



PSED in practice: school exclusions

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GARDEN COURT CHAMBERS



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Structural discrimination in school exclusions

- SEND children more than five times more likely to be excluded than one of their non-SEND peers.
- Gypsy and Traveller children approximately four times more likely to be excluded than white peers.
- Black Caribbean children are nearly three times more likely to be excluded than white peers.



Impact of school exclusions

- Permanent exclusions can be fundamentally life changing for a young person.
- Most permanently excluded young people will be sent to a pupil referral unit for their education.
- Provision at a pupil education unit is statistically poor, with 98% of students failing to achieve 5 satisfactory GCSEs.
- Permanently excluded young people can experience a range of social and emotional difficulties including anxiety, stigma and isolation.
- Ofsted, the Children's Commissioner and other groups have found links between young people being criminally exploited and being excluded from school.
- Criminal exploitation is more likely when a young person is not in school. It includes the practice of "county lines" drug trafficking which places the victims at risk of criminalisation and serious violence



Types of exclusion

- Permanent exclusion (“PEX”): results in the excluded young person being removed from a school’s register and denied access to the school’s grounds indefinitely.
- Fixed term exclusion (“FTE”): results in a young person being denied access to the school’s campus for a set number of days, or part of a day, which is followed by a return to school.
- Internal exclusion: results in the young person being confined to a behavioural unit or otherwise segregated from the mainstream school population.
- Informal exclusion: includes any removal of a child from the school grounds that does not follow procedure. This includes sending a child home to “cool off”. They are always unlawful.



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Exclusions that can be reviewed in school exclusions process

This applies to State schools (i.e. public authorities):

- Any exclusion where discrimination is alleged can be challenged.
- All PEXs will be subject to a review.
- All FTEs that take the total number of days a student has been excluded for to more than 15 in a term will be subject to a review.
- Any FTE that takes the total number of days a student has been excluded for to more than 5 in a term, but less than 15, will be reviewed if the family chooses.
- FTEs that take the total number of days a student has been excluded to less than 5 in a term will not be reviewed.



School exclusions process plus other remedies

- **Governors' Body Hearings ("GBH")** are the first stage of review for any exclusion. A panel of the school's governors will meet to hear representations from the family and the school and either uphold a student's exclusion, or reinstate them.
- **Independent Review Panels ("IRP")**: are a free appeal panel for families who want to challenge the decision of the governors to uphold an exclusion. They are only available to review PEXs.
- **First Tier Tribunal ("FTT")**: is available where disability discrimination is alleged. The relevant tribunal is the Special Educational Needs and Disability ("SEND") chamber. The FTT can direct reinstatement.
- **County Court ("CC")**: is available for claims of discrimination on any basis other than SEND. The CC can direct reinstatement.
- **High Court ("HC")**: is available to hear claims for judicial review, typically when the IRP process has been run but not resulted in reinstatement.



PSED in school exclusion hearings

- The PSED applies to individual decisions NOT just the formulation of policy *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104.
- Non-delegable duty.
- Must be exercised before and at the time of decision. Although it is a continuing duty it cannot be discharged by way of a ‘rear guard action’.
- Must be exercised in substance, with rigour and an open mind.
- The PSED incorporates a *Tameside* duty of inquiry.
- How intensive should the *Tameside* duty be? It’s context sensitive: In *R (Refugee Action) v SSHD* [2014] EWHC 1033 (Admin)
- Factors to consider:
 - The protected characteristics of the individual- an argument for intersectionality?
 - Impacts of exclusions
 - Structural discrimination? Both at school and national level?
 - Less intensive review because it’s an individual decision?



PSED in the SEND Tribunal

- Not within jurisdiction (see s60 Children and Families Act 2014; Chapter 1, Part 6 Equality Act 2010)
- However, lack of compliance with PSED relevant to justification under sections 15 and 19 Equality Act 2010.
- See *Coll v Secretary of State for Justice* [2017] UKSC 40 as applied in *Hussein v SSHD* [2018] EWHC 213 (Admin) at [53]-[66]



School Inclusion Project

- Launching 20 July
- New forum coordinated by Garden Court Chambers to:
 - Develop referral pathways for representation in school exclusion hearings and related legal proceedings
 - Share knowledge and best practice
 - Identify and address systemic unfairness in schools
- Googlegroup and quarterly meetings as well as training



Thank you

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