

Coram submission to Exclusions Review: Call for Evidence, May 2018

1. Introduction – Coram’s work and evidence for this submission

Coram Children’s Legal Centre (CCLC), part of the Coram group of charities, works to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information online and in guides; research and policy work; law reform; training; and international consultancy on child rights. CCLC’s legal practice unit has legal aid contracts in education, family, community care and immigration law and CCLC operates the Child Law Advice Service (CLAS), providing legal advice on family and education law to over 17,000 unique callers a year.

From April 2015 to March 2018, CLAS dealt with 1,735 calls relating to school exclusions, with the following breakdowns:

	2015/6	2016/7	2017/8
Primary school exclusions	120	118	111
Fixed-term	96	78	80
Permanent	24	41	31
Secondary school exclusions	445	491	450
Fixed-term	268	302	153
Permanent	177	189	111
Total	565	609	561

The CLAS website also received 69,166 and 42,502 unique views to its exclusions guidance information pages in 2017 to 2018 and 2016 to 2017 respectively.

Coram’s Creative Therapies team provides art and music therapy to hundreds of children each year. In 2016-2017, 173 children and young people received creative therapy from Coram's experienced therapists including:

- 57 children at four specialist schools in Camden, who were helped to address behavioural and communication difficulties, and
- 33 children at a special educational needs school, who received music therapy. Many of these children have been excluded from mainstream education.

Coram Voice enables and equips children and young people to hold to account the services that are responsible for their care. The Bright Spots Programme, developed by Coram Voice with the University of Bristol, aims to improve the well-being of children and young people in care by identifying and promoting practices that have a positive influence on them, using the Your Life, Your Care survey to measure the quality of looked-after children’s care experience and their sense of well-being.

The information in this submission draws on the experience of these three areas of the Coram groups’ work.

2. Practice in schools in relation to behaviour management and exclusion

a. Lack of support for children with Special Educational Needs

The Department for Education recognises that pupils with special educational needs (SEN) have the highest rate of both permanent and fixed term exclusion. Pupils with identified special educational needs (SEN) accounted for almost half of all permanent exclusions and fixed period exclusions and pupils with SEN support had the highest permanent exclusion rate and were almost seven times more likely to receive a permanent exclusion than pupils with no SEN. Pupils with an Education, Health and Care (EHC) plan or with a statement of SEN had the highest fixed period exclusion rate and were almost six times more likely to receive a fixed period exclusion than pupils with no SEN.¹

From April 1st 2015 to March 31st 2018, CLAS received a total of 1,735 telephone calls which related to exclusion in a primary or secondary school (see table above). CLAS conducted research to determine which of these were regarding exclusion that were prima facie unlawful on the basis of information provided by the caller and considered in accordance with the published statutory guidance in place at the time the exclusion was enforced. The advisor deemed the exclusion to be prima facie unlawful in 25% of the total number of calls. 24% of all unlawful exclusions related to children who either had undiagnosed SEN or were not receiving sufficient support for the suspected or diagnosed SEN.

In many cases parents and carers advised by CLAS reported that their child's additional needs were not being supported by the school but that they had been informed by the school that it was too soon to assess the child for any special educational needs. In other instances, the child had a statement of SEN or an EHC Plan in place but the school stated that it lacked the available resources to effectively meet a child's needs. In some cases, parents and carers have been discouraged in seeking support from the local authority where the school refuses to support a request for a Statement of SEN or an EHC Plan. An overriding theme from these calls was that many mainstream educational institutions lack the staff expertise, financial resources and time to accommodate SEN students.

The exclusion statutory guidance recognises that a permanent exclusion should only be used as a 'last resort'. This is especially true of children with SEN or suspected SEN; the guidance places a clear duty on head teachers to take into consideration a child's SEN before taking a decision to exclude or assess whether a child has underlying needs before taking a decision to exclude. Telephone calls taken by CLAS indicate that some head teachers are not paying sufficient regard to these particular provisions of the guidance in a significant number of cases.

Case study 1

A child received a fixed term exclusion for 5 days. The child is currently being assessed for suspected learning difficulties and his bad behaviour tends to occur in Math and Music. The school is offering no support and the head teacher has said that the school cannot cope with the child's behaviour and

¹ Department for Education, Statistics - Permanent and Fixed Period Exclusions in England: 2015 to 2016, 20 July 2017, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645075/SFR35_2017_text.pdf

that the mother will need to find him a new school. The head has also stated that if the behaviour continues the child will be permanently excluded. The mother feels that the school is not dealing with her son correctly and that they single him out.

It is unlawful for a school to exclude a child because they cannot cope. All schools should have a system in place to identify children with SEN and also put appropriate support in place, which the school has failed to do. By stating that the school cannot cope and that a further incident will lead to a permanent exclusion, the head teacher has placed the school in a compromising position.

The decision to exclude a pupil may be subject to independent review. Parents or carers of pupils who have been excluded can appeal the exclusion decision first to a Governors' Disciplinary Committee and then to an Independent Review Panel. The decision to exclude a pupil can only be overturned by the governing body; the Panel can only recommend that a child be readmitted, or at most direct that the governing body reconsider its decision. In the period since 2011/12, the percentage of Independent Review Panel determinations finding in favour of the parent has hovered around 30%, meaning that for nearly one in three cases decision-making by governing bodies was found to be illegal, irrational or procedurally incorrect.

However, other than guidance for parents and carers in the Department for Education Exclusions statutory guidance, and phone lines such as CLAS, there is no state provided face-to-face advice and support for parents navigating the process. The School Exclusion Project provides pro bono representatives who appear on behalf of the parent before the appropriate decision-making body – the governing body of the school – before the Independent Review Panel. Since the Project started in September 2011, it has provided assistance to over 250 parents whose children face exclusion. CLAS signposted to the project 140 times in the year 2016 to 2017.

While there is provision for a SEN expert in Independent Review Panel (IRP) cases, the experience of CCLC's education lawyers is that even if the SEN expert finds fault with the support provided by a school for the child and the IRP returns the matter to the Governing Body to reconsider, the Governing Body will ordinarily accept the £4,000 fine rather than take further action. While the role of the SEN expert is a good idea, it does not work in practice as the IRP cannot overturn the exclusion.

The only legal remedy for a permanent exclusion is judicial review. However, access to judicial review is impeded by the non-legal hurdles that must be overcome in education matters before a judicial review can be considered, and the lack of public knowledge of these hurdles and processes.

While some parents whose children are 'disabled' under the Equality Act 2010 would be able to lodge a disability discrimination claim with the First Tier Tribunal, which has jurisdiction to overturn an exclusion and order reinstatement, not all children with SEN would be considered disabled under the Equality Act and therefore their parents cannot effectively challenge their child's exclusion from school.

There is no 'bright line' between vulnerable children with a diagnosed SEN and a child with undiagnosed SEN issues facing permanent exclusion. As with family law, access to early advice

through a continuum of provision encompassing both public legal education and early legal advice would allow for better solutions for children. Early advice on a child's unlawful exclusion could ensure that families push for appropriate assessment of their child and SEN issues can be diagnosed.

Case study 2

The mother of Alex, a 12 year old child at a mainstream state school, called CLAS for advice. Alex had concentration problems from an early age and he was thought by Child and Adolescent Mental Health Services to have borderline deficiency order/ADHD, although this had not been formally diagnosed. Alex's new secondary school, which had not made any attempt to assess or identify Alex's special educational needs, had excluded him several times in six months. Alex was temporarily excluded while his school tried to negotiate a managed move to another school, but when this fell through, Alex was trapped at home. Rather than permanently excluding Alex on a formal basis, which would at least have come under the scrutiny of an Independent Review Panel, his school had tried to force him out informally. By the time Alex's mother called CLAS, he had been out of school for nearly three months, during which time she had not been able to work.

Legal aid was available for a judicial review of the unlawful exclusion, but Alex's mum did not know how long her son had to be out of school before his exclusion became 'unlawful' and had no idea that her son's case was within scope of legal aid. Independent legal advice and information was vital to ensure she fully understood her son's rights and the action that could be taken.

Case study 3

The case involved an 8 year old child with SEN whose first fixed term exclusion followed an incident where he threw a bag at his teacher and hit them with a pole. The child's behaviour deteriorated after the exclusion but, in the view of the parents, the school failed to offer support to meet the child's needs. The behaviour escalated and the child attacked a dinner lady. Following further incidents the school issued a permanent exclusion. The mother appealed and the Independent Review Panel quashed the decision on the basis of irrationality; that the governing body had failed to consider all relevant points and did not comply with the Equality Act and SEN Code of Practice. The governing body upheld the decision to exclude. The mother believes that the school does not understand the law surrounding exclusions, because this was the first permanent exclusions in the 18 years it has been established. The client is therefore escalating the matter to the First Tier Tribunal on the grounds of disability discrimination.

In this case the parent had felt persistently failed by the school in providing support for the child's SEN. It appeared that the school did not take account of relevant Statutory Guidance, namely the Special Educational Needs Code of Practice or the Exclusions Guidance. This case demonstrates an example of where an IRP have recommended reinstatement and the Governing Body still upheld the exclusion.

b. Non-compliance with statutory procedural requirements

Statutory guidance explicitly states that “‘Informal’ or ‘unofficial’ exclusions, such as sending a pupil home ‘to cool off’, are unlawful, regardless of whether they occur with the agreement of parents or carers. Any exclusion of a pupil, even for short periods of time, must be formally recorded’.²

Unlawful exclusions include exclusions where the school has failed to follow the statutory guidance without good reason (for example, a failure to inform parents of their right of appeal, a failure to provide the written notification of exclusion); where a school has incorrectly stated that the guidance does not apply to them or has refused to educate a child unless particular conditions are met; or exclusion for a non-disciplinary reasons. Unlawful cases also include those where children were sent home at lunchtime without the matter being formally recorded as an exclusion; and children were placed on a part-time timetable or otherwise restricted in the length of time the child can attend school, without the parent or carer’s full consent, amounting to an unofficial and unlawful exclusion.

Unofficial or unlawful exclusions by schools are invariably not recorded in Department for Education data. In a quarter of the calls to CLAS relating to exclusions, the adviser concluded that the school may have acted unlawfully, either by not complying with procedures or because it did not adequately consider the child’s special educational needs.

In 2013, the Office of the Children’s Commissioner estimated that several hundred schools in England may be excluding children illegally, affecting thousands of children every year.³ The OCC found evidence of pupils being excluded without proper procedures being followed; pupils being placed on extended study leave or part-time timetables; pupils being coerced into leaving their current school; and schools failing to have due regard to their legal responsibilities regarding the exclusion of children with statements of SEN. This was found to impact disproportionately on children with SEN, and those who are least likely to know, or have adults in their lives that know, the law and their rights.

Five years on, Coram still sees these issues on a regular basis and is concerned that increasing numbers of children are missing out on education as a consequence of unlawful practices such as part-time timetabling, managed moves, encouragement to home school or other types of informal exclusion activity which is not captured in national datasets. Another issue seen is the increased use of internal exclusions – for example, placing a child in an on-site form of isolation.

Case study 4

Mother of 16 year old child is concerned about their learning ability and emotional issues. Child has been subjected to cyber-bullying. The child has been bullied about his deceased coach and been called a ‘Paki’. The bullying led to the child chasing one of his bullies. He tripped and fell on him. The child was excluded for 1 day. The school have said that child has to attend off-site provision until he leaves school with no mention of a review. Child attends an Academy

² Department for Education, Exclusion from maintained schools, academies and pupil referral units in England - Statutory guidance for those with legal responsibilities in relation to exclusion, September 2017, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641418/20170831_Exclusion_Stat_guidance_Web_version.pdf

³ Office of the Children’s Commissioner, “Always Someone Else’s Problem” - report on illegal exclusions, April 2013

A decision to direct a pupil off-site should usually be to improve that child's behaviour. It is also evident that the school has not addressed the bullying issue. Any placement off-site should be subject to review. However the law on directing pupil's offsite does not apply to Academies, they will have to rely on their articles of association. It is therefore easy for an Academy to argue that they do not need to review the placement. In these situations, Statutory Guidance can be used as best practice.

Case study 5

A 13 year old child had had three fixed term exclusions on grounds of minor issues, according to this aunt. He was sent home a week before half term and was told that he was being permanently excluded. The school had not sent a letter or confirmed the exclusion over the phone but arranged a meeting to discuss their decision. At the time of the call, the child had been out of education for two weeks with no decision about the exclusion.

The process of notifying parents of exclusion is usually to give parents the opportunity to appeal or complain where necessary. Failing to formally inform parents and refusing to allow a child to return means that the child's education is being unfairly disrupted and they are not being offered an opportunity to fairly challenge the decision.

Case study 6

A child in Year 12 was excluded for failing their mock exams. There were no behaviour problems or any other issues that would justify an exclusion. The sixth form is attached to an Academy.

This case highlights that some Sixth Form Colleges attached to either maintained schools or academies fail to recognise that the Statutory Guidance on Exclusions apply to them. The Statutory Guidance on Exclusions states that it is unlawful to exclude for a reason such as academic attainment/ ability.

Case study 7

A child attends an Independent school and the school is named on the child's EHCP. The child has been excluded on a number of occasions. After the last incident the school stated that the child could not get into trouble again. The child was hit by another child and retaliated. The child was excluded again and was home for 3 days. The child's mother was of the idea that the government guidance on exclusions applied in cases of Independent schools as well.

This case demonstrates a situation in which a child with SEN and an EHCP has been permanently excluded from an Independent School. The 'protection' afforded by paragraphs 23- 25 of the Exclusions Guidance to children with EHCP's does not apply in this situation. Children with SEN are particularly vulnerable to exclusion, especially those in Independent Schools as they are responsible for their own exclusion policies. The DfE is the regulator for independent schools in England and there

should be a stronger onus on independent schools to comply with the exclusion guidance as a matter of 'best practice'.

Exclusion is not the only route open to head-teachers if the relationship between the school, a learner and their family has become strained or has broken down. If delivered promptly, managed moves can offer a valuable alternative in terms of keeping learners in mainstream settings. Statutory guidance makes clear that 'a pupil at any type of school can also transfer to another school as part of a 'managed move' where this occurs with the consent of the parties involved, including the parents and the admission authority of the school. However, *'the threat of exclusion must never be used to influence parents to remove their child from the school'* (italics added). A number of calls to CLAS have raised questions about whether managed moves are being used appropriately and consistently as an alternative to exclusion. There must be a clear and transparent transition process between the original school and the school which the child is moving to.

Furthermore, it must not be assumed that simply providing the child a 'fresh start' will be a magical solution, especially if there are undiagnosed or unmet health and social care needs underlying disruptive behaviours. Exclusion can be more attractive to school leaders than managing a 'difficult' child as it represents a quicker, cheaper solution for the school, but this still has knock on costs to the local authority and will not necessarily be in the best interests of the child.

Case study 8

The child is in Year 9 in an Academy. Following various behaviour incidents, the child had received several exclusions, and the last incident led to the Deputy Head arranging a managed move. The child's mother refused to agree to the move because she felt her son was not violent or abusive. The mother and child had to visit Nigeria because her father passed away and when they returned they were told that the children was no longer on the school roll and had to attend a PRU. The child has been refused entry to the school's premises. The Deputy Head told the mother that the letters regarding the managed move had been sent to her home. The school agreed to a meeting, but this was never arranged.

Schools can opt for a managed move if they believe this would be more suitable and would cause the least disruption to a child's education. The point of a managed move is to work in partnership with parents. However in this case the school proceeded with a managed move without obtaining proper consent from the parent.

3. Engaging parents and pupils effectively

When considering how best to engage pupils it is worth noting that a number of children may 'self-exclude' from education, and this is an important issue to address. For example, Coram Voice's 'Our Lives, Our Care' report highlighted that 3 out of 10 children in care aged 8 to 10 reported being afraid to go to school because of bullying.⁴ Bullying can have a very serious impact on children's well-being leading to truancy, depression and suicide.

⁴ Selwyn, J. & Briheim-Crookall, L (2018) Our Lives, Our Care: Looked after children's views on their well-being in 2017, at <http://www.coramvoice.org.uk/sites/default/files/1053-CV-Our-Lives-Our-Care-report5.pdf>

With looked after children in particular, negative labelling within schools is a common concern. Looked after children are reported as feeling that teachers and peers mistakenly assumed that children were placed in care due to their own poor behaviour, or they failed to appreciate the difficulties faced by children before entering care and the effects of this on their behaviour. The young people also thought that there should be more efforts to improve school attendance to avoid looked after children being seen as different from other children

“Being in care is a struggle because you can get bullied or picked on for being special and this can bring my mood down and others too which means this also impacts on their lives because they might be scared to go to school/college and be afraid that they will get singled out from all the others because they are in care and are different from everyone else.”⁵

In 2017, the Children’s Commissioner for England commissioned Coram to undertake a review of evidence on the subjective wellbeing of children excluded from school and in alternative provision in England. The review highlighted some common themes in the available literature about children who have been excluded from education, were at risk of exclusion and/ or in alternative provision:

- Children who were excluded, or were at the risk of exclusion, repeatedly described themselves as having been labelled “bad” or “naughty” and these views were sometime reinforced by the language that teachers used about the children involved in the studies.
- Some young people understood how their behaviour had led to an exclusion whilst others felt they were victimised and treated unfairly by their teachers.
- Response to AP were mixed. Children generally were positive about their experience of AP and the teachers that taught them. Pupils reported that they felt they were able to better focus on their school work and were away from distractions from their peers. Others enjoyed the physical space that their AP offered (for example students who attended AP away from London) and the chance to be in a calmer, quieter environment. On the other hand, there were some pupils that reported that their AP was restrictive and imposed strict rules on them around interacting with their peers. These instances usually referred to on-site “seclusion” units. Some students found the more activity-based school work at AP to be too easy, with the subjects sometimes not be accepted at colleges they wanted to attend. Others welcomed the chance to explore subjects that were different to the traditional curriculum subjects.
- Young people discussed challenges that they had faced in their family lives and some linked these to the behaviour that they displayed at school. Difficulties that young people had experienced included bereavement, violence and abuse and living with family members with mental health issues.

While CLAS’s advice to parents and carers illustrates a clear need for clear guidance and further legal advice around exclusions, Coram’s work with children in pupil referral units has also highlighted the need for earlier support for families in this area. A number of parents whose child is referred to a PRU are unhappy with the decision, despite the level of support their child will receive in that environment. Furthermore, in a number of cases it is clear that if the child and/or family had received assistance earlier in the system, they might never have been subject to exclusion. Most

⁵ ibid

challenging behaviour is a product of unmet emotional and psychological needs that might be identified when a child joins formal social settings, such as nursery or primary school. A number of exclusions could also be avoided if more resources were available for pastoral and classroom support and there was greater capacity to deal with behavioural issues at an earlier stage, especially with pupils with complex health and social care needs.

Transition to secondary school can be particularly challenging for children (and result in their exclusion) so early intervention would go some way to reducing the excluded population.

4. Conclusion & recommendations

School can be a positive place for children, providing security and support alongside opportunities to learn. But too many lose out on a fulfilling school education, because they have undiagnosed or unmet special educational needs, are temporarily or permanently excluded, or face bullying and stigmatisation. If needs cannot be met in any particular setting or they change, children and families must be able to rely on transparent process with clear advice, effective assessment and timely planning to secure educational entitlement. Coram recommends the following changes to the current system:

Legal advice, awareness-raising & guidance

- A government commitment to ensuring that legal advice is available in cases where children are at risk of school exclusion.
- The provision of guidance on exclusion written with and for children and young people.
- Schools should inform all parents as to their, and their child's, rights in regards to exclusion at the point at which their child enrolls in primary and secondary school.

Assessment & meeting needs

- There should be no permanent exclusion of a child without a full assessment of needs.
- Guidance should place a greater emphasis on meeting the learner's needs and putting an appropriate support package in place *before* commencing a fixed-term exclusion in order to minimise the long-term impacts on educational outcomes for learners, particularly children in care.
- Schools should have reliable access to swift and expert professional advice that enables the child's needs to be met either in that school or in a setting that better meet those needs.
- More support and training should be provided for teachers to understand and deal with disruptive behaviour of young children, especially when there are concerns of underlying Special Educational Needs or mental health issues.
- There needs to be greater awareness that, if a school is unable to meet the child's needs within their budget, parents and carers can request an assessment of and support for their child's SEN directly from the local authority without needing to go through the school first. Include details of charitable organisations that can advise on this such as the Child Law Advice Service.

Children in care

- Priority given to issues important to children in care, including bullying, stigmatisation and carer engagement, by virtual school heads working with designated teachers.

Permanent exclusion from primary schools

- There should be a statutory presumption against permanent exclusion from primary schools, and this should be reflected in revised statutory guidance. All permanent exclusions of a primary-school aged child should be subjected to independent review and no primary school should permanently exclude a child in reception or key stage 1.

Managed moves

- There is a clear need for statutory guidance or departmental advice on managed moves to ensure consistency in their operation. This could also ensure lead to the increased consideration of managed moves as an alternative to permanent exclusion where a school is unable to meet child's needs.

Review & appeal process

- The powers of the independent review panel (IRP) are undermined by the delegation of the final say to the school's governing body. If the IRP, which includes an SEN expert, finds that the decision to exclude was made in error, or flawed because there was no reasonable adjustment made for special educational needs impacting on self-regulation, for example, then reverting to the original decision-maker is unsatisfactory. Coram in the past has advocated for the reinstatement of Independent Appeals Panels, as has the Children's Commissioner and the Administrative Justice and Tribunals Council.⁶ At the very least, we would urge the Department to give further consideration as to whether this process offers a genuinely independent appraisal of exclusion decisions, and upholds the child's right to a fair hearing and effective remedy.

For more information, please contact Kamena Dorling, Group Head of Policy & Public Affairs at kamena.dorling@coramclc.org.uk

⁶ http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=13462:local-authority-appeal-panels-should-hear-appeals-for-all-schools-q-ajtc&catid=56:litigation-articles