

# Challenging discriminatory exclusions: a guide to making written representations

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## Purpose of this guide

This guide is to help you put together your written submission ahead of an Independent Review Panel (IRP), where you are advising a pupil who has been permanently excluded from school and their parents or caregivers. It is designed to be read alongside the template for making written representations to an IRP, which you can download by visiting our website.

### Department for Education guidance

Throughout this document we use the phrase 'the DfE guidance'. This refers to the Department for Education publication: '[Exclusions from maintained schools, academies and pupil referral units in England – Statutory guidance for those with legal responsibilities in relation to exclusion](#)', September 2017. We also refer to the '[Special educational needs and disability code of practice: 0 to 25](#)', 2015.

### Coronavirus changes

There have been changes to the relevant laws and guidance in light of the coronavirus pandemic, which we refer to throughout the guide. These are '[The School Discipline \(England\) \(Coronavirus\) \(Pupil Exclusions and Reviews\) \(Amendment Regulations 2020\)](#)', and the accompanying DfE guidance: '[Changes to the school exclusion process during the coronavirus \(COVID-19\) outbreak](#)' ('the coronavirus guidance').

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## Challenging a permanent exclusion

When a child has been permanently excluded from school, there are two different routes parents or caregivers can take if they feel the decision was unfair and want to take action. These are:

These resources were originally produced with support from the Equality and Human Rights Commission

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## Challenging discriminatory exclusions: a guide to making written representations

- challenging the decision before an Independent Review Panel (IRP)
- bringing an appeal in the First-Tier Tribunal (Special Educational Needs and Disability) (FTT)

There are significant differences between these two routes. It's important you understand these before advising on which one to take.

**This guide is for the IRP route.** A separate guide is available for the FTT option.

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## Advantages of an Independent Review Panel

There are two main advantages to taking the IRP route:

- The process is likely to be faster than the FTT.
- You can raise arguments that go beyond disability discrimination. For example, if procedure hasn't been properly followed and that has had a significant impact on the decision to exclude.

Unlike an FTT, however, an IRP **cannot order that a pupil be reinstated**. It can only direct or recommend that the Governing Body reconsiders the exclusion decision.

Note that neither an IRP nor the FTT has the power to award compensation.

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## Who will be on the IRP

An IRP will be less formal than the FTT and will have either three or five members. The panel will consist of:

1. lay members (one of whom must chair the panel), who have not worked in a school in any paid capacity
2. current or former school governors
3. head teachers or individuals who have been a head teacher within the past five years

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## Deciding on the preferred route

The IRP is likely to be preferable where any disability discrimination arguments are weaker than other arguments. However, if disability discrimination arguments are strong, the FTT is likely to be a better choice. An IRP is also likely to be preferable where there are other strong arguments that could not be put before the FTT.

It is possible to pursue the claim using both routes, but it is likely to be time-consuming and most parents and caregivers prefer to select just one.

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## Timings and deadlines

The deadline to bring a challenge before the IRP is **within 15 school days** of notice being given to the parents by the Governing Body of its decision not to reinstate a permanently excluded pupil.

This is a big difference with the FTT route, where a claim of discrimination under the Equality Act 2010 must be made within six months of the exclusion.

It is possible to bring a challenge before the IRP after the final determination of an FTT judgement or any appeal to the Upper Tribunal. In this case, the deadline for bringing the challenge before the IRP is within 15 school days of that judgement or appeal.

### Coronavirus-related changes to timings and deadlines

For exclusions covered by the coronavirus laws and guidance the deadline to bring a challenge before an IRP has increased to within **25 school days** from the date on which the notice in writing of the Governing Body's decision is

given to parents (or directly to the pupil if they are over 18).<sup>1</sup>

If the exclusion has occurred any time after 1 June 2020 please refer to the latest version of the coronavirus guidance to check if this still applies to your case.

If the exclusion has occurred any time after the 1 June 2020 please refer to the latest version of the Department for Education coronavirus guidance to check if this still applies to your case.

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## Reasonable adjustments for the IRP meeting

If the parent(s) or pupil has additional needs or disabilities that might affect their ability to attend, participate or communicate during the meeting, you should consider whether it is necessary to request reasonable adjustments for the IRP meeting.

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<sup>1</sup> Regulation 8(a), The School Discipline (England) (Coronavirus) (Pupil Exclusions and Reviews) Amendment Regulations 2020, amending Schedule 2(1) of The School Discipline (England) (Pupil Exclusions and Reviews) (England) Regulations 2012.

# How to complete the IRP written submissions template

Remember that the template is only a starting point. Only use the sections that are relevant to you – and feel free to change any section if there are sensible reasons for doing so in your case. Here are some important points to bear in mind.

1. The headings of the proposed sections marked 'Illegality', 'Irrationality' or 'Procedural impropriety' are based on the kinds of arguments that most commonly arise before an IRP. We have used these headings because the overall test the IRP will apply is the same as the test used in a judicial review – that is, whether the Governing Body's decision to exclude was illegal, irrational or procedurally improper.
2. Generally, the grounds should be grouped into the three types of grounds and set out in that order – that is, all the illegality grounds, then all the irrationality grounds, then all the procedural impropriety grounds. The IRP is likely to structure its decision that way, so it will find it helpful if the representations are structured in the same way. However, if there are good reasons to depart from this structure (for example, to make sure that overlapping arguments are next to each other), then do so.
3. Ideally, start each section with your strongest points. But if you have difficulty assessing the strength of the arguments, don't worry too much about this. The IRP has to consider all the grounds, regardless of which order they come in.
4. Use cross-references to avoid repetition: if the facts or arguments you rely on have already been covered somewhere else, say something like: '... for the reasons set out at paragraph X above'.
5. Use numbered paragraphs. This will help you and the IRP refer to the relevant sections of your representations at the hearing.

## 1. Introduction

When completing your summary, remember that the grounds given in the template are not in any particular order. Move them around (in the introduction and the body of the document) so your strongest arguments come first.

Keep similar or related grounds next to each other.

Remember that you are not limited by the arguments, if any, that were made before the Governing Body.

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## 2. Summary of the facts

Set out the facts in chronological order, and be as specific as possible about dates. Try to separate out the facts, so each numbered paragraph deals with one topic.

Where you wish to rely on facts that are not recorded in documents, you will need to either provide statements or ask questions of your witnesses at the hearing to ensure these are in evidence. If doing the latter, you can say at the relevant point in your submissions: 'X will give evidence that...' (or similar) – but avoid providing too much detail.

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## 3. Submissions – choosing your grounds

Below are the main grounds which can be used in challenging a permanent exclusion. Choose the grounds that are most applicable to this exclusion to build your argument and set out the strongest grounds first.

### **Illegality: Unlawful discrimination in breach of the Equality Act 2010**

Although the FTT is usually a more suitable forum for disability discrimination arguments, such arguments can and should be made before an IRP where they are available. Arguments about other forms of discrimination (for example, on the basis of race or religion) can also be made.

These resources were originally produced with support from the Equality and Human Rights Commission

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## **Illegality: Failure to apply the correct test**

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.

Consider not only whether each part of the test has been identified, but whether it has been fully considered. If it's clear that the Governing Body has correctly applied the test, even if it hasn't referred to the fact expressly, this argument will not be a strong one.

If this is not covered elsewhere in your submissions, be sure to add a short paragraph explaining why, if the Governing Body had applied the correct test, it would not have been met on the facts of the case.

## **Illegality: Failure to treat permanent exclusion as 'last resort' – pupil with SEN or EHCP**

Steps that may not have been considered or taken by the school, but are encouraged or required by the DfE guidance, are given below, along with the appropriate paragraph number in the DfE guidance. You can include any that would have made a difference in your case (adapting the language to refer to this particular school and this particular pupil):

- In the case of a pupil who demonstrated persistent disruptive behaviour, the school should intervene early to address underlying causes of disruptive behaviour, including making an assessment of whether appropriate provision was in place to support any SEN or disability that a pupil may have (para. 19).
- In the case of a pupil who demonstrated persistent disruptive behaviour, the head teacher should consider the use of a multi-agency assessment to pick up unidentified SEN and identify mental health or family problems (para. 19).
- In the case of the exclusion of a pupil from a group with disproportionately high rates of exclusion (including pupils with SEN), the head teacher should consider drawing on extra support to identify and address the needs of pupils from these groups, and should take steps to obtain this support (para. 22).

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- In the case of a pupil with an Education, Health and Care Plan (EHCP), the head teacher should seek to avoid permanent exclusion as far as possible (para 23).
- In the case of a pupil with additional needs, the school should engage proactively with the pupil's parents to support their behaviour (para. 24).
- In the case of a child with additional needs or a pupil with an EHCP, where the school had concerns about their behaviour or risk of exclusion before the permanent exclusion, the school should consider what additional support or alternative placement may be required – including assessing the suitability of provision for a pupil's SEN (para. 25).
- In the case of a pupil with an EHCP where the school had concerns about their behaviour or risk of exclusion before the permanent exclusion, the school should consider requesting an early annual review or interim / emergency review (para. 25).

Further examples can be found in the [SEND Code of Practice](#).

### **Illegality: Failure to treat permanent exclusion as 'last resort' – General**

Steps that may not have been considered or taken by the school, but are encouraged or required by the DfE guidance, include those given below. You can include any that would have made a difference in your case:

- In the case of the exclusion of a pupil from a group with disproportionately high rates of exclusion (including pupils eligible for free school meals; looked after children; and Gypsy, Roma and Travellers, and Caribbean pupils), the head teacher should consider drawing on extra support to identify and address the needs of pupils from these groups, and should take steps to obtain this support (para. 22).
- In the case of a looked after child, the head teacher should seek to avoid permanent exclusion as far as possible (para. 23).
- In the case of a looked after child, the school should cooperate proactively with foster carers or children's home workers, the local authority that looks after the child and the local authority's virtual school head (para. 24).

- In the case of a child with additional needs or a looked after child where the school had concerns about their behaviour or risk of exclusion before the permanent exclusion, the school should consider what additional support or alternative placement may be required, including assessing the suitability of provision for a pupil's SEN (para. 25).

### **Illegality: Fettering of discretion (failure to consider each decision on its own merits)**

Common examples include policies that require exclusion in all cases for particular acts (for example, taking or supplying drugs on school premises, bringing a knife onto school premises) or that require permanent exclusion following a rigid 'three strikes' approach.

If a pupil is disabled and the relevant conduct is connected with disability, the application of a policy of this kind is likely to give rise to arguments based on either indirect discrimination, failure to make reasonable adjustments, or discrimination arising from disability.

The template also sets out other grounds under the 'illegality' heading that you may wish to include if relevant: exclusion for non-disciplinary reasons, exclusion not by the head teacher, improperly 'converting' a fixed term to a permanent exclusion, and reliance on misbehaviour outside of the school with no connection to the school.

### **Irrationality: Failure to take account of all relevant points**

The Governing Body is arguably required to consider whether the head teacher complied with their duty of care, and to comply with the Public Sector Equality Duty (PSED), whether or not these issues are raised by the parties.

Where this ground is based on failure to take account of a particular argument made on behalf of the pupil, it is unlikely to succeed simply because the Governing Body says very little about a particular point, or doesn't address each and every argument specifically. There needs to be a complete failure to take account of a point which might have made a difference to the outcome.

Often, a Governing Body decision letter will say that the Governing Body considered 'all submissions and all the evidence' (or similar). However, even in these cases it may be possible to infer from the circumstances – for example, how quickly the letter was prepared following the hearing, or how central the point was – that something hasn't been taken into account despite this 'catch-all' wording.

### **Irrationality: Fact-finding**

This is frequently an issue before an IRP, but is often unsuccessful as the test for irrationality is very strict: it is not enough if the IRP disagrees with the conclusion, as long as a reasonable Governing Body could have reached it.

### **Irrationality: Unreasonable conclusion about 'serious breach' of school's behaviour policy**

In completing this section, remember that the assessment of 'seriousness' should take account of any mitigating circumstances. This means mitigating circumstances can be relied on to show that it was unreasonable to conclude that a breach was serious.

It may be helpful to note that the DfE guidance expressly requires the head teacher to take reasonable steps to identify any contributing factors after an incident of poor behaviour by a pupil, such as a bereavement, mental health conditions or bullying, and to take these into account in making a decision on permanent exclusion (para. 18). These are examples only.

You can also make arguments under the second part of the test: unreasonable conclusion about serious harm to the education or welfare of the pupil or others in the school.

### **Procedural impropriety: Apparent bias**

Although the test for apparent bias is objective (whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased) it can help to show that parents or representatives perceived there was bias at play.

Examples might include disrespectful comments or body language from the Governing Body, indications that members of the Governing Body had discussed the case with the school's representatives before the hearing, or differential treatment of the parties during the hearing.

## **Procedural impropriety: Scheduling / Notification / Opportunity to make representations**

In relation to any of these grounds, it is helpful to add a few sentences explaining why the procedural error was significant. For example, because certain points would have been made on behalf of the pupil that were not considered by the Governing Body and which could have made a difference to its conclusions.

These grounds are separated in the template to help you make your arguments. Other procedural impropriety grounds included in the template are: failure to give adequate reasons for a decision and failure to attribute witness statements.

## **Relevance of new evidence**

This is a complicated issue in IRP proceedings. There are three different scenarios:

1. Where there is evidence the Governing Body could and should have had before it when it made the decision to exclude, but did not. For example, because the school failed to take a statement from a key witness, or failed to identify a relevant policy, until after the hearing. In this case, you can refer to the evidence in the body of your submissions, but you should add a footnote to explain when it was made available and to note that under para. 143 of the DfE guidance, the panel can take account of it even though it was not before the Governing Body.
2. Where there is evidence the Governing Body could not reasonably have had before it, but which you want to rely on. For example, because a new medical report was only finalised after the hearing. This is the kind of evidence you should refer to in this subsection, because under paras. 142 and 144 of the DfE guidance, the panel can only consider it in deciding whether to recommend reconsideration. This does not include evidence about what happened at the Governing Body hearing as it relates to grounds of procedural impropriety. There is no question that the panel can and should consider this, and nothing specific needs to be said about it.

3. Where the school seeks to rely on evidence from the Governing Body about its reasoning process. The DfE guidance expressly states that the school may not introduce new reasons for its decision before the IRP. In contrast, new evidence (that is, in support of an existing reason) can be presented (para. 142). You should therefore object to anything that is different enough to amount to new reasons, and argue that the panel should not take this into account.

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## Additional grounds

The grounds set out in the template are not the only ones that can be presented to an IRP. Other, less common possibilities are given below. If one of these applies to your case, you can add it to your submissions, making sure that you identify the applicable principles and explain how they apply on your facts.

- **Illegality: Failure to provide written notice of permanent exclusion.** The head teacher is required to inform parents in writing about the fact the exclusion is permanent and the reasons for it.
- **Illegality: Exclusion of a pupil for an action of their parent.** It is unlawful to exclude a pupil because of the action of a pupil's parents. In the case of a young pupil, relevant acts by the parent may include matters for which the pupil has been blamed, but for which the parent is ultimately responsible. For example, uniform, hairstyle, jewellery, or lunchbox contents.
- **Procedural impropriety: Failure to seek or circulate evidence.** The Governing Body is required to ask for any written evidence in advance of the meeting, including witness statements and other relevant information held by the school, such as those relating to a pupil's SEN. It is also required to circulate written evidence and information, including a list of those who will be present, to all parties **at least five school days in advance** of the meeting. This is likely to feed into a ground relating to failure to provide an opportunity to make representations.

- **Procedural impropriety: Being a judge in your own cause.** ‘Being a judge in your own cause (for example, if the head teacher who took the decision to exclude were also to vote on whether the pupil should be reinstated)’ is given in the DfE guidance as a substantive example of procedural impropriety that has a significant impact on the quality of the decision-making process and makes it appropriate to quash the decision to exclude. This is likely to overlap with a ground relating to apparent bias, but can also be presented separately.

## Presenting at the IRP meeting

We hope you've found this guide helpful. You can find top tips on presenting your arguments before an IRP or FTT in our document: 'Practical tips on presenting your case in the Independent Review Panel (IRP) or First-Tier Tribunal (FTT)'.

You can download the tips from [our website](#).