sup>60</sup> *ibid.*

<sup>61</sup> DfE statutory guidance 2012 (n 6) 4.

<sup>62</sup> Compare DfE statutory guidance 2012 (n 6) [15-16] to DfE statutory guidance 2015 (n 4) [15-16].

<sup>63</sup> Education Bill Deb 15 March 2011, cols 371-416, Nick Gibb MP, col 378.

<sup>64</sup> Indeed, this forms the basis of a judicial review challenge to the reform currently being brought by Just For Kids Law. See Owen Bowcott and Sally Weale, 'Pupils' lawyers challenge lower threshold for school exclusions' *The Guardian* (London, 6 January 2015): <<http://www.theguardian.com/education/2015/jan/06/pupils-lower-threshold-school-exclusions>> accessed 8 January 2015.

<sup>65</sup> DfE statutory guidance 2015 (n 4) 4.

<sup>66</sup> The School Census is a Department for Education, completed by schools and LAs, that collects school- and pupil-level data, such as class size, pupil background and reasons for exclusions; it is used to monitor the effects of government policies and to assist in developing new policies.

<sup>67</sup> Department for Education, 'School Census 2014 to 2015, Guide version 1.2' (September 2014) [4.6.2.] <[http://www.medway.gov.uk/pdf/DfE%20\(version%201.2\)%20School%20Census%20Guide%20for%20All%20Schools%20-%20Autumn%202014.pdf](http://www.medway.gov.uk/pdf/DfE%20(version%201.2)%20School%20Census%20Guide%20for%20All%20Schools%20-%20Autumn%202014.pdf)> accessed 21 October 2014.

for headteachers, these categories may influence their understanding of which behaviour does and does not justify permanent exclusion.

There has been no research to date on how headteachers relate students' behaviour to the classification categories provided in the statutory guidance and Census.

### 3.2. Children's "best interests"

Article 3(1) UNCRC: *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The UK Government ratified the United Nations' Convention on the Rights of the Child (UNCRC) in 1991. Whilst not incorporated into domestic law, the Convention obliges the UK Government to protect the rights enshrined in any way it can. There were few mentions of the "best interests" of either the excluded pupils or others in the Government White Paper or in parliamentary debates on the matter.<sup>68</sup> A strong motive behind the 2011 reforms was to regain discipline in schools to allow all children to have a safe, happy environment within which to learn.<sup>69</sup>

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#### 3.2.1. "Best interests" in practice

CCCU's research found that the "best interests" of the excluded child seemed to be at the heart of decision-making on exclusion. One headteacher indicated that regulatory frameworks are 'less influential than professional judgement over what we believe are in the best interests of the child' (Headteacher, School 2).<sup>70</sup> Further, another headteacher noted that, whilst it would be easier to apply the rules consistently where "best interests" and the law clash, they instead try to keep the child's "best interests" at heart (Headteacher, School 8).<sup>71</sup> The OCC report into illegal exclusions similarly found that the vast majority of illegal exclusions occur when headteachers are trying to act in the "best interests" of their pupils.<sup>72</sup>

#### 3.2.2. "Best interests" in law

In evaluating the justification for the current approach, we need to distinguish two issues: first, the debate over incorporation of the "best interests" standard in this context; second, the appropriate balance between different parties' competing interests.

In relation to permanent exclusions, there is no domestic legal recognition of the need to have regard to the "best interests" of the child at risk of exclusion.<sup>73</sup> The test for exclusion contained in the 2015 statutory guidance suggests that a pupil may be excluded without any consideration of their welfare. The at-risk pupil's welfare may only be taken into account as part of the 'detriment' alternative to the 'breach of behaviour policy' route. Further, that alternative has been weakened, as consideration of 'detriment' to the education of the at-risk pupil or others may be sufficient and, even if welfare is relied upon, the decision to exclude can be grounded in the welfare of other pupils and others in the school, with no regard to the welfare of the at-risk pupil.

<sup>68</sup> The *White Paper* argued that 'By its nature the appeal process can become unduly adversarial rather than encouraging schools and parents to work together in the interests of the child' ((n 1) [3.29]); in debate Nick Gibb MP said headteachers must act in the "best interests" of all the pupils in a school ((Education Bill Deb (n 63) col 393).

<sup>69</sup> DfES, *White Paper* (n 1) [3.4].

<sup>70</sup> Dr Alison Ekins, 'Annex E: Final report submitted by Canterbury Christ Church University, Inquiry into School Exclusions' (Canterbury Christ Church University, 2011) 29.

<sup>71</sup> *ibid* 33.

<sup>72</sup> OCC, *Always Someone Else's Problem* (n 3) 38.

<sup>73</sup> In fact, Harris has argued that: 'There is no evidence as yet that the principles whereby primacy is given to children's interests within child care law... have spread into the field of education' (Neville Harris, 'Playing Catch-up in the Schoolyard? Children and Young People's 'Voice' and Education Rights in the United Kingdom' (2009) 23(3) *International Journal of Law, Policy and the Family* 331 [Harris, 'Playing Catch-Up']).

The test for exclusion in the 2012 statutory guidance made it possible, but less likely, that the at-risk pupil's welfare would not be taken into account: welfare was regarded in the alternative to education, but one of those two factors needed to be satisfied in addition to breach of the behaviour policy. Whilst, when welfare was relied on, it could relate to either the at-risk pupil or other pupils and others in the school, the 'serious harm' threshold assumed that the 'best interests' of the at-risk pupil and others lay in having the at-risk pupil remain in the school.

The 2015 reform's attenuated role for the at-risk pupil's welfare is readily criticisable. Writing in the context of the pre-2015 position, the OCC criticised the legal framework on exclusion for failing to comply with Article 3 UNCR. The first recommendation of its 2012 report was that 'the [2012] Statutory Guidance on exclusions should specify that the interests of the child concerned must be a primary consideration in exclusion decisions'.<sup>74</sup> In its response, the DfE recognised that the interests of the pupil at risk of exclusion should be an 'important consideration' but stressed that 'schools also need to take account of the interests of other pupils and staff working at the school';<sup>75</sup> the DfE suggested that 'the new exclusion arrangements strike an appropriate balance between these interests'.<sup>76</sup> However one would assess the 2012 position, the 2015 reforms more obviously fail to meet the DfE's defence, namely that their approach recognises the interests of the at-risk pupil as an 'important consideration'.

Monk comments that there have been 'repeated demands' for the "best interests" principle to be incorporated into education law.<sup>77</sup> Yet the issue of "best interests" has not attracted significant academic attention, particularly as regards developing a workable "best interests" principle in this context,<sup>78</sup> which can balance the interests of one pupil against those of others in the school. In fact, Harris notes that recent reforms have promoted the interests of schools over pupils that misbehave.<sup>79</sup>

The welfare/education alternative route to permanent exclusion provides the basis for balancing the interests of the at-risk pupil against those of other pupils and others in the school. As noted, the interests of others in the school can lead to exclusion when consideration of the pupil's situation in isolation would not warrant exclusion. However, whilst the test for exclusion suggests focusing on either the at-risk pupil or other pupils and others in the school, elsewhere the statutory guidance requires the at-risk pupil's circumstances to be assessed in context. This means always taking into account the interests of all affected parties – the at-risk pupil, other pupils, and others in the school. Where the governing body is legally required to consider the exclusion, they 'must consider not only the representations made but also the interests and circumstances of the excluded pupil... and have regard to the interests of other pupils and people working at the school'.<sup>80</sup> This necessitates a broader perspective on the competing interests of pupils and others in the school than the requirements for permanent exclusion applied by the headteacher. The IRP must also have the same consideration for competing interests.<sup>81</sup> The contrast in approach to various parties' interests contained in the test for the exclusion and the requirements imposed on decision-makers complicates reaching any firm conclusion about the weight the government intends to be placed on 'interests' under the 2015 statutory guidance.

Balancing the competing interests of individual children against those of a larger group of children is not unique to the issue of permanent exclusion. For example, Part III of the Children

<sup>74</sup> OCC, *They never give up on you* (n 3) 29.

<sup>75</sup> Department for Education, *'They never give up on you', Office of the Children's Commissioner School Exclusions Inquiry – response from the Department for Education* (2012) [5] [DfE, Response]. This accords with the legal duties imposed on the relevant decision-makers, such as the governing body: Exclusions and Reviews Regulations 2012 (n 6) [6(3)(a)].

<sup>76</sup> DfE, Response (ibid) [5].

<sup>77</sup> Monk, 'Children's rights' (n 5) (unpaginated).

<sup>78</sup> Monk thus suggests that there is a 'certain irony' to the 'repeated demands' for incorporating a "best interests" principle in this context, given the 'extensive criticis[m]' of its operation in other areas of the law (ibid (unpaginated)).

<sup>79</sup> Harris 'Getting a grip?' (n 34) 114.

<sup>80</sup> Exclusions and Reviews Regulations 2012 (n 6) [6(3)(a)], [24(3)(a)]; DfE statutory guidance 2015 (n 4) [58].

<sup>81</sup> Exclusions and Reviews Regulations 2012 (n 6) [7(4)]; DfE statutory guidance 2015 (n 4) [133].

Act 1989 imposes a duty on LAs to safeguard and promote the welfare of children in need within their area.<sup>82</sup> In this context, it was held in *Re M (Secure Accommodation Order)*<sup>83</sup> that, although the individual child's welfare is a significant factor, it can be outweighed by other considerations; the court recognised that there were other factors the relevant decision-making authority had to take into account.

The DfE response to the OCC's recommendation to incorporate "best interests", discussed above, in fact addresses the issue of the appropriate balance to be struck between competing interests. Incorporation of "best interests" need not inhibit the balancing of competing interests, though recognition of the difficulty of providing a conceptual basis for our pragmatic approach may explain the DfE's reluctance.

### 3.3. Equality

The value of equality includes both formal and substantive equality. The former is about treating like cases alike and ensuring rules are applied consistently to all those that come under them. The latter entails equality of opportunity and equality of outcomes.

Rights are implicated in relation to the legal expression of, and opportunity to attain these equality aspects, as well as in relation to children's participation in decision-making that affects them. The education law context has been much criticised for paying insufficient regard to children's rights.<sup>84</sup> Yet, Monk suggests both that resistance to rights may be logical in relation to education law and that 'children's experiences' may be more important than children's 'formal legal rights'.<sup>85</sup>

Further examination of practice is required before we can determine the appropriate role for children's rights in relation to permanent exclusion.

There is some evidence of the impact of the value of equality in relation to two issues: first, the position of groups disproportionately affected by permanent exclusion; second, access to legal advice.

#### 3.3.1. Groups disproportionately affected by exclusion

Recent academic literature and case law pays significant attention to the position of groups disproportionately affected by exclusion, particularly pupils with SEN.<sup>86</sup> Three developments are of note.

Firstly, the Equality Act 2010 amends a school's "duty to make reasonable adjustments" in two respects. Under the Disability Discrimination Act 1995 (DDA), the duty imposed on schools pertained to provisions, criteria and practices; post-2010, it now includes a duty to provide auxiliary aids and services. Further, under the DDA, the duty could be waived if justified; this is no longer the case and the only issue is whether the school's adjustments are "reasonable".<sup>87</sup>

Secondly, parents can now bring a claim under the Equality Act 2010 to the FtT (for disability discrimination) or County Court (for other discrimination) if they feel their child has been

<sup>82</sup> Children Act 1989, s17(1)(a).

<sup>83</sup> [1995] 1 FLR 418.

<sup>84</sup> For example: Harris, 'Playing Catch-Up' (n 73); Jane Fortin, *Children's Rights: The Developing Law* (3rd edn, Cambridge University Press, 2009), ch 6.

<sup>85</sup> Monk (n 5) (unpaginated).

<sup>86</sup> For example: OCC, *They Go the Extra Mile* (n 3); Eleni Stamou, Anne Edwards, Harry Daniels, and Lucinda Ferguson, *Young People At Risk of Drop-Out from Education: Recognising and Responding to Their Needs* (University of Oxford, 2014); *P v Governing Body of A Primary School* [2013] UKUT 154 (AAC), [2013] E.L.R. 497; Harris, 'Legislative Response' (n 25).

<sup>87</sup> Department for Education, *Equality Act 2010: advice for schools* (DFE-00296-2013, 2014) [4.3].

discriminated against by a decision to exclude. This was not available for permanent exclusions under the former IAP regime.

Thirdly, all parents can now request a SEN expert in the IRP review; this was not available under the preceding IAP regime. The role of the SEN expert is 'analogous to an expert witness':<sup>88</sup> they provide advice on whether the school's policies relating to SEN were applied in a legal, reasonable, and procedurally fair way, but do not make an assessment of the particular child's needs.<sup>89</sup> Dance is encouraged by these developments that provide an 'impressive concentration on vulnerable groups' and fill 'a rather large hole in the matter of permanent exclusions'.<sup>90</sup> To this extent, there is a renewed focus on equality.

However, the AJTC criticised these reforms for not going far enough. Given that 70% of permanently-excluded pupils have SEN,<sup>91</sup> the AJTC proposed that all exclusion appeals, or at least all SEN-related permanent exclusion appeals, to be heard by the FtT.<sup>92</sup> Whilst Harris welcomes the recent reform to the role for SEN experts in IRP reviews, he agrees with the AJTC that it would be better if the FtT heard *all* exclusion appeals.<sup>93</sup> The Government rejected this proposal on the basis that it would extend the jurisdiction of the tribunal.<sup>94</sup> It also rejected the more moderate proposal that all SEN-related permanent exclusion appeals be heard by the FtT on the grounds of delay caused by the latter: cases going to a tribunal take 22 weeks to complete, whereas the then-proposed independent review panel would take only 15 school days.<sup>95</sup>

These three reforms focus only on certain equality-oriented issues: SEN, disability, and discrimination. During the passage of the Education Bill 2011, an amendment was proposed that targeted a wider range of pupils at particular risk of exclusion:<sup>96</sup> those with SEN, in receipt of free school meals, in care, or who were young carers. The proposal would have allowed these pupils to be reinstated and required schools to "make reasonable adjustments" if they had previously failed to do so. This would have given greater protection to children from these vulnerable groups. Whilst their greater risk of exclusion was accepted, the then-Minister for Schools, Nick Gibb MP, argued that forcing a school to reinstate a pupil was not the correct approach and would undermine the change to IRPs.<sup>97</sup> The amendment was rejected; only those with SEN were provided with additional protection.

Whilst the OCC highlights other particular groups with a disproportionate risk of exclusion,<sup>98</sup> there is little published research or academic discussion on the most appropriate way to protect the rights and interests of pupils from these groups.

### 3.3.2. Equal access to legal advice

Legal aid for school exclusion cases was removed by LASPO 2012. As such, pupils no longer benefit from equal access to legal advice regardless of means. Whilst the exclusion context is not alone in suffering from the cuts to legal aid, the decision to implement cuts in this area has

<sup>88</sup> DfE statutory guidance 2015 (n 4) [161].

<sup>89</sup> DfE statutory guidance 2015 (n 4) [161-64].

<sup>90</sup> Nabil Dance, 'In Practice: Recent Legal Developments in School Exclusions' [2013] *Education Law Journal* 175, 175.

<sup>91</sup> Brian Lamb, *Lamb Inquiry: Special Educational Needs and Parental Confidence* (DSCF Publications, 2009) [2.78].

<sup>92</sup> Richard Thomas, *Education Bill - letter to the Secretary of State* (March 2011) <<http://ajtc.justice.gov.uk/news/471.htm>> accessed 17 October 2014

<sup>93</sup> Neville Harris, 'SEN Issues: A Less Adversarial System?' [2012] *Education Law Journal* 93, 97.

<sup>94</sup> JCHR, *Legislative Scrutiny* (n 42) [1.30].

<sup>95</sup> *ibid.*

<sup>96</sup> *Education Bill Deb* (n 63) col 380.

<sup>97</sup> *ibid* col 412.

<sup>98</sup> The OCC's report highlights four over-represented groups in exclusion figures: SEN, ethnic minorities, boys and low income background. See OCC, *They never give up on you* (n 3).

been criticised. For example, the AJTC argues it is a false economy, given the link between school exclusion and offending, and that excluded pupils cost society around £650m per annum.<sup>99</sup> Maxwell also warns that lack of legal aid will hinder the development of education law.<sup>100</sup>

### 3.4. The child's right to be heard

Article 12(1) UNCRC: *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

In England, pupils under the age of 18 are unable to lodge an independent review themselves and must rely on their parents or guardians to do so.<sup>101</sup> In Wales, pupils and their parents both have a right of appeal when the pupil is between 11 and 15 years old; they acquire an independent right of appeal when they are 16 years old.<sup>102</sup> In Scotland, a pupil's right to appeal turns on their legal capacity; they are presumed capable at 12 years of age, hence have a right to appeal in addition to their parents' right; as in Wales, pupils acquire an independent right to appeal when they are 16 years old.<sup>103</sup>

In contrast to Article 3, there has been long-standing academic and political criticism of the current law on exclusion for failure to comply with Article 12 UNCRC. Harris has noted on several occasions that the lack of provision of an independent right of appeal for the pupil breaches Article 12 UNCRC.<sup>104</sup> Similarly, Fortin comments that education law generally fails to recognise children's right to participate.<sup>105</sup>

Criticism of the current position extends to calls for reform in relation to two matters: first, children's relative opportunity to appeal compared to their parents; second, the available outcomes of any external appeal or review. In relation to the first issue, the Children's Commissioner saw the Education Act 2011, then a Bill, as an opportunity to provide pupils with the same powers as their parents to appeal exclusions and, where applicable, an independent qualified advocate.<sup>106</sup>

During the passage of the Education Bill 2011, Meg Munn, MP, proposed an amendment that would have allowed children the opportunity to make representations, appeal, and receive information relevant to representations.<sup>107</sup> She argued that the amendment was not 'anything unusual or strange, but something the Government had been signed up to for some time' (i.e. the UNCRC).<sup>108</sup> She also pointed out that children have the right to have their voice heard in other contexts, for example in medical decision making.<sup>109</sup>

<sup>99</sup> Administrative Justice and Tribunal Council, 'AJTC Response to the Ministry of Justice's Consultation on Proposals for Reform of Legal Aid in England and Wales' (CP 12/10, 2011) <[http://ajtc.justice.gov.uk/docs/Legal\\_Aid\\_Response.pdf](http://ajtc.justice.gov.uk/docs/Legal_Aid_Response.pdf)> accessed 21 October 2014 [AJTC, 'Response'].

<sup>100</sup> Maxwell (n 32) 15.

<sup>101</sup> Exclusions and Reviews Regulations 2012 (n 6) [2(a)].

<sup>102</sup> In Wales, children and their parents both have the right when the child is between 11 and 16 years of age (The Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations 2003 [2]).

<sup>103</sup> In Scotland children have the right once they are adjudged to have legal capacity; this is presumed from the age of 12 (Standards in Scotland's Schools etc. Act 2000, s41 (read in conjunction with Age of Legal Capacity (Scotland) Act 1991, s1) and Scottish Executive, *Exclusion From Schools In Scotland: Guidance to Education Authorities Circular 8/03 (2003)* [25] <<http://www.scotland.gov.uk/Resource/Doc/47063/0023825.pdf>> accessed 21 October 2014).

<sup>104</sup> Neville Harris 'Education law: Excluding the child' (2000) 12(1) *Education and the Law* 31 [Harris, 'Excluding the Child']; Neville Harris, 'Exclusion Appeal: Fettered Discretion?' (Editorial) [2002] *Education Law Journal* 3, 3 [Harris, 'Exclusion Appeal']; Harris, 'Playing Catch-up' (n 73); Harris, 'Legislative Response' (n 25).

<sup>105</sup> Fortin (n 84).

<sup>106</sup> Office of the Children's Commissioner, 'Views on the Education Bill' (February 2011) section 2.

<sup>107</sup> Education Bill Deb (n 63) Meg Munn, MP, col 397.

<sup>108</sup> *ibid* col 398.

<sup>109</sup> *ibid* col 399-400.

The then-Minister for Schools, Nick Gibb MP, expressed sympathy for the principle that the pupil's views should be heard.<sup>110</sup> However, he suggested that sufficient safeguards were already in place and that the DfE's statutory guidance gave significant weight to pupil's participation.<sup>111</sup> Further, he argued that it was the responsibility of the pupil's *parents* to decide whether to seek a review.<sup>112</sup> Whilst parents may often have that role in practice, reliance on parents may be insufficient protection for the purpose of Article 12 UNCRC. As Mark Hendrick, MP, noted in parliamentary debate, there are parents who do not believe their child's education is important and would not stand up for them, even if that is what the child wished.<sup>113</sup>

The OCC's 2012 report, after the Education Act 2011 was passed, highlighted the new review process' lack of compliance with Article 12 UNCRC<sup>114</sup> and urged the Government to amend the process so pupils' views were taken into account.<sup>115</sup> The DfE's response repeated the Minister's view as regards the sufficiency of the current process.<sup>116</sup> Yet, whilst the statutory guidance encourages headteachers, governing bodies, and IRPs to listen to pupils,<sup>117</sup> it does not afford pupils a 'right' to be heard that they can independently exercise, as required by Article 12. Instead, an adult needs to be willing to intervene on the pupil's behalf.

In relation to the second issue, the available outcomes from the appeal / review stage, rather than arguing for reform, there have been calls to reverse recent reform in relation to the available outcomes of the IRP process. In particular, the OCC in 2012 called for the reinstatement of the IAP process 'at the earliest opportunity'.<sup>118</sup> Prior to the move from IAPs to IRPs, the OCC also expressed concern that any weakening of the appeals process could undermine children's rights under Article 3, 12, and 28 of the UNCRC.<sup>119</sup>

Despite these criticisms there is no method for a child to seek redress in respect of a breach of their Article 12 right, or any other right enshrined in the UNCRC. The only method would be via Optional Protocol 3. This allows children or their representatives to submit complaints directly to the Committee on the Rights of a Child if their UNCRC rights have been violated. To date, however, the United Kingdom has neither ratified nor signaled an intention to ratify this Protocol.

### 3.5. The right to a fair trial (for pupils, their parents and carers)

Article 6 ECHR: *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

It is not yet settled in law that Article 6 of the European Convention on Human Rights (ECHR) is engaged in this context. The Government, drawing on the decision in the *Tom Hood* case,<sup>120</sup> argues that the decision to exclude is not 'a determination of a civil right or obligation'.<sup>121</sup> In its February 2010 judgment in the *Tom Hood* case, the Court of Appeal took the view that denial of the opportunity to be educated in one school did not equate to what might be characterised as denial of a 'right' to continue to receive education in that school. Giving the only substantive judgment, Lord Justice Wilson reasoned that he:

<sup>110</sup> *ibid* Nick Gibb, MP, col 403.

<sup>111</sup> *ibid*.

<sup>112</sup> *ibid*.

<sup>113</sup> *ibid* Mark Hendrick, MP, cols 403-4.

<sup>114</sup> OCC, *They never give up on you* (n 3) 16.

<sup>115</sup> *ibid* Recommendations 2, 29.

<sup>116</sup> DfE, *Response* (n 75) [10].

<sup>117</sup> See, for example, statutory guidance 2015 (n 4) [16] regarding headteachers.

<sup>118</sup> OCC, *They never give up on you* (n 3) 19.

<sup>119</sup> OCC, 'Formal Submission' (n 43) 10.

<sup>120</sup> *R (on the application of LG) v The Independent Panel for Tom Hood School* [2010] EWCA Civ 142 [*Tom Hood School*].

<sup>121</sup> JCHR, *Legislative Scrutiny* (n 42) [1.35].

... would not accept that the concomitant of the duty of a school to keep a register is the right of a child registered therein to continue – in principle – to be educated there: such would be to elevate the significance of a school’s requisite attention to its paper-work to an astonishing level at which its due completion would create substantive rights of profound importance for a pupil.<sup>122</sup>

This also reflects the European Commission’s case law in decisions such as *Simpson v United Kingdom*.<sup>123</sup> Yet, the JCHR disagrees, and relies on the European Court of Human Rights’ March 2010 decision in *Oršuš v Croatia*,<sup>124</sup> in which the Grand Chamber suggests that the ECtHR has ‘abandoned’ the earlier approach<sup>125</sup> and now sees exclusion as a determination of a civil right to which Article 6 necessarily applies.<sup>126</sup> The JCHR does not accept the Government’s attempt to distinguish *Oršuš* on the basis that the facts involved discrimination and not exclusion.<sup>127</sup>

If we proceed on the basis that Article 6 is engaged, more is needed to demonstrate that the absence of an independent right for pupils to either appeal (under the former IAP regime) or lodge a review (under the current IRP process) violates excluded pupils’ Article 6 right. Further, given the weaker available outcomes for the new IRP process, one might argue that, even if excluded pupils had an independent right to lodge a review, it would be insufficient to respect their Article 6 right. The same argument might be made in respect of parents’ current right to lodge a review.

Harris considered it ‘doubtful’ whether the former IAPs process conformed with Article 6.<sup>128</sup> It is arguably yet more uncertain that this is the case with the weakened IRP process, though the Government has argued that review panels together with the availability of judicial review satisfy Article 6.<sup>129</sup> The AJTC disagrees, and argues the panels ‘represent an erosion of appeal rights, which is entirely inappropriate given the serious consequences of children being excluded from school’.<sup>130</sup> Relying on its understanding of the ECtHR’s jurisprudence, the JCHR concludes that the system of independent review panels is incompatible with Article 6.<sup>131</sup> Even without the weakened panels process, there is a strong case to be made that any process which denies pupils an independent right to lodge their own appeal would contravene Article 6. In the House of Commons, both Meg Munn, MP, and Julie Hilling, MP, argued that not to allow children a right to appeal would be contrary to natural justice and the right to a fair trial.<sup>132</sup>

Unlike the UNCRC, the ECHR is incorporated into domestic law via the Human Rights Act 1998; it is thus unlawful for education law not to reflect the ECHR’s contents. Whilst the AJTC’s and JCHR’s views that the current framework is incompatible with the UK’s ECHR obligations are strongly held, this is yet to be confirmed in our domestic courts.

### 3.6. Conclusion

It is clear that the various stakeholders are not equally concerned or implicated in respect of each of the values outlined above. Law reform focused on empowering schools and, by implication, teachers and headteachers. In their actions, headteachers see themselves as most concerned with the “best interests” of the excluded pupil and others in the school. Yet, commentators and the OCC concentrate on the protection of the rights of children and their parents and carers in the exclusion process.

<sup>122</sup> *Tom Hood School*, Wilson LJ [15].

<sup>123</sup> (1989) 64 DR 188 (ECmHR).

<sup>124</sup> *Oršuš v Croatia* (App no. 15766/03) (2011) 52 E.H.R.R. 7 (GC).

<sup>125</sup> *ibid* [104].

<sup>126</sup> JCHR, *Legislative Scrutiny* (n 42) [1.39].

<sup>127</sup> *ibid* [1.36-1.39].

<sup>128</sup> Harris, ‘Excluding the child’ (n 107) 43.

<sup>129</sup> JCHR, *Legislative Scrutiny* (n 42) [1.40-1.41].

<sup>130</sup> AJTC, ‘Response’ (n 102).

<sup>131</sup> JCHR, *Legislative Scrutiny* (n 42) [1.37], [1.40-43].

<sup>132</sup> Education Bill Deb (n 63) cols 398, 401.

Outside of the exclusions context, children’s rights have underpinned recent law reform. Part 6 of the Children and Families Act 2014 was introduced to clarify and expand the role of the Children’s Commissioner. A revised s2 Children Act 2004 employs stronger language to convey a more meaningful role for the Commissioner. Previously, s2(1) Children Act 2004 stated that ‘[t]he Children’s Commissioner has the function of *promoting awareness of the views and interests* of children in England’.<sup>133</sup> The new provision - s107 (substituting s2(1)) – reads that ‘[t]he Children’s Commissioner’s primary function is *promoting and protecting the rights of children* in England’.<sup>134</sup> The extent to which this will affect education law is uncertain, although the Commissioner has a clear interest in this area, as highlighted by the recent consultation on a rights-based approach to education.<sup>135</sup>

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<sup>133</sup> Emphasis added.

<sup>134</sup> Emphasis added.

<sup>135</sup> Office of the Children’s Commissioner, *Consultation by the Office of the Children’s Commissioner: A rights-based approach to education* (September 2014) <[http://www.childrenscommissioner.gov.uk/content/publications/content\\_830](http://www.childrenscommissioner.gov.uk/content/publications/content_830)> accessed 21 October 2014.

# Non-lawyers and the governing legal framework in practice

*This section explains how the legal framework affects the work of various groups of non-lawyers involved in the exclusion process and examines current evidence on how these groups understand the governing legal framework and relate it to practice.*

*Aspects of our analysis in this section draw on findings from our scoping survey, conducted between July and September 2014.*

## 4.1. Headteachers and teachers

Headteachers' legal duties are set out in primary and secondary legislation; in addition they must have regard to any guidance issued by the Secretary of State when making decisions.<sup>136</sup> In theory, therefore, teachers should be aware and make use of statutory guidance issued to aid their understanding of the statutory framework. This is important, both to ensure teachers do not act unlawfully but also so they understand the full extent of their discretion. Research by the OCC, CCCU, and the NFER has highlighted differences in understandings of the law and statutory guidance and how they are used at different stages in the process. An analysis of these findings highlights two possible reasons why the law may not be followed correctly: either because it is not properly understood, or because it is felt it obstructs professional opinion as to the best course of action. These will be examined in turn.

### 4.1.1. Understandings of the legal framework

There is some evidence of a lack of understanding of the legal framework. In particular, research by CCCU, which informed the OCC's report in 2012, highlighted differences in knowledge as to the relevance of various guidelines. For example, the head of Years 7-8 in one school commented to CCCU that he '... use[d] the school policy document, which [he] assume[d] work[ed] within Local Authority guidelines, which [he] assume[d] work within statutory guidelines' (School 2).<sup>137</sup> The headteacher of another school remarked that '...the Local Authority will often present guidance as though it is statutory where it is not. The Chair of Governors and I had to research very carefully' (School 1).<sup>138</sup> The contrast between these two excerpts from school management teams highlights a difference in understanding between schools as to the importance of having regard for the statutory guidance in its original form.

The same is true for the practice of illegal exclusions, which has recently been brought to the fore by another report by the OCC.<sup>139</sup> Whilst some schools knowingly act illegally,<sup>140</sup> the OCC considered it '... very rare for schools systematically, wilfully or knowingly to break the law'.<sup>141</sup> For example, Dance notes that the most common example of an unlawful exclusion is in response to breach of uniform policy.<sup>142</sup> CCCU also found this to be the case, with 15.6% of the schools they interviewed identifying persistent breaches in uniform as a reason for fixed-term exclusion.<sup>143</sup>

<sup>136</sup> Education Act 2002, s52(3)-(9).

<sup>137</sup> Ekins (n 70) 29.

<sup>138</sup> *ibid* 30.

<sup>139</sup> OCC, *Always Someone Else's Problem* (n 3).

<sup>140</sup> *ibid* 26-29.

<sup>141</sup> *ibid* 38.

<sup>142</sup> Dance (n 90) 176.

<sup>143</sup> Ekins (n 70) 11.

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There are two noteworthy aspects to the OCC's findings, both of which are substantiated by CCCU's research, discussed above. The first is a lack of awareness of the legal framework. The OCC's report was informed by the NFER Teacher Voice Omnibus Survey in November 2012.<sup>144</sup> The survey included questions for teachers on their knowledge of actions that may be legal and illegal with regard to exclusions. Between 16% and 38.6% of participating teachers responded that they '[didn't] know' the answers to the issues raised.<sup>145</sup> The NFER also found that, in most cases, teachers assumed the school's policy towards exclusion would be informed and lawful, so that all they had to do was follow it, rather than read up on the legislation and statutory guidance themselves.<sup>146</sup> The second relates to teachers' intention to act in the "best interests" of the child. The OCC found that teachers seek to do so either in ignorance of the legal framework or because they believe that the law is either wrong or does not apply to their particular school.<sup>147</sup> This is the case both with regard to the law on exclusion<sup>148</sup> and with regard to their duties under the Equality Act 2010.<sup>149</sup>

Misunderstanding or misuse of law can also undermine the opportunity for law to help teachers and improve practice. In a different but related setting, Middlemas notes that the impact of legislation and other measures were not always sufficient to make a difference to the practical reality of victims of bullying.<sup>150</sup> Further, Harris concludes that the complexity of the current law, particularly with regard to the changes under the Education Act 2011, 'may deter full utilisation of various powers'.<sup>151</sup>

Better teaching training could remedy potential misunderstanding of the law. Whilst teacher training has been seen as a solution in relation to other issues, its potential in this regard has not been explored. Thus, in 2012 Government 'Behaviour Czar' Charlie Taylor issued recommendations to improve teacher training on management of pupil behaviour. Omitted from these recommendations were any measures to ensure trainee teachers were educated on the law governing discipline in schools.<sup>152</sup>

#### 4.1.2. The law and the exercise of professional judgment

In section 3.2, we noted that the "best interests" standard is not incorporated into the law in this context and highlighted the uncertain understanding of and role for the "best interests" of the excluded pupil and others in the school in practice. As noted in section 4.1.1, even when teachers and schools have a good understanding of the legal requirements for disciplinary exclusion, they may depart from those requirements if they feel that the outcome of their application does not provide the correct result. Much turns on the exercise of professional judgment.

With regard to having an awareness of the statutory guidance, CCCU's research showed some disparity in how closely they were followed: one school emphasised the importance of being aware of the 'legal framework',<sup>153</sup> whereas another commented that statutory guidance and frameworks can be "less influential than professional judgement over what we believe are in the best interests of the child" (Headteacher, School 2').<sup>154</sup>

<sup>144</sup> Robert Smith, Helen Aston, and Katie Pyle, *NFER Teacher Voice Omnibus 2012 Survey* (Office of the Children's Commissioner, 2012) <<http://www.nfer.ac.uk/publications/99930/99930.pdf>> accessed 21 October 2014

<sup>145</sup> OCC, *Always Someone Else's Problem* (n 3) Table 2, 40-41.

<sup>146</sup> *ibid*

<sup>147</sup> *ibid* 38.

<sup>148</sup> *ibid*

<sup>149</sup> *ibid* 33-34.

<sup>150</sup> Sam Middlemas, 'Legal Protection for School Pupils who are Victims of Bullying in the United Kingdom' [2012] *Education Law Journal* 237, 239.

<sup>151</sup> Harris 'Getting a grip?' (n 34) 114 (discussing recent changes to the law surrounding searches and seizure and school exclusions).

<sup>152</sup> Neville Harris, 'Teacher Management of Pupil Behaviour (Editorial)' [2012] *Education Law Journal* 153, 153 [Harris, 'Teacher Management of Pupil Behaviour'].

<sup>153</sup> Ekins (n 70) 30 (Focus Group, School 14).

<sup>154</sup> *ibid* 29.

Further, the threshold for bad behaviour that warrants exclusion may also vary within schools. CCCU found that '[w]hilst thresholds...across the schools involved were...largely consistent, the data did identify that within schools there are often differences in expectations and thresholds for exclusions'<sup>155</sup> and that thresholds

... seem to be largely based upon, not a set criteria of specific behaviours, but instead "professional feelings, or gut feelings, about whether an exclusion from school is actually going to serve the purpose that you are wanting to achieve" (Headteacher, School 1).<sup>156</sup>

Such differences in perspectives adopted by teachers within the same school may also influence the overall school disposition towards the law and legal framework, as discussed in the next section. The opportunity for exercise of professional judgment is not of itself cause for concern; CCCU thus notes that 'whilst fair and consistent processes are to be encouraged, it is recognised that in reality there is a need for flexible systems and this is the case regardless of how well teaching professionals understand the legal framework'.<sup>157</sup>

One particular area in which flexibility is seen as important in practice is in relation to children from specific groups at higher risk of exclusion. It is recognised by teachers that, although the procedure suggests treating all cases identically, in reality this is not the case:

"Procedures say no, everyone treated equally; but if the question is should they be excluded or isolated, then yes it is a factor" (Head of Year 7- 8, School 2).<sup>158</sup>

"We are very clear we work within a framework, so we can be flexible in inverted commas up to a point" (Inclusion Manager, School 11).<sup>159</sup>

"One thing that I couldn't say hand on heart is that we apply the behaviour protocols consistently. X is not the same as Y, there are mitigating circumstances: we live in a world that is not just black and white: there are grey areas" (Headteacher, School 8).<sup>160</sup>

Being seen to treat all pupils equally, rather than actually treating all students equally, was sometimes seen as important in itself. One school commented that they

"... need to perpetuate the myth of the rule of law: so the child that misbehaves needs to be seen to be punished, we do actively need to help children and that needs to be done out of sight" (Headteacher, School 2).<sup>161</sup>

This evidence demonstrates that, even when teachers and headteachers have a good understanding of the law, they will sometimes disregard it if they perceive it to conflict with best practice. Interwoven misunderstanding and well-intended purposeful disregard makes it hard to establish the extent to which teachers (and other non-legal professionals) truly understand the law on exclusion. What if their admitted disregard, for example, stems in part from a mistaken belief as to the flexibility of the legal requirements for exclusion?

There is little recent secondary literature on this issue. Writing in 2001, Gold criticised the law for being too complex; he commented that the statutory guidance and case law 'have combined to place a greater straightjacket on schools than is reasonable'.<sup>162</sup> Thus, Harris, writing in 2014, reviews the role of the law in school discipline and concludes that

<sup>155</sup> *ibid* 12.

<sup>156</sup> *ibid* 13.

<sup>157</sup> *ibid* 16.

<sup>158</sup> *ibid* 30.

<sup>159</sup> *ibid* 30-1.

<sup>160</sup> *ibid*.

<sup>161</sup> *ibid* 33.

<sup>162</sup> Richard Gold, 'Conflicting Interests: Exclusion, the Individual and the School Community' [2001] *Education Law Journal* 202, 202.

the true extent to which teachers understand and use their statutory powers is unknown.<sup>163</sup> As has already been discussed, one feature of recent statutory reforms has been to accord teachers and headteachers greater power with regard to both exclusion and search and disposal of pupils' property. Harris notes that, without more evidence, it is difficult to evaluate how schools use these powers and apply in practice the disciplinary sanctions available to them.<sup>164</sup> In-school differences in teachers' approaches to exclusion-related issues highlight the relevance of the academic discourse on the theorisation of childhood;<sup>165</sup> there is insufficient evidence, however, to identify how possible constructions of childhood underpin current practice.

Further research is needed into how teachers' understand the law and whether they experience law as reflecting and enabling best practice. This would permit a more meaningful assessment of the value of the governing law and legal framework in practice.

## 4.2. School culture

Our scoping survey, carried out between July and September 2014, explores the extent to which the culture of individual schools, individual LAs, and their understanding of the law on exclusion may affect exclusion and appeal rates. This takes as its starting-point one of the conclusions reached by Fletcher and Strand, namely that differential rates of exclusion 'probably have significant socio-cultural and school policy dimensions'.<sup>166</sup> As Fletcher and Strand note, there is not yet any published evidence regarding the relative impact of variations between individual schools' policies and practice on exclusion rates.<sup>167</sup> They express this potential impact in terms of school or disciplinary policy. Our concern may be seen as broader, and focuses on the culture of individual schools; we are interested in the underlying nature of any potential causative connection. We wish to understand how schools contextualise their understanding of the governing law to their own circumstances, and how that process of contextualisation impacts on exclusion and appeal rates and outcomes.

### 4.2.1. Scoping survey methodology and summary of findings

Information was gathered from schools and LAs via requests under the Freedom of Information Act 2000 (FOI Act); follow-up surveys were emailed to LA inclusion officers. Data available from the Government's statistical first releases (SFRs) and Ofsted was also employed to provide background context. We surveyed four LAs within one of the SFR regions. To ensure data protection, we have anonymised our discussion of these LAs as follows:

- LA 1 – high permanent exclusion rate;
- LA 2 – medium permanent exclusion rate;
- LA 3 – low permanent exclusion rate; and
- LA 4 – rapid change in permanent exclusion rate from medium to high during the four-year survey period.

In delineating LAs according to exclusion rates, we recognise the concern over the social construction of exclusion rates<sup>168</sup> but adopt the SFR-published and FOI-declared rates as a

<sup>163</sup> Harris, 'Getting a grip?' (n 34) 114.

<sup>164</sup> *ibid.*

<sup>165</sup> For example: Daniel Monk, 'Theorising education law and childhood: constructing the ideal pupil' (2000) 21 *British Journal of Sociology of Education* 355.

<sup>166</sup> John Fletcher and Steve Strand, *A Quantitative Analysis of Exclusions from English Secondary Schools* (unpublished manuscript: University of Oxford, 2014) 1.

<sup>167</sup> *ibid.* 3. Whilst there have been a number of multilevel studies, which have included consideration of schools' disciplinary policies, Fletcher and Strand explain that methodological difficulties – sample size, number and type of variables considered – mean that these studies cannot be relied on as evidence of impact of variation between schools.

<sup>168</sup> For example: Graham Vulliamy and Rosemary Webb, 'The Social Construction of School Exclusion Rates: Implications for Evaluation Methodology' (2001) 27(3) *Educational Studies* 358.

valuable starting-point to a more in-depth analysis. A total of 185 English secondary schools were sent FOI Act requests for information, of which 47 responded.<sup>169</sup> Schools were asked to provide: their total number of permanent exclusions and “managed moves” in the academic years 2009-10, 2010-11, 2011-12, and 2012-13;<sup>170</sup> the reasons for these permanent exclusions; and any information they had on legal and non-legal advice and representation used by both their pupils and themselves in the permanent exclusion and appeal/review process.

- Of the 47 schools that responded (18 maintained, 29 Academies), 21 had not permanently excluded a pupil during the four-year survey period.
- Of the 21 schools that had not permanently excluded, five had organised “managed moves”. Thus 16 schools reported that they had neither permanently excluded nor employed “managed moves” on any occasion during the four academic years surveyed.
- Of the 26 schools that had permanently excluded, 11 schools reported that some or all of the pupils had received non-legal advice or representation. Four schools said their pupils received advice or representation from a LA inclusion officer or other LA representative.
- Only one pupil had legal representation and this was at an IAP. One school rightly noted, however, that parents and pupils may well seek legal advice without informing the school.
- No schools sought legal advice or representation. Those that did seek outside advice obtained it from the LA inclusion services, professional bodies, or unions. Advice from the LA and unions was also sometimes sought for drafting exclusion policies, and used alongside the DfE statutory guidance.
- LA inclusion officers were the most common source of advice for all affected parties.

In response to the emergent role of LA inclusion officers, we sent an additional survey to the inclusion officer or inclusion services for each of our four LAs; two replied. This survey was not a formal FOI Act request.

#### 4.1.2. Specific findings in relation to school culture

##### A) Permanent exclusion rates and school governance culture

LA 1 provided numbers of permanent exclusions and “managed moves” for all the secondary schools in its area. Comparing these with information available on pupil characteristics (available from Ofsted) shows a pattern to be expected. Schools with the highest rates of permanent exclusion also have higher percentages of boys, pupils on free school meals, and pupils with SEN (statistics for the percentage of BME pupils were not available). This accords with the OCC’s pupil-level conclusion on the causes for exclusion, and suggests a limited role for school culture:

The strongest predictor of being excluded from school, either permanently or on a fixed-term basis, is having a SEN, particularly at School Action Plus level. This is followed by being Black Caribbean (for permanent exclusions) or male (for fixed-term exclusions).<sup>171</sup>

<sup>169</sup> This might itself be noteworthy in terms of schools’ understanding of or regard the law, given the strict framework created by the Freedom of Information Act 2000. That said, one school did reply to the request stating that, because their LA (LA 3) had received and was replying to a similar request, they considered that they did not need to respond directly to the questions asked. This highlights a lack of awareness of the concern, identified by Ofsted, that data about pupils can ‘go missing’ such that LA-held data does not accurately accord with the accumulated school-level data for schools within that LA. See Ofsted, *Pupils Missing Out on Education* (London: Ofsted, 2013).

<sup>170</sup> We chose to focus on the four most recent academic years only so as to reduce the likelihood that respondent schools would seek to rely on section 13(1) of the Freedom of Information Act 2000 on the basis that it would take more than 18 hours (exceed £450) to gather the information necessary to comply with the request. Only one school responded that compliance was too onerous; they (LA 2, Academy) suggested that it would take 25 hours to comply. However, they did then respond to an abbreviated survey.

<sup>171</sup> OCC, *They never give up on you* (n 3) 94.

Yet, Fletcher and Strand’s multi-level analysis found that these pupil-level factors were less critical:

Experience of fixed-term exclusion is the predominant predictor of permanent exclusion but higher rates of permanent exclusion, especially of children from deprived neighbourhoods and certain ethnic groups, are not fully accounted for by previous exclusion.<sup>172</sup>

In addition, recalling Fletcher and Strand’s conclusion that differential rates of exclusion ‘probably have ... school policy dimensions’,<sup>173</sup> another correlation of note for LA 1 was the rate of exclusions compared to the Ofsted ratings for “Behaviour and safety of pupils” and “Leadership and management”, which we might regard as indicators of school culture: schools with fewer exclusions were rated as “2: Good” or “1: Outstanding” and those with more exclusions had been rated as “3: Requires improvement”. These findings suggest that poor management may correlate with increased poor behavior, and support the likelihood that school culture has a currently-underexplored role in determining individual schools’ permanent exclusion rates. No firmer conclusion can be reached given that exclusion rates correlate with both indicators of school culture and heightened pupil-level factors.

Further, consideration of exclusion rates within our other study LAs highlights the potentially complex relationship between exclusion rates and school culture. In LA 3, the lowest-excluding LA in our study, schools with key pupil-level indicators of the likelihood of exclusion, particularly the higher numbers of pupils with SEN and free school meals, and the lowest academic attainment, counted for both the highest-excluding and the lowest-excluding schools. Of those that were the highest-excluding, they had consistently better school culture indicators than the highest-excluding schools in LA 1; this finding also hints at a role for LA culture. Of those that were the lowest-excluding, they had both the best and the worst school culture indicators. These findings suggest the need to explore when and why schools might adopt a differential response – excluding either significantly more or fewer pupils – when faced with high pupil-level indicators and/or poor school culture indicators.

Our findings of a differential response in exclusion rates for the schools in LA 3 is supported by the OCC’s analysis of the dilemma faced by new headteachers in struggling schools. The OCC comments that such headteachers might *either* exclude more pupils initially in order to signal to the larger student population what behaviour was acceptable in their school *or*, conversely, take the opposite approach and introduce policies against exclusion in all but extreme cases.<sup>174</sup> The OCC presents this as individual schools’ ‘pragmatic’ response to their own circumstances. We would question, however, whether the differential approach is fair to pupils negatively impacted by such school-specific contextualisations of the governing legal framework. Whilst exclusion may be beneficial for some pupils in some circumstances, negative outcomes for excluded pupils are more likely. Is it justifiable that individual school culture determines, at least in part, the likelihood of such negative outcomes?

Finally, it is reasonable to suggest that increased poor behaviour may correlate with the reason for exclusion. Thus, we hoped to test for two further correlations, namely that schools with higher permanent exclusion rates more frequently exclude on the basis of “persistent disruptive behaviour” and that schools with lower permanent exclusion rates more often exclude for one-off incidents (a particular event involving one pupil or a small group of pupils). Whilst this was the case in some instances (for example: School 3, LA 4, a low-excluding Academy, which excluded three pupils in one year for theft), there is not enough data to draw any firm conclusions.

## B) School-led “zero permanent exclusion” policies

One school (School 1, LA 3: maintained school in the lowest-excluding authority) reported a policy within the school of not permanently excluding pupils. This is not a formal policy

<sup>172</sup> Fletcher and Strand (n166) 1.

<sup>173</sup> *ibid.*

<sup>174</sup> OCC, *They never give up on you* (n 3) 75.

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mentioned in the school's behaviour policy or Ofsted reports, although the school had been commended by Ofsted in its most recent report for not permanently excluding pupils. The school instead adopts other measures to control behaviour. Ofsted reports show that, in the past, this school had high numbers of fixed-term exclusions but this has improved. Ofsted also refers to pupils attending courses at other institutions to equip them with strategies to improve their behaviour. Ofsted's favourable view of this policy might be contrasted with the DfE's recent suggestion that 'adopting a blanket approach of never excluding pupils may undermine the school's ability to maintain discipline'.<sup>175</sup>

Further research is required to examine the prevalence of such school-led policies, the extent to which they are encouraged and/or supported by the school's LA, and how the existence and implementation of such policies affects outcomes for pupils at such schools.

### 4.3. Local Authority Inclusion and Exclusion Officers

#### 4.3.1. Mediating role between local authority and school cultures

Research by CCCU found that, on the whole, schools spoke positively about the LA Inclusion and Exclusion Officers.<sup>176</sup> Our 2014 scoping survey highlights these officers as the most common source of advice and support to both schools and parents during the exclusion process.

Schools in LAs 2 and 3 identified the use of LA inclusion officers as a source of advice for both pupils and schools in the exclusion process and, whilst we contacted officers working in all four of our targeted LAs, it was officers from these two authorities that responded to our follow-up survey. These were also the two LAs with lower exclusion rates. This correlation between use by schools within the two LAs with low exclusion rates and the activity levels of the inclusion officers provides tentative evidence of a particular culture within these LAs. More specifically, it hints that exclusions are used where necessary, but that this is tempered by the availability of support and advice; it may also be that support is provided for early intervention.

There was also some anecdotal evidence of interaction between LA culture and school culture in the role played by these LA officers. Both LA officers commented on their role in attending Governor Discipline Committee meetings. In addition, the officer from LA 2 explained that they proactively contact a school for discussion if there is an evolving pattern of exclusions at a particular school or if a particular fixed-term exclusion seems unduly long in comparison to previous exclusions.

#### 4.3.2. Role in relation to advice and representation

The officers from LAs 2 and 3 have the job title of 'Inclusion Officer'. Both provide advice to schools *and* pupils throughout the exclusion process. One difference of note related to their views as to whether they provide legal advice. The inclusion officer for LA 3 was clear that they do not give legal advice but could refer legal questions to LA lawyers if necessary. The inclusion officer for LA 2 answered that they would give basic legal advice, depending on experience, and would refer more involved legal questions to lawyers.

The uncertainty as to whether the inclusion officers dispense legal advice is also highlighted by responses from three schools in LA 3. When they were asked if they received legal or non-legal advice, two schools (LA 3: Schools 4 and 8) referred to the LA inclusion services as legal advice but another said it was non-legal (LA 3: School 6). This highlights a potential difference of opinion amongst schools as to what constitutes legal advice or representation. Yet, both inclusion officers reported that they had either received training on the law governing exclusions

<sup>175</sup> DfE statutory guidance 2015 (n 4) [14]. There was no similar suggestion in the DfE's 2012 statutory guidance.

<sup>176</sup> OCC, *They never give up on you* (n 3) 27.

or had it made available to them from the same source as their authority's IRP panel members (LA 2: an education advisor, who was formerly a practicing solicitor; LA 3: a practicing barrister).

Other than our surveys and a brief mention in the CCCU report, there is no other published research on LA inclusion and exclusion officers' role in relation to exclusion from school.

#### 4.4. Governors

The role played by school governors was noted by CCCU's research. Whilst governors are an important part of the process, research suggests they principally become involved in the event of an appeal.<sup>177</sup> Several schools recognised, however, that the clerk to the governors could supply support and guidance on the legal issues as they are 'aware of the legal framework'.<sup>178</sup> In addition to LA officers, this is a further instance of teachers turning to non-legal professionals for help with legal issues.

Concern has previously been expressed as to the appropriateness of this task for non-lawyers. After the *Dunraven* case in 2000 (which established that the role of governors is to reconsider the exclusion, acting as an independent check on the headteacher<sup>179</sup>), Gold warned that 'the effect of *Dunraven* will be to increase the complexity of the task of governors and appeal panels to a point that would seriously challenge professional judges let alone lay people'.<sup>180</sup>

There is no research into the extent to which school governors are used for legal advice or the quality of their understanding of or training received in education law.

#### 4.5. Independent Review Panel members (previously Independent Appeal Panel members)

The statutory guidance that sets out the duties of IRP members has changed five times since the Education Act 2002 (see above, Table 2, section 2.3). Panel members are required to receive training on the governing law and legal framework.<sup>181</sup> Yet significant concern has been expressed in the academic literature and case law that lay panels (review panels, previously appeal panels) do not understand all the issues involved in a permanent exclusion. Writing in 2002, Harris points to the frequent changing in the guidance 'exacerbating the sense of uncertainty in what is already considered a legal minefield'.<sup>182</sup> In *SA (by his Litigation Friend, MA) v London Borough of Camden Independent Appeal Panel*,<sup>183</sup> an IAP was criticised for only receiving advice from a clerk (who is not a lawyer) and not seeking independent advice from a qualified lawyer when the statutory guidance did not set out a clear course of action in the particular circumstances.<sup>184</sup>

One of the particular concerns, since the introduction of s51A(4) Education Act 2002 (inserted by Education Act 2011), is that lay panels do not sufficiently understand the principles of judicial review. These principles determine the circumstances in which an IRP may quash the decision of the governing body and direct reconsideration. As the DfE statutory guidance notes, these principles are explained as irrationality, illegality, and procedural impropriety.<sup>185</sup> In order to be able to understand this particularly complex area of law, as Capewell notes, '[p]resumably they will have to be sent on a crash course on public law before continuing in their posts'.<sup>186</sup> In *R (CR)*

<sup>177</sup> Ekins (n 70) 18.

<sup>178</sup> *ibid.*

<sup>179</sup> *R v Headteacher and Independent Appeal Committee of Dunraven School ex parte B* [2000] ELR 156 (QB), per Sedley LJ at 182.

<sup>180</sup> Gold (n 162) 208.

<sup>181</sup> Exclusions and Reviews Regulations 2012 (n 6), Sch 1: [5]; DfE statutory guidance 2015 (n 4) [120].

<sup>182</sup> Harris, 'Exclusion Appeal' (n 104) 3.

<sup>183</sup> [2013] EWHC 3152 (Admin), [2014] ELR 29.

<sup>184</sup> *ibid* [32-33].

<sup>185</sup> DfE statutory guidance 2015 (n 4) [153-54].

<sup>186</sup> Edd Capewell, 'Education Bill 2011 - Law Reform or Politics?' [2011] *Education Law Journal* 90, 92-3.

*v Independent Review Panel of the London Borough of Lambeth*, Collins J, obiter, expresses concern as to the appropriateness of the IRP's role: '[I]t is difficult to see that it is entirely satisfactory for what is a lay body to be required to apply judicial review principles in the decision that they have to make'.<sup>187</sup>

Even if we assume that, as a matter of principle, IRPs may be an appropriate venue for applying the law on judicial review, it is not clear that they are capable of doing so as matter of practice. The AJTC cautions that it is 'unrealistic and inappropriate' to believe lay panel members will be able to have a sufficient understanding of judicial review.<sup>188</sup> Maxwell similarly argues that 'independent review panels [are] required to take decisions based on complex matters of law, for which they have insufficient training and guidance'.<sup>189</sup> This concern is heightened by the LASPO 2012 cuts to Legal Aid, which mean that there are many fewer legal professionals involved who can safeguard the legal rights and interests of the excluded child at this stage.

There is no published research on the extent to which IRP members understand the principles of judicial review and apply them as lawyers would.

Legal professionals do become involved in the rare instance of a discrimination claim. For issues of discrimination, parents can currently appeal to the FtT (for disability discrimination) or the County Court (for other discrimination) instead of, or as well as, lodging a review with an IRP.

There have been calls for IAPs and, subsequently, IRPs to have legally qualified members. One moderate version of this argument is that panels should have a legally qualified clerk or chair.<sup>190</sup> A further-reaching version of this argument is that the FtT should hear all exclusion appeals (see above, section 3.3.1);<sup>191</sup> this is because a judge, either alone (interlocutory decisions) or with two experienced professionals (disposition of proceedings), always presides over FtT hearings<sup>192</sup> and the FtT process is more stringent: the Tribunal looks at the case afresh and has the power to reinstate the pupil.<sup>193</sup>

Older research by Harris and Eden reveals a stark difference in opinion between commentators on the one hand, and LAs, IAP members, headteachers and governors on the other. The overwhelming majority of the latter group of non-legal professionals believed that appeal panels should not have lawyer chairs. Their reasons included the desire to '[k]eep lawyers out. The process is about common sense and good sense, the law is about neither' (Headteacher)<sup>194</sup> and that it would be 'too nit-picking and tend to be more concerned about law and not the child' (LA).<sup>195</sup> Harris and Eden argue that this shows a lack of appreciation on the part of heads and LAs for the role of lawyers in ensuring a fair and impartial process; the authors conclude that these

Anecdotal evidence – gathered as part of our 2014 scoping survey – from a lawyer who acts for parents revealed that, since the cuts to legal aid, the only exclusion cases in which parents instruct lawyers are those which involve a child with SEN. The lawyer felt that this was because parents did not understand the legal remedies available. For example, they did not understand that if the process had been conducted unfairly, they could bring an action for judicial review, and that this was potentially within the scope of legal aid (assuming they met the standard qualifying requirements).

<sup>187</sup> [2014] EWHC 2461 (Admin) at [32] [*Lambeth*]. Mr Justice Collins also notes that the statutory guidance only sets out the 'text book' requirements of judicial review, without explaining some of the wider circumstances that can lead to judicial review (such as error of fact) ([30-31]).

<sup>188</sup> AJTC, 'Response' (n 99).

<sup>189</sup> Maxwell (n 32) 16.

<sup>190</sup> Harris N and Eden K with Blair A, *Challenges to School Exclusions: Exclusions, Appeals and the Law* (Routledge/Falmer, 2000); ACE lobbies during the passage of the Education Bill 2002; Council of Tribunals (Great Britain), 'School Admission and Exclusion Appeal Panels: Special Report' (Cm 5788, 2003).

<sup>191</sup> Thomas (n 92).

<sup>192</sup> Practice Statement on the 'Composition of Tribunals in Relation to Matters that Fall to be Decided by the Health, Education and Social Care Chamber on or after 18 January 2010' (16 Dec 2009, as am. 21 July 2014).

<sup>193</sup> Contrast: DfE statutory guidance 2015 (n 4) [133].

<sup>194</sup> Harris and Eden with Blair (n 190) 127.

<sup>195</sup> *ibid.*

professionals either failed to see problems with the procedure or were ignorant of the way lawyer chairs conduct other appeal hearings.<sup>196</sup>

There has been no further research into this issue since Harris and Eden's work. It would be interesting to investigate whether this dichotomy of opinions persists and, if so, to more closely examine whether the introduction of a wider role for legal professionals might bring benefits in terms of process and outcomes.

#### 4.6. SEN experts

As discussed above (section 3.3.1), the introduction of the right to request a SEN expert at an exclusion review,<sup>197</sup> regardless whether the child has or is suspected to have SEN, was an important and welcomed change in the move from IAPs to IRPs. Harris notes that 'their need has long been recognised'.<sup>198</sup>

A SEN expert 'should be a professional with first-hand experience of the assessment and support of SEN, as well as an understanding of the legal requirements on schools in relation to SEN and disability'.<sup>199</sup> Their role is to advise the panel on how SEN may be relevant to the case but not to assess whether the pupil in question has SEN.<sup>200</sup> As discussed in section 4.7, below, parents have made significant use of this free expert assistance.

This new role for SEN experts shows a recognition of need for expertise in the area of exclusion reviews. Rather than a similar recognition of the role for legal expertise, the removal of legal aid, discussed in more detail in section 4.7, suggests a belief that legal expertise is not necessary in this context.

#### 4.7. Parents

Research by Sheffield Hallam University<sup>201</sup> examined parents' motivations for appealing or lodging reviews against the permanent exclusion of their children. Parents were interviewed after the appeal or review had been decided, hence the account of their motivation may have been affected by the outcome. Yet, Wolstenholme et al's findings are still of interest. They found that approximately two-thirds of parents who decided to challenge the decision to exclude reported that they did so either out of a wish to remove the exclusion from the child's record or simply to be vindicated in some way.<sup>202</sup> As outlined in section 2.1, above, the appeal/review process can only remedy decisions to exclude either made contrary to procedural fairness or founded on a mistake as to the events leading to exclusion. Whilst they are understandable personal goals, neither of the parents' expressed motivations correspond to this rationale for the appeal/review process. Further, Wolstenholme et al found that, when parents raised concerns about the appeal/review process, it was usually because it did not allow them to achieve their desired personal objective.<sup>203</sup>

These findings may suggest that parents do not understand the purpose and range of possible outcomes of the appeal/review process. Yet, they may also suggest that, in the absence of

<sup>196</sup> *ibid* 126-7.

<sup>197</sup> First recognised in the DfE statutory guidance 2012 (n 6) [155-58], this is now regulated in the DfE statutory guidance 2015 (n 4) [161-64].

<sup>198</sup> Harris 'Teacher Management of Pupil Behaviour' (n 152) 79.

<sup>199</sup> DfE statutory guidance 2015 (n 4) [125].

<sup>200</sup> Exclusions and Reviews Regulations 2012 (n 6) Sch 1: [18].

<sup>201</sup> Claire Wolstenholme, Mike Coldwell, and Bernadette Stiell, *Independent Review Panel and First-tier Tribunal Exclusion Appeals Systems* (Sheffield Hallam University, Centre for Education and Inclusion Research, Department for Education, 2014).

<sup>202</sup> *ibid* 3-4.

<sup>203</sup> *ibid* 5.

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an appeal/review mechanism that straightforwardly enables parents to vindicate their own motivations, they will use whatever legal options are available in the attempt to do so. There is no evidence as to whether this use of the appeal or review process is inevitable. With additional legal advice and understanding of the roles played by IRPs and FtTs, would fewer parents, who would have *otherwise* been inclined to appeal or lodge a review, proceed along the formal legal route?

In terms of overall rates of appeal/review, Harris and Eden found that parents who received advice were 33% more likely to appeal,<sup>204</sup> and that parents who appealed ‘were far more likely to have received *independent* advice’.<sup>205</sup> In particular, of those who received advice, parents advised by solicitors were more likely to appeal, whereas those advised by the school or LEA were less so.<sup>206</sup> It is not clear, however, that the receipt of legal advice is causally connected to parents’ decision to appeal or lodge a review. Whilst that is one possible explanation, it might equally be that parents seek legal advice *because* they are more inclined to fight the exclusion.

Recent cuts to legal aid (via LASPO 2012) have had a significant impact on the role for legal advice. There are now only three organisations that can obtain legal aid under an education law franchise: Maxwell Gillott, Coram, and the National Youth Advocacy Service.<sup>207</sup> There are other organisations that provide free advice and representations to parents and carers,<sup>208</sup> but this is now on an entirely pro bono basis. “Exceptional funding” aside, only SEN and disability issues and judicial review can attract legal aid. Sheffield Hallam’s research found around 25% of parents complained of lack of support, which made the process more difficult.<sup>209</sup>

As has been noted above, the AJTC strongly opposed the removal of legal aid for exclusion appeals and reviews. Much of their opposition was based on the recognition that a large percentage of exclusion cases involve pupils with SEN, which necessarily entail complex issues around these needs and the possibility of disability discrimination.<sup>210</sup> The introduction of SEN experts for IRPs may, at least in part, ameliorate this concern. Statistics released for 2012/13 show that SEN experts were requested in 53.4% of reviews of exclusions from maintained schools and academies.<sup>211</sup> There are multiple possible reasons for this. First, and most obviously, this could be because such a high proportion of pupils excluded have SEN (68% in 2012/13, which – according to the SFR – includes those with and without a statement).<sup>212</sup> Second, parents may misunderstand the limited role the SEN expert can play in the appeal/review process. Third, even when parents correctly understand the particular role for SEN experts, they may request a SEN expert because, in the absence of readily-available free legal representation, they feel the additional assistance from the free-of-charge SEN expert is better than the alternative. This final possible explanation suggests that savings on legal aid may have had the unintended consequence of increased, inappropriate costs elsewhere.

It would be valuable to further investigate parents’ view and understanding of the role of SEN experts to ascertain whether these experts are being used for the correct reasons.

<sup>204</sup> as cited in Harris, ‘Excluding the child’ (n 104) 39.

<sup>205</sup> Harris and Eden, with Blair (n 190) 140 (emphasis in original).

<sup>206</sup> Harris, ‘Excluding the child’ (n 104) 39. See also Harris and Eden, with Blair (n 190) 140-141.

<sup>207</sup> Maxwell (n 32).

<sup>208</sup> For example: ACE Education runs a telephone advice line, which is staffed by volunteers (<http://www.ace-ed.org.uk/>), though it is not clear to what extent their advice is *legal* advice. City University and Matrix Chambers provide a joint pro bono legal advice and representation service for parents of pupils who have been excluded from school (<http://www.city.ac.uk/law/careers/pro-bono-professional/information-for-clients/citymatrix-school-exclusions-project>); BPP also offers a similar service (<http://www.bpp.com/bpp-university//school-exclusions>). Within London, there is also the Pan-London Education Legal Advice Service (<http://thlc.co.uk/education.htm>). These are in addition to organisations such as IPSEA (<http://www.ipsea.org.uk/>), which focus on providing advice in relation to SEN issues in particular.

<sup>209</sup> Wolstenholme et al (n 201) 4.

<sup>210</sup> AJTC, ‘Response’ (n 99)

<sup>211</sup> Department for Education, *Permanent and fixed-period exclusions in England: 2012 to 2013 (Statistics: exclusions, 2014)* Table 13b <<https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2012-to-2013>> accessed 17 October 2014.

<sup>212</sup> *ibid* Table 9.

## 4.8. Local authority culture

Aside from the specific role for LA inclusion and exclusion officers, our scoping survey considered the extent to which there was any evidence that the LA's culture affected permanent exclusion rates.

### 4.8.1. Local authority lawyers

Of the 47 schools who responded to our scoping survey, none said that they sought advice from their LA's lawyers. One of the two inclusion officers surveyed (LA 3), however, did note that they would meet periodically with one of their LA's lawyers to review the statutory guidance, the exclusion profile in the area, and any recent case law.

### 4.8.2. Local authority-led 'zero exclusion' policy

One school responded that their local city council has introduced a policy of "zero permanent exclusions". This was incentivised by devolving funding from the PRU budget. Representatives from all the secondary schools in the district work together under an independent chair and use "managed moves" rather than exclusions. Schools are also using the devolved funding to improve their own internal support and guidance facilities for poorly-behaved students.

When asked what effect the legal framework had on allowing this policy to come into being, respondent school's headteacher commented that:

I think the complicated legal framework has operated as a useful smokescreen to allow something relatively complicated and daunting to actually come into being. There is a sense that everybody wanted the end result, County Officers included, and were, therefore, happy to turn a blind eye to anything likely to stand in its way.

Unfortunately, no other schools from this district responded to their FOI Act requests for information.

### 4.8.3. Interaction between school and local authority cultures

As we outlined in section 4.3.1, above, of the four LAs we surveyed, the two with active inclusion services have lower rates of exclusions across all schools. This suggests a possible means for LA culture to interact with and influence school culture and decision-making about permanent exclusions.

Yet, this possible interaction is more complex. In section 4.2.2, above, we explained that in the highest-excluding LA in our scoping survey (LA 1), there was a clear correlation between schools' exclusion rates, pupil-level indicators of exclusion and available school culture indicators (Ofsted ratings for "behaviour and safety" and "leadership and management"). More significant for present purposes were our findings in respect of the lowest-excluding authority (LA 3). Schools with key pupil-level indicators of exclusion dichotomised between having the highest and lowest permanent exclusion rates in that area (see section 4.2.2, above). The correlations with school culture indicators are critical: first, of those that were the highest-excluding, they had consistently better school culture indicators than the highest-excluding schools in LA 1; second, of those that were the lowest-excluding, they had both the best and the worst school culture indicators. Both of these findings suggest a possible role for LA culture in influencing school culture and, to the extent the last finding suggests this is a distinct issue, schools' decision-making on exclusion.

Further research is required to examine the extent and nature of any influence the LA has on individual school culture and decision-making in respect of permanent exclusion.

#### 4.9. Conclusion

Whilst the process of exclusion from school is governed by law and a legal framework, it may be that no lawyers become involved at any stage of the exclusion process, even if the pupil's parents lodge an application for a review with the IRP.

Legal professionals only necessarily become involved in two scenarios: first, at the appeal stage if there is an issue of discrimination and the pupil's parents appeal to the FtT or County Court; second, if, after the exclusion, the pupil's parents apply for judicial review of the decision to exclude. Usually, parents must *first* exhaust their statutory rights, namely lodging an application with the IRP or appealing to the FtT or County Court, *before* applying for judicial review. Exceptionally, however, judicial review may instead be considered the appropriate means to the address the issues raised by the exclusion.<sup>213</sup> Only one application for judicial review, *R (CR) v Independent Review Panel of the London Borough of Lambeth*,<sup>214</sup> has been heard since the new IRP process was introduced.

It is thus non-lawyers who implement the law, particularly school management teams, with the support and guidance of LA officers. The discussion in this section highlights that the law affords significant discretion to non-lawyers, particularly headteachers, in terms of how they interpret and apply the law. It is also clear that headteachers and parents misunderstand the law on exclusion; whilst the former misunderstand aspects of the legal requirements that must be satisfied to warrant exclusion, the latter principally misunderstand the remedies available if they lodge a review of their child's exclusion with the IRP. In addition, headteachers also disregard particular legal requirements, principally if they consider that the "best interests" of the affected pupil and others in the school lie elsewhere. This makes it particularly concerning that the DfE's decided to remove from the 2015 statutory guidance any definition of what it means to 'have regard' to the statutory guidance.

Our scoping survey highlights the potential significance of school and LA cultures within this legal discretionary framework in determining the likelihood that a particular pupil will be excluded. In particular, analysis of individual schools' responses regarding exclusions against publicly available data on their pupil-level risk factors and indicators of school culture suggest that school culture has a role to play in determining the likelihood that a particular pupil will be excluded. This role has not been examined to date, and our scoping survey results reveal it is a complex one, which may also be interwoven with the cultures of LAs. The work of LA inclusion and exclusion officers has been revealed as central to schools' understanding of the law and work within the legal framework, as well as a critical source of advice for parents. Further research is needed into the role of these LA officers.

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<sup>213</sup> For example: *R v Rectory School Governors, ex parte WK* [1997] ELR 484.

<sup>214</sup> *Lambeth* (n 187).

# Conclusion and directions for further research

Harris contends that ‘the legislation is dominated by powers and procedures with little specific acknowledgement of the rights of children in this context’.<sup>215</sup> Yet, children’s rights are implicated in this context, both via international law obligations under the UNCRC, and in domestic law via the Equality Act 2010. The absence of an independent right for the pupil to lodge a review and the weakening of the IRP’s powers, discussed in sections 3.3-3.5, highlight real concern as to whether children’s rights are sufficiently respected in the governing law and legal framework.

In practice, as mentioned in section 3.2.1, teachers and headteachers report that they make decisions based on children’s “best interests”, a value also enshrined in the UNCRC. The governing law, as explained in section 3.2.2, does not reference “best interests” but only the various “interests” of the affected pupil and others in the school: the test for exclusion suggests that only the interests of either the at-risk pupil or those of other pupils or others in the school may be taken into account if exclusion is warranted by meeting the ‘detriment’ to ‘welfare’ threshold; the statutory guidance on process, however, suggests that all affected parties’ interests must be taken into account when determining whether to exclude a particular pupil. Yet, no guidance is given as to how to perform this latter balancing of competing interests. The legal framework affords discretion to headteachers amidst a current trend of granting greater authority to schools, as discussed in section 3.1, particularly in relation to the new, lower threshold for exclusion. Evidence as to teachers’ and headteachers’ lack of understanding and positive disregard of the governing law in favour of professional judgment, as explained in section 4.1, calls into question the fitness for purpose of the current legal regime.

This concern over teachers’ understanding and use of the law is complicated by an under-explored issue: **the impact of school and LA cultures and dispositions towards the law in influencing the likelihood of exclusion of any particular pupil**. The need to explore these issues further has been highlighted by key findings from our scoping survey, particularly:

- The clear correlation between schools’ exclusion rates, pupil-level indicators of exclusion and available school culture indicators (Ofsted ratings for “behaviour and safety” and “leadership and management”) in LA 1 (highest-excluding authority) (section 4.2.2);
- The finding that in LA 3 (lowest-excluding authority) schools with key pupil-level indicators of exclusion, dichotomised between having the highest and lowest permanent exclusion rates in that area (section 4.2.2).

Both of these findings suggest a role for the culture of schools in determining the likelihood that any particular pupil will be excluded, yet the second finding highlights the potentially interwoven character of this relationship. This complexity is emphasised by two further findings in relation to schools in LA 3:

- Of those that were the highest-excluding, they had consistently better school culture indicators than the highest-excluding schools in LA 1 (section 4.8.3);
- Of those that were the lowest-excluding, they had both the best and the worst school culture indicators (section 4.8.3).

The comparison between exclusion rates in LAs 1 and 3, as highlighted by these findings, also suggests a complex interplay between school and LA cultures and dispositions toward the law, which also needs to be examined. This is the most significant gap in understanding of education law in practice, which we have identified.

<sup>215</sup> Harris, ‘Getting a grip?’ (n 34) 114.

Examination of these dispositional aspects also extends to consideration of how schools and LA officers understand the nature of the balancing exercise required in relation to the “interests” of the affected pupil and others in the school; how schools and LA officers understand the nature and contents of the governing law more generally; the extent to which LA officers can and do provide impartial advice to both schools and parents, and whether that advice is legal or non-legal; and the extent to which headteachers’ apparent disregard for the law in favour of professional judgment reflects misunderstanding of the extent and nature of legal obligations, rather than truly informed disregard. Investigation of these matters will shed light of the overall relevance of the law and legal framework for the ongoing gradual decline in the number of permanent exclusions from English schools, as highlighted in sections 2.2-2.3.

In addition, we have also identified a number of discrete issues, which merit further research:

- 1. The reason(s) for the significant decline in the number of reviews lodged against permanent exclusions in 2012/13 compared with appeals brought in 2011/12.** Sections 2.2-2.3. Past reforms to the law and legal framework have not consistently or coherently affected statistics on exclusions and appeals. To better assess whether the appeal/review process sufficiently protects children’s rights, it is important to determine whether matters such as the cuts to legal aid and the weakening of the powers for IRPs compared with IAPs have caused this decline, and what factors underpin ongoing evidence of the rate of appeals/reviews. Whilst Wolstenholme et al considered the views of parents who lodged reviews, what of parents who do not lodge reviews? How aware are they of the nature of an IRP review and why do they decide not to lodge reviews?
- 2. How often IRPs order that, should a school uphold an exclusion despite a direction to reconsider, the school should pay £4,000 towards that pupil’s continuing education; of that number, how many schools uphold the exclusion and in fact pay that sum.** Section 2.1. It is not known to what extent, if at all, this power influences schools’ decision-making when they have been directed to reconsider. There is much less information available on exclusion from Academies, and a comparison between maintained schools and Academies in this regard would be a significant contribution to understanding the distinctiveness of Academies.
- 3. The impact, if any, of the categories according to which schools classify the ‘reason for exclusion’.** Section 3.1.2. The 2012 statutory guidance lacks the detail of the 2008 guidance as regards ‘reasons for exclusion’. This was intended to afford headteachers greater discretion. When completing the School Census, however, the school must identify a ‘reason for exclusion’ set out by the DfE. Research is needed to assess whether the increased discretion in the statutory guidance has impacted the way that school management teams construct individual pupils’ behaviour. Do headteachers truly appreciate their discretion to make exclusion decisions? If so, does that affect the outcome of the decision reached? Does the current approach sufficiently protect and respect children’s rights and “best interests”?
- 4. The possible benefits, if any, of law reform targeted at pupils, other than those with SEN, who are at greatest risk of exclusion based on pupil-level risk factors.** Section 3.3.1. Recent law reform has much focused on addressing the position of pupils with SEN; this is critical, given the significant over-representation of pupils with SEN in the class of pupils permanently excluded from school. Yet, research has identified four groups at greatest risk of permanent exclusion: pupils with special educational needs, from minority ethnic groups, boys, and those from low income families. Further research might examine whether law reform could assist these other groups disproportionately affected by exclusion.
- 5. IRP members’ understanding of the governing law and legal framework, and the evidence for and against introducing a legally-qualified panel member or clerk.** Section 4.5. Harris and Eden’s earlier work found that teachers and headteachers were

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adverse to the use of lawyers in independent appeal/review panels.<sup>216</sup> Given the recent change from IAPs to IRPs and the removal of legal aid, however, judges and commentators are more concerned about lay IRP members' understanding of relevant legal concepts. This affects IRPs' ability to sufficiently respect and protect children's rights and "best interests. Research is needed to identify the extent of IPR members' understanding of the law, as well as to ascertain the current views of educational professionals on any potential role for lawyers in this process.

6. **Why there have been so few applications for judicial review of permanent exclusions from school.** Sections 4.5, 4.7, 4.9. IRPs have weaker powers than the IAPs they replaced. Further, IRP members may misunderstand the principles of judicial review. For these reasons, Maxwell suggested that 'the decisions of governing bodies and headteachers are going to come under much closer legal scrutiny. This can only increase the number of potential judicial reviews, particularly as the system beds down'.<sup>217</sup> It is interesting to consider why parents apply for judicial review so infrequently. Might it be due to lack of understanding, as suggested by the anecdotal evidence gathered as part of our scoping survey? Or might it be due to lack of awareness? Or might it be because IRP members understand the law on judicial review adequately?
7. **Parents' understanding of the IRP process, and the extent to which increased understanding would affect the likelihood that parents lodged reviews of permanent exclusions.** Section 4.7. Wolstenholme et al found that parents' motivations for appealing or lodging a review did not accord with the powers available to IRPs and FtTs.<sup>218</sup> It would be reasonable to suggest that, a better understanding of these powers might reduce the likelihood that parents appealed or lodged reviews. Yet, Harris and Eden found that parents who received advice, particularly independent advice, were more likely to appeal.<sup>219</sup> Without further research, we cannot hypothesise what impact a greater understanding of the appeal/review process and available outcomes would have on the number of parents pursuing that avenue.
8. **Parents' understanding of the role of SEN experts in the IRP process, and reasons for requesting a SEN expert.** Sections 3.3.1, 4.6-4.7. The recent introduction of the right to request a SEN expert to assist with an IRP have proven popular with parents. Research into parents' perception of the role of the SEN expert is necessary to ensure they are understood and used as intended, particularly when viewed within the broader context of cuts to legal aid.
9. **The impetus for, prevalence and impact of school-level or local area 'zero exclusion' policies.** Sections 4.2.2, 4.8.2. Our scoping survey revealed that both individual schools and groups of schools within a district within an LA had adopted 'zero exclusion' policies. These policies, particularly the school-level policy, were not publicly advertised, but were having a significant impact on how particular schools and teachers and others within those schools worked with pupils at risk of exclusion. Further research is needed to determine how schools that adopt such policies otherwise address behavioural issues that would instead lead to permanent exclusion and whether outcomes for affected pupils are better than if they had been excluded from that school. Whilst the negative and long-lasting outcomes of young people's exclusion from education are well-documented,<sup>220</sup> the consequences of exclusion may be beneficial for some pupils in some situations. This is particularly important given the DfE's inserted suggestion in its 2015 statutory guidance that schools that adopt a 'zero exclusion' policy 'may undermine [their] ability to maintain discipline'.<sup>221</sup>

<sup>216</sup> Harris and Eden with Blair (n 193).

<sup>217</sup> Maxwell (n 32) (unpaginated).

<sup>218</sup> Wolstenholme et al (n ).

<sup>219</sup> Harris and Eden with Blair (n 193).

<sup>220</sup> For example: Harry Daniels and Ted Cole, 'Exclusion from school: short-term setback or a long term of difficulties?' (2010) 25(2) *European Journal of Special Needs Education* 115-130.

<sup>221</sup> DfE statutory guidance 2015 (n 4) [14].

10. **How commonly parties seek legal advice, and the underlying reasons why parties seek or do not seek legal advice.** Exclusion from school is regulated by law, yet our scoping survey identified that legal advice is rarely sought by any parties, and that, when it is, it is from non-legal LA officers rather than lawyers. Further research is needed to better understand parties' election to exclude law from the process. This is particularly important in relation to parents. For example, is it because the legal framework is seen as clear, hence parents do not feel they need any specifically-legal advice? Is it because, despite the legal framework, parents do not conceive of exclusion as a legal issue? Is it because LA officers satisfactorily address legal and non-legal questions about exclusion?

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