

<b>Children and Young People Select Committee</b>			
<b>Title</b>	Evidence for CYP Select Committee Exclusions Review	<b>Item No</b>	
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<b>Class</b>	Part 1	<b>Date</b>	17 <sup>th</sup> October 2018

## 1. Purpose of report

- 1.1 As part of Exclusions Review the Committee has requested a report on the statutory duties in relation to exclusions.
- 1.2 This report sets out the legal framework and position in relation to exclusions and the role of schools, headteachers, governing bodies and the local authority.

## 2. Recommendations

The Select Committee is asked to note the contents of this report.

## 3. Context - exclusions (fixed and permanent)

### 3.1 What are exclusions? The definitions

There are two types of exclusion – fixed period (suspended) and permanent (expelled). Where a child or young person is excluded for a fixed period, schools must set and benchmark work for the first five school days.

If the exclusion is longer than five school days, the school is responsible for arranging full-time education from the sixth school day onwards. The child can only be removed for up to 45 school days in one academic year.

Schools also have the authority to direct pupils to off-site provisions for reasons of behaviour, or to provide alternative education to meet specific needs. The placement must be kept under evaluation and involve parents/carers and the pupils in the assessment of his/her educational needs.

### 3.2 Statutory process for exclusions

All statutory processes in relation to exclusions is supported by the **‘Exclusion from maintained schools, academies and pupil referral units in England’ Statutory guidance for those with legal responsibilities in relation to exclusion, September 2017.**<sup>1</sup> (Also see appendix one for other key legislation)

The statutory guidance from Department for Education (DfE) provides a guide to the legislation that governs the exclusion of pupils from maintained schools, pupil referral units (PRUs), academy schools (including free schools, studio schools and university technology colleges) and alternative provision academies (including alternative provision free schools) in England.

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<sup>1</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/641418/20170831\\_Exclusion\\_Stat\\_guidance\\_Web\\_version.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641418/20170831_Exclusion_Stat_guidance_Web_version.pdf)

The guidance aims to support headteachers, governing bodies, local authorities, academy trusts, independent review panel members, independent review panel clerks, and individuals appointed as SEN experts in the legal processes surrounding exclusions.

The decision to exclude a pupil must be lawful, reasonable and fair. Schools have a statutory duty not to discriminate against pupils on the basis of protected characteristics, such as disability or race. Schools should give particular consideration to the fair treatment of pupils from groups who are vulnerable to exclusion.

#### **4. The role of school headteacher regarding exclusions**

4.1 Only the headteacher of a school can exclude a pupil and this must be on disciplinary grounds. A pupil may be excluded for one or more fixed periods (up to a maximum of 45 school days in a single academic year), or permanently. A fixed-period exclusion does not have to be for a continuous period.

A **fixed-period exclusion** can also be for parts of the school day. The law does not allow for extending a **fixed-period exclusion** or 'converting' a fixed-period exclusion into a **permanent exclusion**. In exceptional cases, usually where further evidence has come to light, a further fixed-period exclusion may be issued to begin immediately after the first period ends; or a permanent exclusion may be issued to begin immediately after the end of the fixed period.

The headteacher may withdraw an exclusion that has not been reviewed by the governing body.

Any decision of a school, including exclusion, must be made in line with the principles of administrative law, i.e. that it is: lawful; rational; reasonable; fair; and proportionate<sup>2</sup>. When establishing the facts in relation to an exclusion decision the headteacher must apply the civil standard of proof; i.e. 'on the balance of probabilities' it is more likely than not that a fact is true, rather than the criminal standard of 'beyond reasonable doubt.'

The headteacher and governing body must comply with their statutory duties in relation to SEN when administering the exclusion process. This includes having regard to the SEND Code of Practice. The headteacher should, as far as possible, avoid permanently excluding any pupil with an Education, Health and Care Plan (EHCP) or a Child Looked After (CLA).

A decision to exclude a pupil permanently should only be taken:

- in response to a serious breach or persistent breaches of the school's behaviour policy; and
- where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school.

The behaviour of a pupil outside school can be considered grounds for an exclusion.

The headteacher must, without delay, notify the governing body and the local authority of:

- any permanent exclusion (including where a fixed-period exclusion is followed by a decision to permanently exclude the pupil);
- any exclusion which would result in the pupil being excluded for a total of more than five school days (or more than ten lunchtimes) in a term; and
- any exclusion which would result in the pupil missing a public examination or national curriculum test.

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<sup>2</sup> With respect to the legislation relating directly to exclusions and a school's wider legal duties, including the European Convention on Human Rights and the Equality Act 2010.

4.2 Lewisham local authority provides headteachers and governing bodies with the **Exclusion from Maintained Schools, Academies and Pupil Referral Units - A guide for Headteachers in the London Borough of Lewisham**. The guide provides Headteachers advice and information about exclusions and the key points, preventative measures and alternatives to exclusion, preparing for exclusion meetings, template letters and forms for all stages and Managed Moves. (See Appendix two for Permanent Exclusions flowchart)

## 5. The role of the governing body regarding exclusions

For a fixed-period exclusion of more than five school days, the governing body must arrange suitable full-time education for any pupil of compulsory school age.

The governing body has a duty to consider parents' representations about an exclusion and must consider the reinstatement of an excluded pupil within 15 school days (19 of receiving notice of the exclusion) if:

- the exclusion is permanent;
- it is a fixed-period exclusion which would bring the pupil's total number of school days of exclusion to more than 15 in a term; or
- it would result in a pupil missing a public examination or national curriculum test.

The following parties must be invited to a meeting of the governing body and allowed to make representations:

- parents (and, where requested, a representative or friend);
- the headteacher; and
- a representative of the local authority (in the case of a maintained school or PRU).

The governing body must notify parents, the headteacher and the local authority of its decision, and the reasons for it, in writing and without delay. In the case of a permanent exclusion where the governing body decides not to reinstate the pupil, the governing body's notification must also include the following:

- The fact that it is permanent.
- Notice of parents' right to ask for the decision to be reviewed by an independent review panel and the following information:
  - a) the date by which an application for a review must be made (i.e. 15 school days from the date on which notice in writing of the governing body's decision is given to parents;
  - b) where and to whom an application for a review (and any written evidence) should be submitted;
  - c) that any application should set out the grounds on which it is being made and that, where appropriate, this should include a reference to how the pupil's SEN are considered to be relevant to the exclusion;
  - d) that, regardless of whether the excluded pupil has recognised SEN, parents have a right to require the local authority/academy trust to appoint an SEN expert to advise the review panel;
  - e) details of the role of the SEN expert; and
  - f) that parents may, at their own expense, appoint someone to make written and/or oral representations to the panel.
- The right to apply for an independent review panel, if parents believe that there has been unlawful discrimination in relation to the exclusion then they may make a claim under the Equality Act 2010.

The governing body must ensure that a pupil's name is removed from the school admissions register if:

- 15 school days have passed since the parents were notified of the governing body's decision to not reinstate the pupil and no application has been made for an independent review panel; or
- the parents have stated in writing that they will not be applying for an independent review panel.

5.1 Lewisham local authority provides governing bodies with training and the **Governor Handbook** which includes guidance and a Governor checklist to support them in this process.

## 6. The role of the local authority regarding exclusions

For permanent exclusions, the local authority must arrange suitable full-time education for the pupil to begin no later than the sixth school day of the exclusion.

For a permanent exclusion, if the pupil lives outside the local authority area in which the school is located, the head teacher must also notify the pupil's 'home authority' of the exclusion and the reason(s) for it without delay.

In addition, where a pupil has an EHC plan, the local authority may need to review the plan or reassess the child's needs, in consultation with parents, with a view to identifying a new placement.

The local authority must have regard to the relevant statutory guidance when carrying out its duties in relation to the education of looked after children.

Provision does not have to be arranged by either the school or the local authority for a pupil in the final year of compulsory education who does not have any further public examinations to sit.

6.1 In Lewisham it takes an average of between two and three weeks to place excluded pupils into alternative provision, this is calculated from the exclusion date to the start date at the provision. This mainly due to the admissions process at Abbey Manor College, as the interview and Risk assessment for referred pupils are currently carried out on separate days, with the pupil starting the following week.

It is also worth noting that many parents delay their child's admission to the Abbey Manor College in the hope they will be successful at the Governors Disciplinary Panel and have their child's exclusion not upheld. These panels should be arranged with 15 school days of the date of the exclusion and schools aim to hold these panels as quickly as possible after the exclusion, however this is not always possible.

**79 per cent** of pupils permanently excluded from Lewisham schools were referred to and attend Abbey Manor College. **21 per cent** of pupils were referred to other provision including the Greenwich PRU, Bromley Trust Academy, Ilderton Motors, Bromley Tutorial Foundation, the Croydon PRU, Arco Academy, The Lewisham Hospital Outreach Programme, Education My Life Matters and the Southwark PRU.

The reasons for pupils being referred to other Alternative Provision include:

- The pupil has gang associations or bail restrictions (this is assessed in partnership with Youth Offenders Service and the Serious Youth Violence Team).
- The pupil who lives out of borough and is referred to their home local authority.

## 7. The local authority's/academy trust's duty to arrange an independent review panel

### 7.1 Arranging a date and venue

If applied for by parents within the legal time frame, the local authority or (in the case of an academy) the academy trust must, at their own expense, arrange for an independent review panel hearing to review the decision of a governing body not to reinstate a permanently excluded pupil.

This must be upheld within 15 school days of notice being given to the parents by the governing body of its decision not to reinstate the permanently excluded pupil.

## 7.2 **Appointing independent panel members**

The local authority/academy trust must constitute the panel with either three or five members (as decided by the local authority/academy trust) representing each of the three categories below. A five member panel must be constituted with two members from each of the categories of school governors and headteachers:

- A lay member to chair the panel who has not worked in any school in a paid capacity, disregarding any experience as a school governor or volunteer.
- Current or former school governors who have served as a governor for at least 12 consecutive months in the last five years, provided they have not been teachers or headteachers during that time.
- Headteachers or individuals who have been a headteacher within the last five years.

In Lewisham the independent panel is organised by the Corporate Governance Support Team.

## 7.3 **Conduct of an independent review panel**

The chair outlines the procedure and the panel supports all parties to participate in the review and ensure that their views are properly heard. The independent review should be conducted in an accessible, unthreatening and non-adversarial manner.

The panel's decision should not be influenced by any stated intention of the parents or pupil not to return to the school. The focus of the panel's decision is whether there are sufficient grounds for them to **direct or recommend that the governing body reconsider its decision to uphold the exclusion.**

When considering the governing body's decision the panel should apply the following tests:

- Illegality – did the governing body act outside the scope of its legal powers in deciding that the pupil should not be reinstated?
- Irrationality – did the governing body rely on irrelevant points, fail to take account of all relevant points, or make a decision so unreasonable that no governing body acting reasonably in such circumstances could have made it?
- Procedural impropriety – was the governing body's consideration so procedurally unfair or flawed that justice was clearly not done?

If the panel upholds the governing body's decision, the clerk should immediately report this to the local authority as well as notifying the parents and governing body.

Where the panel directs or recommends that the governing body reconsider whether a pupil should be reinstated, the governing body must reconvene to do so within ten school days of being given notice of the panel's decision.

## 8. **The role of the local authority in supporting and engaging with schools and families regarding exclusions**

- 8.1 All schools are able to access the **Access, Inclusion & Participation** service for support relating to a pupil's behaviour or exclusion. Headteachers and clerks to governing bodies can contact the Inclusion & Reintegration Officer for advice regarding the procedures

following a decision to exclude. This is a statutory service within the local authority. The role of the Inclusion & Reintegration Officer is to:

- collate information on all exclusions in Lewisham maintained schools (including sixth forms), academies, free schools, alternative provision academies and alternative provisions;
- compile exclusion reports including analysis of exclusions by type, reason, SEND, ethnicity, age, gender etc;
- notify the relevant alternative provider of all reported permanent exclusions;
- support schools to help prevent permanent exclusions;
- support schools who are struggling with managing pupils with challenging behaviour; and
- advise schools on managed moves.

8.2 The Inclusion & Reintegration Officer provides the advice, guidance and signposting to families regarding exclusions. There is a Parent Guide which includes responses to the following:

- What are the reasons for exclusion?
- What happens next?
- Can a child be permanently excluded for a serious first incident?
- What if a child has emotional and behavioural difficulties or a learning difficulty that affects their behaviour in school?
- What if a child has a statement for special educational needs or an ECHP?
- How a family to be communicated regarding an exclusion?
- What if the family disagree with a child's exclusion?
- What is the discipline committee? What happens at the discipline committee meeting?
- If the governors uphold the exclusion, what happens next?
- Avoiding 'unofficial exclusions'

This information is also available on the Lewisham website for parents to review<sup>3</sup>.

## **9. The role of the local authority to support children at risk of exclusion with intervention and prevention**

School-based strategies for preventing exclusions include:

- Referrals to CAMHs , MASH and Early Help, Team around the Child
- Support from external experts e.g Lewisham Inclusion Outreach Service
- pastoral support programmes internally and with external providers
- alternatives to exclusion – alternative provision and intervention programmes
- managed moves / managed transfers

Early intervention to address underlying causes of disruptive behaviour should include an assessment of whether appropriate provision is in place to support any SEN or disability that a pupil may have. The headteacher should also consider the use of a multi-agency assessment for a pupil who demonstrates persistent disruptive behaviour. Such assessments may pick up unidentified SEN but the scope of the assessment could go further, for example, by seeking to identify mental health or family problems which trigger behaviour change.

### **9.1 Lewisham Fair Access**

The local authority in partnership with all Lewisham Schools has agreed, as part of the overall strategy to reduce permanent exclusion, that cases of children at risk of exclusion

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<sup>3</sup> <https://www.lewisham.gov.uk/myservices/education/schools/attendance/Pages/Exclusions.aspx>

can be referred to the Fair Access Panel for consideration prior to a making a decision to permanently exclude a student.

Fair Access Panel (Protocol) is based on the requirements of the Admissions Code of Practice issued December 2014 and regulations relating to children missing from education. It takes account of the particular circumstances relating to schools in Lewisham and builds on current good practice.

Local authorities have a duty to ensure that each child in its area can secure access to education. A Fair Access Protocol supports the local authority in this duty, while providing an equitable system for allocation of places. Children in Lewisham are placed under the Fair Access Protocol by the Fair Access Panel.

The operation of the Fair Access Protocol is outside normal admissions arrangements and is triggered when a parent of an eligible child has not secured a school place under:

- in-year admissions; or
- Reception or secondary transfer procedures.

All Lewisham schools, including those that have their own admission authority e.g. church schools, are required to adhere to the requirements of this protocol. Lewisham's Fair Access Protocol is designed to:

- Provide a fair, equitable and open allocation of school places, particularly for children who are harder to place.
- Be fair and transparent, to have the confidence of all primary schools and to include representatives of mainstream primary schools in the decision making process.
- Ensure no school or academy – including those with vacancies – is asked to take a disproportionate number of children who have been excluded from school, or have challenging behaviour. Information such as number of children on roll, exclusions and in year admissions is held by the local authority Access, Inclusion and Participation Service and will be monitored and taken into consideration.
- Respond to the needs of vulnerable children who are not on the roll of any school, placing them in education provision quickly and without delay, taking account of their specific needs.
- Reduce the time all children and particularly vulnerable children spend out of education.
- Strengthen and develop the existing admissions arrangements and procedures, taking into account the local authority's duty to coordinate all in year admissions to school.

It is acknowledged that in some instances there are early warning signs that a student may be at risk of permanent exclusion, for example a student that has received more than two fixed term exclusions due to persistent disruptive behaviour. It is agreed that collaborative working within the following guiding principles in respect of making an offer of an alternative school place for those student who are at risk of exclusion:

- Student centred focus.
- Honesty and transparency.
- Ensuring safeguarding is paramount.
- Avoid negative outcomes of permanent exclusion where possible.
- Shared responsibility for reducing exclusions.
- Greater understanding of the wider implications of permanent exclusions.

## **10. 'Unofficial exclusions'**

Off-rolling or unofficial exclusions are unlawful outside proper process. There is only one reason a school can exclude a pupil permanently from a school, and that is due to behavioural issues. Off-rolling is unlawful outside proper process. '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.

Fortunately in Lewisham schools are strongly accountable and problems are rare, for example a school sending a pupil home and not writing to the parent to explain why, and not informing the parent of their statutory rights. Local authority officers are vigilant but problems are experienced with out of borough schools.

Ofsted provides guidance for inspectors on off-rolling. On inspection, inspectors need to be clear about what is meant by 'off-rolling' and be able to distinguish between lawful and unlawful off-rolling. The Ofsted definition of 'off-rolling' is *"the practice of removing from the school roll without a formal, permanent exclusion or by encouraging a parent to remove their child from the school roll, when the removal is primarily in the interests of the school rather than in the best interests of the pupil. Off-rolling in these circumstances is a form of 'gaming'. If a schools removes a pupil from the roll due to formal permanent exclusion and follows proper processes, this is not off-rolling."* Ofsted judgements and reports will highlight practices where pupils are removed from the roll in the interests of the schools, not the pupils, and report these as 'off-rolling'.

### 10.1 **Elective Home Education (EHE)**

EHE is the term used by the Department for Education (DfE) to describe parents' decisions to provide education for their children at home or otherwise than by sending them to school. This is different to home tuition provided by a local authority or education provided by a local authority other than at a school.

Children whose parents elect to educate them at home or otherwise are not registered at mainstream schools, special schools, independent schools, academies, Pupil Referral Units (PRUs), colleges, children's homes with education facilities or education facilities provided by independent fostering agencies. Some parents may choose to engage private tutors or other adults to assist them in providing a suitable education, but there is no requirement for them to do so. Learning may take place in a variety of locations, not just in the family home.

To ensure that parents are not being persuaded to do this illegally schools have a statutory duty to notify the local authority when a family elects for a child to be home educated. The Lewisham Elective Home Education Protocol <sup>4</sup> is designed to ensure that:

- No child is left without education provision as a result of being withdrawn from school following an EHE notification;
- EHE notifications are not used by parents as a way to move a child from school to school (known as 'school hopping');
- EHE notifications are not used by parents as a means to avoid prosecution for a child's non-attendance at their registered school;
- EHE notifications are not used by parents or school staff to avoid due process and compliance with other protocols;
- EHE is not a 'knee jerk' response to a problem, crisis or dispute between the child, family and school;
- EHE is not used in place of resolving ongoing issues or problems perceived by the child, family and/or school;
- EHE is not used as a means to deregister a child presenting significant challenges or as an attempt to pass them on to another school or local authority.

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<sup>4</sup> <https://www.lewisham.gov.uk/myservices/education/schools/attendance/Documents/EHEProtocolsOctober2017.pdf>

Within Lewisham, the Elective Home Education Service supports families who have concerns that their child has been unofficially excluded<sup>5</sup>. In order to be highly vigilant about unofficial off-rolling, many children are referred back to their original school in line with Lewisham protocols and through Fair Access Panel. The effectiveness of this protocol is reflected by the drop in the number of inappropriate referrals by Lewisham schools. Potential cases are now often resolved by partnership working between schools, the EHE team, Admissions, the Attendance and Welfare Service, Special Education Needs, Children's Social Care, Health and other agencies, depending on the circumstances.

## 10.2 Children Missing Education (CME)

A child missing from education is defined by the DfE as "a child of compulsory school age who is not on a school roll, nor being educated otherwise (e.g. privately or in alternative provision) and who has been out of any educational provision for a substantial period of time (usually four weeks or more)".

Children Missing Education Statutory Guidance for Local Authorities January 2015 states that all children, regardless of their circumstances, are entitled to a full time education which is suitable to their age, ability, aptitude and any special educational needs they may have.

Lewisham has robust systems to enable us to establish the identities of children of statutory school age in our borough, as far as it is possible to do so, who are not registered pupils at a school, and are not receiving "suitable education" otherwise than at a school.

In the borough there will be a variety of reasons and circumstances as to why there are children missing education which may make a child more likely to be at risk. For example:

- Children who cease to attend school – withdrawal from a school by the parent.
- Moving in and out of the borough and beginning the school application process.
- Failure of schools to notify the local authority of a child being off-rolled or being excluded.
- Unsuccessful admission applications.
- Looked after Children (LAC).
- Excluded children who do not accept the Local Authority's offer.

All schools and educational providers are required to notify the Attendance Service when a child fails to attend its educational provision for 10 consecutive school days and their whereabouts are unknown. Education providers have a statutory duty that requires them to complete checks before advising the local authority of a missing child<sup>6</sup>. The CME Officer provides advice and challenge to schools and the Lewisham CME and Off-Rolling Guidance is also available.

The annual register audit programme carried out with Lewisham schools enables the local authority to scrutinise the school roll and registers e.g. correct coding, pupils in off-site provision and un-authorized absences. It also provides the opportunity to investigate any inconsistencies. There is guidance and training offered to schools and governors by the Lewisham Attendance Service as part of the statutory duty of the local authority. Where the Access Inclusion and Participation Service discovers any irregularity the appropriate officer would challenge the school to ensure that the child is either reinstated or that the correct process is adhered to e.g. if a child is missing more than 20 days and the school is aware of their location the school cannot take the child off-roll as the school would be expected to

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<sup>5</sup> <https://www.lewisham.gov.uk/myservices/education/schools/attendance/Pages/Educating-your-child-at-home.aspx>

<sup>6</sup> <https://www.lewisham.gov.uk/myservices/socialcare/children/keeping-children-safe/information-for-professionals/protocols-and-policies/Pages/Children-missing-education.aspx>

follow non-attendance procedures. Where schools purchase a service level agreement with the local authority it would be regular practice to support with detailed case work.

- 10.3 Any agency which is concerned about a child being out of school in an unofficial way is recommended to contact the Access, Inclusion and Participation Service which will communicate and challenge a school or academy in such circumstances.

## **11. Financial implications**

- 11.1 There are no direct financial implications arising from this report.

## **12. Legal implications**

- 12.1 There are no specific legal implications arising as a result of this report. A summary of all relevant legislation is included at Appendix 1.

## **13. Crime and Disorder Implications**

- 13.1 There are no crime and disorder implications.

## **14. Environmental Implication**

- 14.1 There are no environmental implications.

## **15. Equalities Implication**

- 15.1 There are no direct equality implications arising from this report. The proposals and initiatives set out in this report are intended to eliminate unlawful discrimination and harassment, promote equality of opportunity and good relations between different groups in the community and to recognise and to take account of people's differences.

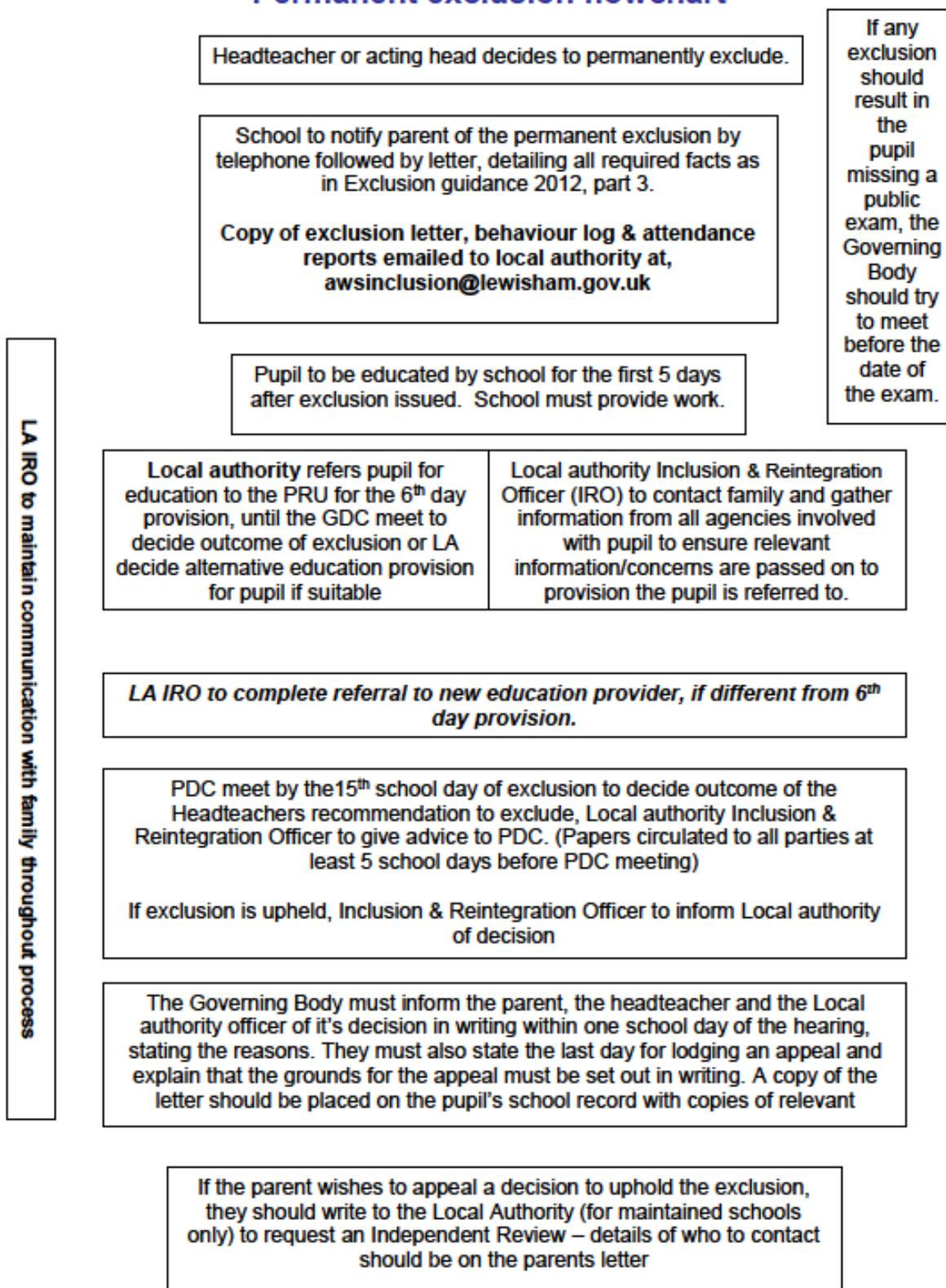
For further information please contact Ruth Griffiths, Service Manager – Access, Inclusion and Participation on 020 8314 3499

**17. Appendix 1: Legislation in relation to exclusions (fixed and permanent)**

The principal legislation for exclusions is:

- The Education Act 2002, as amended by the Education Act 2011;
- The School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012;
- The Education and Inspections Act 2006; and
- The Education (Provision of Full-Time Education for Excluded Pupils) (England) Regulations 2007.
- Attendance Guidance and Education (Pupil Registration) (England) Regulations 2006
- Children Missing Education statutory guidance

## Permanent exclusion flowchart



October 2016