Neutral Citation Number: [2022] EWHC 1146 (Admin)

Case No: CO/2750/2021

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2022

**Before** :

**MRS JUSTICE LANG DBE**

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**Between :**

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| **THE QUEEN** | **Claimant** |
| **on the application of** | |
| **A PARENT** | |
| **- and -** | |
| **GOVERNING BODY OF XYZ SCHOOL** | **Defendant** |
| **BOROUGH OF XYZ** | **Interested Party** |

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**Michael Etienne** (instructed by **Just For Kids Law**) for the **Claimant**
**Alexander Line** (instructed by **Legal Services**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 5 April 2022

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# Approved Judgment

**(Anonymity Orders made)**

**Mrs Justice Lang :**

1. The Claimant seeks judicial review of the decision to exclude her son ("A Pupil") permanently from XYZ School ("the School"), a process which culminated in a Reconsideration decision by the Defendant ("the Governing Body") to maintain the decision to exclude him, notified to the Claimant by a letter dated 11 May 2021.

2. The Claimant's grounds for judicial review of the Governing Body's Reconsideration decision are, in summary, as follows:

   i) The Governing Body's decision was vitiated by actual or apparent bias.

   ii) The Governing Body erred in law by conducting a review of its earlier decision, instead of considering the matter "afresh", as advised in the Department for Education's Schools Exclusion Guidance, at paragraph 176.

   iii) In the light of the findings of the Independent Review Panel ("IRP") in its letter of 1 April 2021, the decision to exclude A Pupil could not be lawfully or rationally maintained by the Governing Body.

   iv) The Governing Body unfairly pre-determined its decision.

## Factual summary

3. A Pupil, whose date of birth is 31.10.03, was a pupil at the School at all material times until he was permanently excluded by the Headteacher with effect from 13 December 2019. At the date of the exclusion decision, he was aged 16 and in Year 11, his final year at the School.

4. The School is a co-educational mainstream school for pupils aged 11 to 16 years. It is maintained by the local education authority which is the Interested Party ("XYZ Borough").

5. On 26 June 2019, a 12 year old female pupil at the School ("the Complainant") made disclosures alleging serious sexual misconduct towards her by A Pupil and other pupils. These matters were referred to the Police and to local authority Social Care services ("Social Care") at both XYZ Borough, and ABC Borough, in which A Pupil and his family reside. The School's Designated Safeguarding Lead ("DSL") took a leading role, under the overall control of the Headteacher.

6. A Pupil was under police investigation for oral rape of a minor from June 2019. As a result, the Headteacher and the Governing Body were advised not to undertake their own investigation into those matters, and not to disclose any information concerning the disclosures or the investigation to the Claimant and A Pupil, to avoid any interference with the police investigation. The Police provided limited information to the DSL and Headteacher.

7. A Safeguarding Team conducted an initial risk assessment on 27 June 2019 and advised that the Complainant should be kept apart from A Pupil. A Pupil was required to study in the internal exclusion room at School, and to be chaperoned when moving around the School building.

8. On 3 September 2019, XYZ Borough informed a member of the school staff that A Pupil had been arrested and released on bail with conditions, including a condition prohibiting contact with the Complainant. So, at the beginning of the autumn term, on 4 September 2019, the Headteacher informed A Parent and A Pupil that because of his arrest and bail conditions, A Pupil could not attend School. A Parent explained that A Pupil had not been arrested over the summer holidays. Further enquiries confirmed that A Pupil had not been arrested, but that his arrest was imminent. Later on 4 September 2019, the Headteacher informed A Parent that A Pupil could not return to school until a risk assessment had been carried out by Social Care. However, on 5 September 2019, following a conversation between the Headteacher and XYZ Borough Social Care about the risk assessment, and a meeting between the Headteacher and A Parent, it was agreed that A Pupil could return to School, but that he would have to remain in the internal exclusion room. At that time, the School's view was that there were no grounds upon which he could be required to remain at home. The Headteacher spoke to both the police and the local authorities about the "untenable situation" (Minutes of Governing Body meeting on 5 February 2020).

9. The Police arrested A Pupil at the School on 27 September 2019. Initially he was released on bail, subject to conditions. On or about 24 October 2019, he was released under investigation, without conditions. Following his arrest, A Pupil was required by the School to remain at home. Educational provision was to be arranged by XYZ Borough.

10. During the autumn term, the Headteacher and the DSL made numerous attempts to obtain support and advice from the Social Care staff at the two local authorities. In September 2019, ABC Borough stated that A Pupil's case could not be opened until he had been arrested. After his arrest, ABC Borough took the view that it was the responsibility of XYZ Borough to undertake any risk assessment. However, even after his arrest, ABC Borough did not take any active steps in this regard. In September 2019, the Specialist CSE and HSB Social Worker at XYZ Borough sent an email to the School explaining why, on reflection, she felt she could not complete a Harmful Sexual Behaviour Risk Assessment for A Pupil as he was the responsibility of a different local authority, who held his social care files. As well as access to the files, it would be necessary for both A Pupil and his family to participate in the assessment, and his parents had not agreed to do so. In the event, neither Borough undertook a risk assessment prior to A Pupil's exclusion.

11. When A Pupil was arrested, police officers found indecent images of sexual acts involving a minor on A Pupil's mobile phone. Notes of a Strategy Review meeting at the School, on 9 October 2019, included the following:

> "After an initial download and brief look, the police have obtained three videos from his mobile telephone – one including a group engaging in vaginal sex with a young female. On first looks, it cannot be confirmed to be [the Complainant]. These three videos were sent to [the Complainant's] mobile telephone number. It is likely that there will be charges for the obtaining, saving and sharing child pornography. The phone will be downloaded entirely and looked at more closely, however this will take some time……

> Actions:
>
> ….
>
> - a joint meeting (police and sw) will be conducted to question [name redacted] about the third video.
>
> - to complete a full download, look at the videos more closely for more detail and possibly question the young men again."

12. On 5 December 2019, the Specialist CSE and HSB Social Worker at XYZ Borough sent an email to senior management at the School stating:

> "I have confirmed with the Officer in Charge that we are allowed to tell [the School] that:
>
> - He is released under investigation for the oral rape of a 12 year old. There are no conditions attached to the RUI but if he was to approach [the Complainant] it would be considered witness intimidation which is an arrestable offence.
>
> - He had indecent images of children on his phone."

13. On 12 December 2019, the Police sent an email to senior management at the School stating:

> "[A Pupil] is still under investigation for the offence of rape.
>
> He does not have any conditions in place.
>
> If he was found to be contacting the victim in regards to the offence, directly or via third-party he would be arrested for a further offence.
>
> It has not be *[sic]* a request from police that he be excluded from school, I was advised this was the policy at the time."

**The Headteacher's decision**

14. The decision to exclude A Pupil was taken by the Headteacher on 13 December 2019, and took immediate effect. Prior to taking the decision, the Headteacher did not interview A Pupil about the allegations, nor discuss A Pupil's situation with the Claimant. A revised letter was issued on 16 December 2019 (the earlier letter was apparently sent out in error). The stated reason for the exclusion was as follows:

> "Following information received from [XYZ Borough's] Principal Officer Safeguarding in Education and the police, [A Pupil] has been excluded for sending obscene pictures of a sexual act involving a minor, to another student who is the alleged victim of such an act. His involvement in this act is being investigated by the police. This is a serious breach of the school's

> behaviour policy. Additionally, I am of the view that allowing [A Pupil] to remain in the school would seriously harm the education or welfare of others in the school."

15. The letter explained that the Governing Body would hold a meeting to review the decision, which the Claimant was invited to attend, and to make written representations in advance of the meeting.

**The Governing Body's review of the Headteacher's decision**

16. A Panel of the Governing Body considered the Headteacher's decision at meetings on 5 and 26 February 2020.

17. The Headteacher explained that the decision was based on:

    i) The School's Behaviour Policy;

    ii) The School's Safeguarding Policy, at Section 6(a):

> "Peer on peer abuse can manifest itself in many ways. This may include bullying (including cyber bullying), physical abuse, sexual violence / sexual harassment, 'up-skirting', 'sexting' or initiation / hazing type violence and rituals. We do not tolerate any harmful behaviour in school and will take swift action to intervene where this occurs. We use lessons and assemblies to help children understand, in an age-appropriate way, what abuse is and we encourage them to tell a trusted adult if someone is behaving in a way that makes them feel uncomfortable. Our school understands the different gender issues that can be prevalent when dealing with peer on peer abuse."

    iii) The Department for Education's School Exclusion Guidance, at 3.1, that any decision to exclude must be lawful, rational, reasonable, fair and proportionate.

18. At the Governing Body meetings, the Headteacher was questioned by A Pupil's representative about the references to the Complainant in the exclusion letter. He explained that in the letter he did not intend to state that the obscene images of a minor on the phone portrayed the Complainant.

19. At the Governing Body meetings, it was confirmed by A Pupil and his representative that A Pupil accepted that there were images on his mobile phone but he denied that they were sent to anyone at the School. He sent them to "somebody not in school". On my reading of the minutes at page SB35, A Pupil and his representative did not dispute the nature of the images i.e. that they were sexual/indecent. The Claimant told the Panel that the videos had been sent to A Pupil in a WhatsApp Group.

20. In its decision letter dated 6 March 2020, the Panel upheld the exclusion, stating:

> "In forming its decision, the Panel considered the importance of the decision for [A Pupil], who is in Year 11 and is within a sector of the community with protected characteristics, Afro

Caribbean heritage; the alleged victim who is a fellow pupil, who raised a significant safeguarding issue which remains the subject of ongoing investigations; and the school Headteacher and Designated Safeguarding Lead who have the responsibility for meeting the needs of both students within their care.

After carefully considering the representations made and all the available evidence, with all parties having had opportunities to present, question and challenge, governors decided to uphold the decision of the Headteacher to permanently exclude [A Pupil].

The reasons to uphold the exclusion are as follows:

• Serious breach of the [School] Behaviour Policy in holding obscene pictures of a sexual act involving a minor, and, on the balance of probabilities, sending obscene images.

• If [A Pupil] were to remain at [the School] this would be detrimental to the education and welfare of others in the school, in particular, the Panel concluded, there would be a significant risk of harm to the younger pupil if [A Pupil] remained in the school. The risk, intentional or otherwise, of them meeting is on the balance of probabilities sufficient to cause harm.

The Panel also acknowledged that there are a number of lessons to be learnt for the school; that the extent of cross-borough co-operation between social service departments had not necessarily helped the school in managing this situation; and that the time span of the police investigation, which the Panel notes is ongoing, provided additional challenge.

In coming to its decision, the Panel considered each of the issues raised by [the Claimant] and her legal adviser which are addressed in detail below. The Panel noted that both [A Pupil's] academic and behaviour record were good. In summary, the Panel found that there had been a serious breach of school behaviour policy and that, on the balance of probabilities, this related to the wider allegations which link to a younger pupil of the school and which led to the safeguarding decision to move [A Pupil] to the Internal Exclusion room in June 2019.

The Panel found that having decided this, the school had no alternative but to permanently exclude. The Panel found that the school could have communicated with [the Claimant] and [A Pupil] at the time of making the decision to permanently exclude even though the ongoing police investigation may have limited that discussion.

The Panel noted that the school had previously discussed the possibility of alternative arrangements with [the Claimant], recognising the significant limitations of long-term use of the

> "inclusion room". [The Claimant] was opposed to a managed move to a boys' school, and the school was minded that given the advice it had received regarding the serious safeguarding situation, it was not considered suitable to arrange a managed move to a mixed sex school. Whilst the Panel noted that at the time of the Hearing [the Claimant] had not changed her view, it is of the view that a discussion with both ought to have taken place and might have helped explore other options and to help all parties understand the situation but on the balance of probabilities it would not have altered the outcome. The Panel heard how the clear preference of the parent was, and remains, to have [A Pupil] return to mainstream school.
>
> The Panel heard that between October at the time of [A Pupil's] arrest and December, the school received several and continued advice from both the police and social services that, whilst initial bail conditions had not been renewed, that [A Pupil] had been released pending further investigation and specifically that he should not have contact with the complainant. The school was advised that should he approach the younger pupil concerned it would be considered Witness intimidation which is an arrestable offence, and would be detrimental to [A Pupil].
>
> The Panel heard that when [A Pupil] had been in internal inclusion between June and October, with different start and finish times and that he was accompanied when moving around school, he had still on a number of occasions passed the pupil in the corridor, and that this had caused serious distress to the pupil concerned.
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> The Panel considered [the Claimant's] view that the school was large and that as they were in different years they would not meet, but did not share that view.
>
> In the face of this advice, the option of [A Pupil] returning to [the School] either to inclusion provision (which was noted by all parties as not suitable education) or as a mainstream pupil, would put himself at risk and put the other pupil at risk too.
>
> The Panel found that the decision to permanently exclude was proportionate.
>
> The Panel upheld the decision of the Headteacher.
>
> ……"

## The IRP decision

21. The Claimant applied to the IRP for a review of the decision. A hearing date in April 2020 was offered, but the Claimant and her solicitors considered that a remote hearing

by video was unsatisfactory, and the IRP was not holding in-person hearings because of the COVID-19 pandemic. In January 2021, the Claimant and her solicitors agreed to a remote hearing, to avoid further delay. The Claimant's representatives submitted written representations and attended hearings on 1 and 31 March 2021.

22. By the date of the IRP hearing, A Pupil was aged 17 and he was continuing his education at a college (he has since left college). In the meantime, on 27 January 2021, the Police had informed A Pupil that no further action would be taken against him in respect of the allegations he had been facing.

23. In a decision letter dated 1 April 2021, the IRP recommended that the Governing Body should reconsider the decision to exclude A Pupil for the following reasons:

> "After careful consideration of the written documentation originally submitted, the oral evidence submitted at the 1 March meeting by your representative and the Governing Body, and the additional representations submitted from your representative and the Governing Body since the 1 March meeting, the Panel concluded that the Governing Body should **reconsider** its decision to permanently exclude [A Pupil]
>
> The Panel took into account that this was an extremely complex case, and this had been borne out by the lengthy submissions at both the Governing Body hearing and the IRP. The Panel recognise that the school had faced a number of problems, given the parallel Police investigation, and the limits placed on the school in investigating these allegations
>
> In reaching their decision the Panel considered the following points –
>
> • The Panel took account of the submissions of the Governing Body, and the Head Teacher, that the incident that had taken place was a serious breach of the School Behaviour Policy
>
> • The Panel did however consider that the Governing Body letter of permanent exclusion to [A Pupil] also referred to the fact that to allow [A Pupil] to remain at school would seriously harm the education or welfare of others in the school. The Panel were of the view that, whilst recognising the difficulties faced by the school to engage both [XYZ Borough] and [ABC Borough] in order to undertake a written risk assessment, the Governing Body should have given further consideration to the fact that no risk assessment was undertaken, and that this fact impacted on the ability of the Governing Body to satisfy the requirement in relation to the aspect of potential harm of the education or welfare of other pupils. The Panel is of the view that the Headteacher could have carried out a risk assessment, and recorded it on behalf of the school, even if other agencies were not able to. The Keeping Children Safe guidelines states that a risk assessment, in electronic or written form, should be carried

> out and recorded, and indeed that not only should a risk assessment be undertaken on behalf of the perpetrator, but it also should also have taken place on behalf of the victim, which the Panel had felt had not taken place
>
> • The Panel also considered the issue of the gathering of evidence around the allegation of [A Pupil] having indecent images of a sexual nature on his phone. Whilst the Panel recognised the difficulties imposed on the Headteacher in gathering evidence in relation to the nature of the images, due to the Police investigation being carried out, it is felt that the absence of any representations from [A Pupil] in relation to details of the allegations, and the subsequent letter from the Police confirming that no further action would be taken against [A Pupil] made it difficult, in the Panel's view, for the Governing Body to consider all the necessary evidence available, when making their decision to permanently exclude".

**The Governing Body's Reconsideration decision**

24. Pursuant to the recommendation of the IRP, the Panel re-convened to re-consider the decision to permanently exclude A Pupil. At a preliminary meeting, on 19 April 2021, the Panel:

> "determined that they would not call for representatives at the reconsideration meeting, but that they would provide an opportunity for the pupil concerned to make a personal statement, for the parent to submit information about what they were seeking (in particular because reinstatement was not a practicable option open to the Governors given the passage of time, that [A Pupil] is now too old to attend the school, and he is in any event now attending a college). The panel had also determined that they would provide the school an opportunity to provide a written risk assessment based on the situation at the time of the exclusion. The panel communicated its intention to do so to [the Claimant's] representatives. Following objections to this approach by the representatives, this assessment was then withdrawn and it has not been taken into account by the panel."

25. In the notes of the meeting on 4 May 2021, it is recorded that "having taken legal advice, the Panel has not considered any new Risk Assessment information".

26. At the outset, the Panel considered what approach should be taken to the issue of reinstatement, bearing in mind that it was not feasible in this particular case because of A Pupil's age:

> "In undertaking the reconsideration, the Governors Panel were guided by paragraphs 171 to 180 of the Statutory Guidance Exclusions: The Governing Boards Duty to reconsider reinstatement following a review.

> The panel noted paragraph 180 of the statutory guidance, regarding the presumption that a pupil will return to the school if reinstated regardless of stated intentions of the parent or pupil. However, the panel also noted the following points:
>
> a. The appeal had been postponed at the request of [the Claimant] and/or her representatives, resulting in a delay of the IRP hearing of nearly 12 months.
>
> b. The IRP had been held outside of the statutory timeframe (paragraphs 88-92 of the statutory guidance).
>
> c. By the time of the IRP hearing, [A Pupil] was no longer eligible to attend as a pupil of [XYZ School]. Therefore, regardless of any stated intention of [A Pupil] or his parents, he cannot be reinstated to the school because this is not a practicable or feasible option in the circumstances.
>
> d. The statutory guidance does not expressly cover such circumstances, and they had not been addressed by the IRP in its decision (despite this having been raised by the Governing Body in its submission to the IRP).
>
> e. The Governors panel provided [the Claimant's] representatives with an opportunity to make representations on this issue, which have been read and taken into account.
>
> f. Despite the issue raised above, as part of its reconsideration the panel has applied its mind to the question of whether it would have offered reinstatement had this been a practicable and feasible option, conscious of the fact that this letter could form part of [A Pupil's] educational record. However, for reasons stated below, the panel has decided to confirm its previous decision and the permanent exclusion, therefore this question does not arise."

27. The Panel summarised their deliberations and conclusions as follows:

> "**Was the decision to exclude in response to a serious breach or persistent breaches of the school's behaviour policy?**
>
> The panel re- considered whether *"sending obscene pictures of a sexual act involving a minor, to another student who is the alleged victim of such an act"* (the reason provided by the Headteacher) was a serious breach of the School's behaviour policy..
>
> The panel were of the view that this was a very serious allegation which would constitute a serious breach of the school's behaviour policy, and indeed noted that it fell within the

requirements to report to the police. (Sexual violence and sexual harassment between children in schools and colleges May 2018).

The panel reviewed the evidence provided by the school at the first hearing. This consisted of the school record, emails from the police and records of conversations from [XYZ Borough] principal safeguarding lead. Particularly in the school record dated 9th October 2019, at a Strategy meeting it was advised that *"the police have obtained three video's have been obtained from his mobile telephone – one including a group engaging in vaginal sex with a young female." "These three video's were sent to [the victim's] mobile telephone number."*

Furthermore, in an email of 5th December 2019 Specialist CSE and HSB Social Worker following their discussion with police that the school could be advised that *"He is released under investigation for the oral rape of a 12 year old. There are no condition attached to the RUI but if he was to approach [the Complainant] it would be considered Witness intimidation which is an arrestable offence." "He had indecent images of children on his phone."*

The panel also notes that at the previous hearing before the governing body, it was accepted by [A Pupil's] representatives that [A Pupil] held images on his phone and that they had been sent (although it was not accepted that they had been sent to the victim by [A Pupil]). See further below.

The panel noted that the school continued to be advised by external agencies that they were not to interview or investigate this matter further, as it continued to be subject to police investigation. The school continued to follow up and were advised that this remained a live and active investigation.

The IRP recommended that we considered the impact of the further evidence provided in this case. The panel noted that the decision that *"the police decided to take no further action against you in relation to a criminal allegation"* was not made until 27th January 2021, more than 13 months after the Headteacher decision, and nearly 12 months after the Governor Panel Hearing. This was well beyond the time when it would have been reasonable for the Headteacher or the original panel to have received such evidence and the Head Teacher and panel cannot be criticised for not taking it into account because it was not, and could not have been, available (see paragraphs 190 to 192 Statutory Guidance).

As noted in our original decision, the Panel were of the opinion that, notwithstanding that it would likely have made no material difference, the Headteacher ought to have given [A Pupil] the opportunity to explain to him about the images found on the

phone and to answer the allegation that he had sent them to the victim or anyone else. However, the panel in the hearing on the 5th February 2020 gave [A Pupil] a number of opportunities to put his point of view across. The panel is of the view that overall the process was fair and, taken as a whole, [A Pupil] was not deprived of this opportunity. On page 11 /12 the notes record explicitly that the Chair asked about the images. The extract of the minutes notes the following: *"In response to the Chair's question as to whether [A Pupil] was saying there were no images on his phone, [A Pupil] responded 'No', adding that they were not sent to anyone in the school. KR added that images were sent to somebody not in school but suggested that the decision to permanently exclude [A Pupil] was made as the school believed that images had been sent to the girls (alleged victim) and were seen as harassment. KR said this was not the allegation. The Chair said that [A Pupil] seems to strongly dispute that images were sent to the alleged victim or any other student in the school. FC asked 'so how did the images get to …. your phone? GDS advised [A Pupil] to answer that that question was under investigation, adding that [A Pupil] had not said he didn't have the images but that they were not sent to [the alleged victim or anyone in school]".* Accordingly, it was not in dispute that [A Pupil] had the images on his phone. He also accepted that they had been sent to someone outside of the school. It was also known that they had been received by the victim.

Whilst it was argued on [A Pupil's] behalf that he had not sent them to the victim, the panel was entitled to consider all the circumstances before it and apply the balance of probabilities to the question of whether [A Pupil] had sent them, and to its consideration of the exclusion generally (paragraph 65 of the statutory guidance). The panel refer to its original decision letter which makes it clear that this is exactly what it did.

The panel considered whether they were being swayed in their opinion by the more serious underlying allegation and investigation of *"the oral rape of a 12-year-old"*. The panel were clear that this was a most serious allegation, that there would have been grounds for considering this to be cause for permanent exclusion, but were very clear that this was not the ground for exclusion cited by the Headteacher, which is what the panel had applied its mind to.

On reconsideration the Panel decided that their original decision was reasonable and took into account that it had not on this basis been questioned by the IRP in the reasons for reconsideration that it gave.

Reason for Exclusion: Serious breach of the [School] Behaviour Policy in holding obscene pictures of a sexual act involving a

minor, and, on the balance of probabilities sending obscene images.

**Would allowing the student to remain in school seriously harm the welfare or education of the student or others in the school?**

The panel considered the situation of the Safeguarding risk assessment as described in *"Keeping Children Safe in Education"*. They took note that a risk assessment should be recorded in writing or electronically. The panel noted that the original referral under the Keeping Children Safe in Education followed the guidance and that, given the most serious allegation of rape, the decision to ensure that the victim was not likely to meet up with the alleged perpetrator was a reasonable and proper outcome in the circumstances. The panel were asked by the IRP to reconsider the situation of the Headteacher not securing a further formal Safeguarding risk assessment in December. As noted at the original hearing, the Headteacher had tried to arrange for this to happen, but had been frustrated in his attempts to do so. The panel noted that he could have then carried out a risk assessment himself and recorded that in writing. However, whilst the panel noted that the need for a risk assessment is set out in guidance of Keeping Children Safe in Education, it was not an express requirement under the statutory guidance applicable to school exclusions. The panel took the view that the absence of a written risk assessment did not make the exclusion unlawful. The panel is satisfied that, although there was not a written risk assessment completed by the Headteacher, he plainly was satisfied that a level of risk existed otherwise he would not have taken the steps that he did. The panel considers that the Headteacher's belief that there was a risk to the victim was reasonably held, given the overall circumstances of the case. In the panel's view, and applying the balance of probabilities to the question, had that been recorded into a written risk assessment by the Headteacher then it would have most likely confirmed his view as to the existence of the risk. Applying its mind to the question of whether a risk assessment would have made a material difference, having reconsidered the point the panel does not believe that it would have done so.

Furthermore, the panel noted that the Headteacher had considered the impact on [A Pupil's] education, and of being restricted in his school attendance, as the Headteacher explained in full during the first hearing. The panel also noted the advice received from both the Headteacher and the Deputy Headteacher of the impact on the victim of passing [A Pupil] in the corridor when he was escorted around the school. The Panel considered the advice in *"Sexual violence and sexual harassment between*

*children in schools and colleges"* regarding the impact on victims and violators.

The panel took the view before, and continued to do so now, that, given the context of the allegations and that it is not in dispute that [A Pupil] held the images on his phone, interactions between the girl and [A Pupil] had the real potential to cause significant distress to her, however unintentional or casual the interaction. This distress would be even more likely and significant within the overall circumstances of an allegation of rape which was at the time being actively investigated by the police and in which [A Pupil]'s involvement had been suspected, especially as the girl was below the age of consent. The panel were concerned that during their hearing, and subsequently at the appeal and in all submissions, very little consideration of the impact on the victim has been evidenced by [A Pupil], even around the admitted holding of sexual images.

Therefore, applying the balance of probabilities, the panel found that this element of the exclusion test was satisfied.

Having already considered the issue of the Headteacher investigating the holding of images with [A Pupil], the panel also reconsidered the duties of the Headteacher in regard to the permanent exclusion and notification and engagement with the parent. As found in the original hearing, the panel noted that the Headteacher ought to have contacted the parent prior to making his final decision. As above, however, the panel considers that [A Pupil] was afforded this opportunity when the Headteacher's decision was considered by the governing body on the first occasion. Therefore, the panel was satisfied that this was not a fundamental flaw in the process which impacted materially on overall fairness. In furthering this issue at the original hearing, the panel heard how the parent had been asked to consider alternative arrangements for a managed move to another school. The panel heard from the Headteacher that he could only propose a single sex school, given the nature of the allegation (Keeping Children Safe in Education) and that the parent had been very clear that this was not acceptable. Whilst, faced with the prospect of permanent exclusion, it might have been that the parent changed her mind. However, the panel heard for themselves at the first hearing that the parent rejected a single sex school and continued of that view in February 2020, and was adamant [A Pupil] would not attend a pupil referral unit.

**Overall decision:**

Having carefully reconsidered its decision, generally and with regard to the points raised by the IRP, the panel remains of the view that given the risk to the victim, the overall circumstances

> of the case, and the serious breach of the school's behaviour policy, that their original decision was correct."

28. Thus, the Governing Body (acting by a Panel of Governors) re-considered and decided to uphold its original decision, made on 6 March 2020, to uphold the permanent exclusion decision made by the Headteacher. This is the decision which is the subject of this claim for judicial review, filed on 10 August 2021.

## Statutory framework

29. Section 51A of the Education Act 2002 ("EA 2002") makes provision for the exclusion of pupils from school, as follows:

> "**51A Exclusion of pupils: England**
>
> (1) The head teacher of a maintained school in England may exclude a pupil from the school for a fixed period or permanently.
>
> …
>
> (3) Regulations must make provision—
>
> (a) requiring prescribed persons to be given prescribed information relating to any exclusion under subsection (1) or (2);
>
> (b) requiring the responsible body, in prescribed cases, to consider whether the pupil should be reinstated;
>
> (c) requiring the local authority to make arrangements enabling a prescribed person to apply to a review panel for a review, in any prescribed case, of a decision of the responsible body not to reinstate a pupil;
>
> (d) about the constitution of a review panel;
>
> (e) about the procedure to be followed on a review under paragraph (c).
>
> (4) On an application by virtue of subsection (3)(c), the review panel may—
>
> (a) uphold the decision of the responsible body,
>
> (b) recommend that the responsible body reconsiders the matter, or
>
> (c) if it considers that the decision of the responsible body was flawed when considered in the light of the principles applicable on an application for judicial review, quash the

> decision of the responsible body and direct the responsible body to reconsider the matter.
>
> …
>
> (10) In this section—
>
> …
>
> *"exclude"*, in relation to the exclusion of a pupil from a school or pupil referral unit, means exclude on disciplinary grounds (and *"exclusion"* is to be construed accordingly);
>
> …
>
> *"the responsible body"* means—
>
> (a) in relation to exclusion from a maintained school, the governing body of the school;
>
> …"

30. The power to exclude rests with the headteacher, but it is subject to a mandatory review by the governing body. By regulation 5 of the School Discipline (Pupil Exclusions and Reviews) Regulations 2012 ("the 2012 Regulations"), when a headteacher exercises the power to exclude, he must inform the governing body without delay. Under regulation 6(2), the governing body must decide whether or not the pupil should be reinstated. Under regulation 6(3), the governing body must arrange for a meeting at which it will hear representations from the parent of the excluded pupil, the headteacher and the local education authority. If the governing body decides that the pupil should be reinstated, it must direct the headteacher accordingly and the headteacher must comply (regulation 6(4), (5)).

31. The decision by the headteacher and the mandatory review by the governing body are separate stages, but are regarded as part of a single process: see *R (DR) v Head Teacher of St George's Catholic School and others* [2002] EWCA Civ 1822, per Simon Brown LJ, at [37]; *R v Governors of Dunraven School, ex parte B* [2000] LGR 494, per Sedley LJ, at 498-500.

32. A review of a governing body's decision by the IRP only occurs if a parent requests it (regulation 7(1)). The IRP's primary powers are set out in section 51A(4) of the EA 2002. The IRP can: (a) uphold the decision; (b) recommend that the responsible body reconsiders the matter; or (c) if it considers that the decision of the responsible body was flawed when considered in the light of the principles applicable on an application for judicial review, quash the decision of the responsible body and direct the responsible body to reconsider the matter. In this case, the IRP decided to exercise its power under sub-paragraph (b) of section 51A(4) to recommend that the governing body reconsider the matter.

33. The IRP has no power to reinstate a pupil, because it is performing a review rather than substituting its own decision for that of a governing body. But it does have an effective quashing power, which results in the nullification of a governing body's decision and a

requirement to reconsider. By contrast, a recommendation to reconsider is a lesser power which does not result in a quashing of the decision.

34. Additional powers are conferred on the IRP under regulation 7(5)(a) to direct the governing body to place a note on the pupil's educational record; and under regulation 7(5)(b) to order the local authority to make adjustments to the school's budget share if the following a decision by the panel to quash the governing body's decision, the governing body decides not to reinstate the pupil.

35. Regulation 8(1) provides that where the IRP has either recommended or directed a reconsideration of a decision not to reinstate a pupil, the governing body "must reconvene in order to reconsider the exclusion" within 10 school days after notification. When the governing body have reconsidered their decision, they must inform the parent, the headteacher and the local authority of their reconsidered decision and the reasons for it, without delay (regulation 8(2)).

36. The current statutory scheme was considered in *R (CR) v Independent Review Panel of the London Borough of Lambeth* [2014] EWHC 2461 (Admin), per Collins J. at [69] – [78].

37. In exercising their statutory functions under section 51A(1) of the EA 2002 or under the 2012 Regulations, the headteacher, the governing body and the IRP "must have regard to any guidance given from time to time by the Secretary of State" (regulation 9).

38. At all stages, the civil standard of proof is to be applied (regulation 10).

## Guidance

39. In 2017, the Department for Education published statutory guidance on exclusion: 'Exclusions from Maintained Schools, Academies and Pupil Referral Units in England' ("the School Exclusion Guidance").

40. The 'Summary' explains that it is statutory guidance to which those concerned must have regard when carrying out their functions in relation to exclusions. It adds that 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".

41. In its list of "Key Points", the School Exclusion Guidance includes the following:

> "- Good discipline in schools is essential to ensure that all pupils can benefit from the opportunities provided by education. The Government supports head teachers in using exclusion as a sanction where it is warranted. However, permanent exclusion should only be used as a last resort, 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 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."

42. The School Exclusion Guidance provides advice to headteachers as follows:

> "**Statutory guidance on factors that a head teacher should take into account before taking the decision to exclude**
>
> 16. 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.
>
> 17. The decision on whether to exclude is for the head teacher to take. However, where practical, the head teacher should give the pupil an opportunity to present their case before taking the decision to exclude.
>
> ….."

43. The School Exclusion Guidance to a governing body when reviewing a headteacher's decision to exclude includes the following advice:

> "67. Where reinstatement would make no practical difference because for example, the pupil has already returned to school following the expiry of a fixed-period exclusion or the parents make clear they do not want their child reinstated, the governing board must still consider whether the pupil should be officially reinstated. If it decides against reinstatement of a pupil who has been permanently excluded the parents can request an independent review."

44. It provides guidance to the IRP on reaching its decision:

> "157. 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 board reconsider its decision to uphold the exclusion.
>
> ……

> 159. When considering the governing board's decision in light of the principles applicable in an application for judicial review, the panel should apply the following tests:
>
> • Illegality – did the governing board act outside the scope of its legal powers in deciding that the pupil should not be reinstated?
>
> • Irrationality – did the governing board rely on irrelevant points, fail to take account of all relevant points, or make a decision so unreasonable that no governing board acting reasonably in such circumstances could have made it?
>
> • Procedural impropriety – was the governing board's consideration so procedurally unfair or flawed that justice was clearly not done?
>
> 160. Procedural impropriety means not simply a breach of minor points of procedure but something more substantive, that has a significant impact on the quality of the decision-making process. This will be a judgement for the panel to make, but the following are examples of the types of things that could give rise to procedural impropriety: bias; failing to notify parents of their right to make representations; the governing board making a decision without having given parents an opportunity to make representations; failing to give reasons for a decision; or 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).
>
> 161. Where the criteria for quashing a decision have not been met, the panel should consider whether it would be appropriate to recommend that a governing board reconsiders its decision not to reinstate the pupil. This should not be the default option, but should be used where evidence or procedural flaws have been identified that do not meet the criteria for quashing the decision, but which the panel believe justify a reconsideration of the governing board's decision. This could include when new evidence presented at the review hearing was not available to the governing board at the time of its decision."

45. It also provides guidance to a governing body on the duty to reconsider reinstatement following a review:

> "172. It is important that the governing board conscientiously reconsiders whether the pupil should be reinstated, whether the panel has directed or merely recommended it to do so. Whilst the governing board may still reach the same conclusion as it first did, it may face challenge in the courts if it refuses to reinstate the pupil, without strong justification.
>
> …..

> 176. The reconsideration provides an opportunity for the governing board to look afresh at the question of reinstating the pupil, in light of the findings of the independent review panel. There is no requirement to seek further representations from other parties or to invite them to the reconsideration meeting. The governing board is not prevented from taking into account other matters that it considers relevant. It should, however, take care to ensure that any additional information does not make the decision unlawful. This could be the case, for example, where new evidence is presented or information is considered that is irrelevant to the decision at hand.
>
> 180. The governing board should base its reconsideration on the presumption that a pupil will return to the school if reinstated, regardless of any stated intentions by the parents or pupil. Any decision of a governing board to offer reinstatement which is subsequently turned down by the parents should be recorded on the pupil's educational record. The governing board's decision should demonstrate how they have addressed the concerns raised by the independent review panel; this should be communicated in standard English for all parties to understand."

46. The Keeping Children Safe in Education Guidance ("the Keeping Children Safe Guidance") was issued by the Department for Education in 2019, and re-issued in 2020.

47. The 'Summary' explains that it is statutory guidance and that schools "must have regard to it when carrying out their duties to safeguard and promote the welfare of children". It adds that "[w]e use the term "must" when the person in question is legally required to do something and "should" when the advice set out should be followed unless there is good reason not to".

48. Part V of the Keeping Children Safe Guidance is concerned with "managing reports of child on child sexual violence and sexual harassment". It provides:

> "269. Reports of sexual violence and sexual harassment are likely to be complex and require difficult professional decisions to be made, often quickly and under pressure. Pre-planning, effective training and effective policies will provide schools and colleges with the foundation for a calm, considered and appropriate response to any reports.
>
> 270. This part of the guidance does not attempt to provide (nor would it be possible to provide) detailed guidance on what to do in any or every particular case. The guidance provides effective safeguarding practice and principles for schools and colleges to consider in their decision making process."

49. Under the heading "The immediate response to a report", paragraph 273 and 274 give guidance on the initial response to a report from a child. Paragraph 274 includes the advice that "where the report includes an online element … they key consideration is for staff not to view or forward illegal images of a child". This section includes

guidance on carrying out an immediate risk assessment following a report is at paragraphs 275 to 277:

> "Risk Assessment
>
> 275. When there has been a report of sexual violence, the designated safeguarding lead (or a deputy) should make an immediate risk and needs assessment. Where there has been a report of sexual harassment, the need for a risk assessment should be considered on a case-by-case basis. The risk and needs assessment should consider:
>
> • the victim, especially their protection and support;
>
> • the alleged perpetrator; and
>
> • all the other children (and, if appropriate, adult students and staff) at the school or college, especially any actions that are appropriate to protect them.
>
> 276. Risk assessments should be recorded (written or electronic) and should be kept under review. At all times, the school or college should be actively considering the risks posed to all their pupils and students and putting adequate measures in place to protect them and keep them safe.
>
> 277. The designated safeguarding lead (or a deputy) should ensure they are engaging with children's social care and specialist services as required. Where there has been a report of sexual violence, it is likely that professional risk assessments by social workers and or sexual violence specialists will be required. The risk assessment at paragraph 275 is not intended to replace the detailed assessments of expert professionals. Any such professional assessments should be used to inform the school's or college's approach to supporting and protecting their pupils and students and updating their own risk assessment."

50. The next section of the Keeping Children Safe Guidance considers action following the report, and addresses referral to social care and to the Police. Paragraph 280 emphasises the importance of keeping the victim and alleged perpetrator a reasonable distance apart on school premises. Paragraph 281 advises that when to inform the alleged perpetrator will be a decision that should be carefully considered. Where a report is made to social care and/or the police, then the school should discuss with the relevant agency how the alleged perpetrator will be informed. It also advises:

> "Where a report has been made to the police, the school … should consult the police and agree what information can be disclosed to staff and others, in particular, the alleged perpetrator and their parents or carers. They should also discuss the best way to protect the victim and their anonymity."

51. Paragraph 281 gives guidance on delays in the criminal process, as follows:

> "Managing any delays in the criminal process
>
> • There may be delays in any case that is being progressed through the criminal justice system. Schools and colleges should not wait for the outcome (or even the start) of a police investigation before protecting the victim, alleged perpetrator and other children in the school or college. The risk assessment as per paragraph 275 will help inform any decision.
>
> • Whilst protecting children and/or taking any disciplinary measures against the alleged perpetrator, it will be important for the designated safeguarding lead (or a deputy) to work closely with the police (and other agencies as required), to ensure any actions the school or college take do not jeopardise the police investigation.
>
> • If schools or colleges have questions about the investigation, they should ask the police. The police will help and support the school or college as much as they can (within the constraints of any legal restrictions)."

## Grounds of challenge

52. At the hearing, the Claimant's counsel made his submissions in a different order to the pleaded case, and skeleton argument. I have adopted the same approach.

## Ground 3

53. Under Ground 3, the Claimant submitted that the Headteacher's decision to exclude A Pupil was unlawful as the failure to carry out a risk assessment was in breach of the School Exclusion Guidance and the Keeping Children Safe Guidance. In the light of the IRP decision to that effect, the Panel could not properly uphold the exclusion. The Panel's reasoning and conclusion on this issue was irrational.

54. The legal principles may be briefly stated. Public bodies will generally be required to act in accordance with guidance unless there is a good reason not to (*R v Islington LBC, ex parte Rixon* (1996) 1 CCLR 19, QBD). In *R (S) v Brent London Borough Council* [2002] EWCA Civ 693 it was held that appeal panels and schools must keep in mind that "guidance is no more than that: it is not direction, and certainly not rules" (per Schiemann LJ, at [15]). These principles are reflected in the Summary at the beginning of both sets of Guidance relevant in this case.

55. The test for irrationality was described by the Divisional Court (Leggatt LJ and Carr J.) in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649:

> "98. ….The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more

> accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223*, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see eg *Boddington v British Transport Police [1999] 2 AC 143*, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

56. The School Exclusions Guidance sets out guidance on factors that a head teacher should take into account before taking the decision to exclude:

> "16. 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.
>
> 17. The decision on whether to exclude is for the head teacher to take. However, where practical, the head teacher should give the pupil an opportunity to present their case before taking the decision to exclude.
>
> ….."

It does not advise that a risk assessment should be carried out prior to exclusion.

57. The Keeping Children Safe Guidance gives guidance at paragraphs 275 to 277 on the carrying out of a risk assessment following receipt of a report of 'child on child' sexual violence or sexual harassment (see paragraph 48 above). In cases of sexual violence, there should be an immediate risk assessment. In cases of sexual harassment "the need for a risk assessment should be considered on a case-by-case basis".

58. It was common ground that a risk assessment was undertaken on 27 June 2019, the day after the allegation of sexual misconduct was made against A Pupil by the Complainant, which amounted to a report of sexual violence. The outcome of the assessment was that A Pupil and the Complainant should be kept apart. Arrangements were made for A Pupil to study alone in the internal exclusion room.

59. The initial report from the Police that indecent images were found on A Pupil's mobile phone when he was arrested on 27 September 2019, which were sent to the Complainant's telephone number, was considered by the School on 9 October 2019. It was further confirmed to the School in December 2019.

60. From September 2019 onwards, the Headteacher and the DSL requested the two local authorities to undertake a risk assessment but neither local authority was willing or able to do so (see paragraph 10 above).

61. The IRP recommended that the Governing Body re-consider its decision to permanently exclude A Pupil because *inter alia*, prior to the decision to exclude, no risk assessment was undertaken in accordance with the Keeping Children Safe Guidance. It considered that this impacted on the ability of the Governing Body to satisfy the requirement of potential harm to the education and welfare of pupils. The IRP recognised the difficulties that the Headteacher and the DSL had in obtaining a risk assessment from either of the two local authorities, but considered that in those circumstances, the Headteacher could have been carried out a risk assessment himself and recorded it, on behalf of the School.

62. In my judgment, the Claimant's submission that the IRP found that the Governing Body could not satisfy the second limb of the permanent exclusion test, and therefore the decision to exclude was unlawful, was not correct. The IRP chose not to exercise its power to quash the decision and direct a re-consideration under section 51A(4)(c) of the EA 2002, and therefore it can be inferred that the IRP was not satisfied that the decision of the Governing Body "was flawed when considered in the light of the principles applicable on an application for judicial review". Instead, the IRP considered it was appropriate to exercise the lesser power of recommending a reconsideration, under section 51A(4)(b) of the EA 2002. In deciding how to proceed, the IRP no doubt had well in mind the School Exclusion Guidance at paragraphs 159 – 161. This was a case within paragraph 161 where "flaws have been identified that do not meet the criteria for quashing the decision".

63. In those circumstances, once the Governing Body had decided to re-consider the decision, it was obliged to consider the issues raised by the IRP, in the course of their re-consideration, but it was entitled to reach its own conclusion on those issues, and whether or not the pupil should be reinstated.

64. Upon reconsideration, the Panel initially proposed that it would ask the School to provide a written risk assessment (with the assistance of a third party) based on the situation at the time of the exclusion, considering the risks for both A Pupil and the Complainant in relation to educational provision and health and well-being, The Claimant's solicitors strongly objected to this proposal, advising that the Panel should confine itself to re-considering the original decision, and that a credible risk assessment would not be possible so long after the event. The Claimant's solicitors indicated that they would seek a judicial review of any decision to proceed on that basis. The Panel took legal advice and decided to withdraw the proposal for a risk assessment, as explained in its decision, and recorded in the minutes of the meeting.

65. The Panel expressly considered the relevant guidance in the Keeping Children Safe Guidance and the School Exclusions Guidance. It found that the Headteacher had tried to arrange for one or other of the two local authorities to undertake another risk

assessment, but he was frustrated in his attempts to do so. This was also accepted by the IRP.

66. The Panel noted that the Headteacher could have carried out a risk assessment himself and recorded it in writing, as indicated by the IRP. However, the Panel correctly concluded that there was no requirement for him to do so in the School Exclusion Guidance. The Panel concluded that the absence of a written risk assessment did not make the exclusion unlawful. The Panel was satisfied that the Headteacher believed that there was a risk to the Complainant, and that his assessment of risk was reasonable, given the overall circumstances of the case. On the balance of probabilities, if the Headteacher had recorded his assessment in writing, then "it would have most likely confirmed his view as to the existence of the risk".

67. The Claimant contends that there was no evidence to support these findings and conclusions; that the Panel failed to take account of the factors that would favour A Pupil in any risk assessment; and that its conclusions were irrational. In particular, it was irrational for the Panel to seek to separate the issue of the risk assessment and the lawfulness of the Headteacher's decision to exclude.

68. Having carefully considered the notes of the meeting, the decision, and the evidence from the original meeting, I do not accept these submissions.

69. First, there was clear evidence of a risk to the Complainant, and the factors relating to A Pupil were considered.

70. The Panel found, on the balance of probabilities, that A Pupil had sent obscene pictures of a sexual act to the Complainant, in circumstances where, following disclosures by the Complainant, A Pupil was under Police investigation for an offence of oral rape in relation to her.

71. The Headteacher's Summary Report dated 18 December 2019 stated "The impact of [A Pupil's] continued attendance at the school would pose a safeguarding threat to an alleged victim of a criminal assault.".

72. The notes of the meeting recorded:

> "the Governor Panel agreed that it was reasonable to assume that the apparent link between the images and the earlier case in which [A Pupil] was involved and under investigation would have an impact on the mental health of the victim, in agreement with the professional judgment of the Headteacher and Deputy Headteacher on the impact and assessment of a permanent exclusion".

73. The decision states:

> "The panel also noted the advice received from both the Headteacher and the Deputy Headteacher of the impact on the victim of passing [A Pupil] in the corridor when he was escorted around the school. The Panel considered the advice in "Sexual

> violence and sexual harassment between children in schools and colleges" regarding the impact on victims and violators.
>
> The panel took the view before, and continued to do so now, that, given the context of the allegations and that it is not in dispute that [A Pupil] held the images on his phone, interactions between the girl and [A Pupil] had the real potential to cause significant distress to her, however unintentional or casual the interaction. This distress would be even more likely and significant within the overall circumstances of an allegation of rape which was at the time being actively investigated by the police and in which [A Pupil's] involvement had been suspected, especially as the girl was below the age of consent. The panel were concerned that during their hearing, and subsequently at the appeal and in all submissions, very little consideration of the impact on the victim has been evidenced by [A Pupil], even around the admitted holding of sexual images."

74. The decision letter of 6 March 2020 referred to the evidence at the original hearing:

> "The Panel heard that between October at the time of [A Pupil's] arrest and December, the school received several and continued advice from both the police and social services that, whilst initial bail conditions had not been renewed, that [A Pupil] had been released pending further investigation and specifically that he should not have contact with the complainant. The school was advised that should he approach the younger pupil concerned it would be considered Witness intimidation which is an arrestable offence, and would be detrimental to [A Pupil].
>
> The Panel heard that when [A Pupil] had been in internal inclusion between June and October, with different start and finish times and that he was accompanied when moving around school, he had still on a number of occasions passed the pupil in the corridor, and that this had caused serious distress to the pupil concerned.
>
> The Panel considered [the Claimant's] view that the school was large and that as they were in different years they would not meet, but did not share that view.
>
> In the face of this advice, the option of [A Pupil] returning to [the School] either to inclusion provision (which was noted by all parties as not suitable education) or as a mainstream pupil, would put himself at risk and put the other pupil at risk too."

75. The Claimant's submission that the risk was negligible because A Pupil did not know who had made the allegation against him, and that it was possible to keep A Pupil and the Complainant separated at the School, was not accepted.

76. At the original hearing, evidence was given about the adverse impact on A Pupil of the arrangements in place to minimise the risk of contact with the Complainant, in accordance with advice from Police and Social Care, following the disclosures by the Complainant. This was also referred to by the Headteacher in his Summary Report dated 18 December 2019. The evidence was taken into account by the Governing Body Panel in its re-consideration:

> "Furthermore, the panel noted that the Headteacher had considered the impact on [A Pupil's] education, and of being restricted in his school attendance, as the Headteacher explained in full during the first hearing."

77. Secondly, the Panel was satisfied that the Headteacher had assessed the risk to the Complainant, and that his assessment was reasonable. In my view, it is self-evident that, if the Headteacher had recorded in writing the assessment that he had in his mind at the time, his written assessment would have identified the risk to the Complainant in the same terms. This was a rational conclusion which the Panel was entitled to reach.

78. Thirdly, the Panel's view (as expressed in the notes) that the lack of a risk assessment and the decision to exclude were two separate issues was simply another way of expressing the point that the decision to exclude was not necessarily rendered unlawful because there was no risk assessment. This view was not expressed in the language that a lawyer would use, but the Panel was comprised of educationalists, not lawyers.

79. I consider that the Panel was rationally entitled to conclude that the absence of a formal risk assessment did not render the exclusion unlawful. The Keep Children Safe Guidance advised that, in cases of sexual violence, there should be an immediate risk assessment, and in cases of sexual harassment, the need for a risk assessment should be considered on a case-by-case basis. It was lawful for a decision maker not to follow guidance if there was a good reason for not doing so. The Headteacher had a good reason for not obtaining a further risk assessment from Social Care, as his efforts to obtain one from the two local authorities had been frustrated. Although the IRP indicated that the Headteacher could have recorded a risk assessment himself, there was no requirement in the School Exclusion Guidance for the Headteacher to undertake and record a risk assessment before permanently excluding a pupil. The Panel was satisfied that the Headteacher had in fact assessed the risks, and that his professional judgment was reasonable in all the circumstances. Therefore they concluded that his otherwise lawful decision to exclude was not rendered unlawful by reason of the failure to write down his assessment of risk.

80. In my judgment, the Panel's decision was rational and any departure from the Keeping Children Safe Guidance was justified, in the particular circumstances of this case.

81. For the reasons given above, Ground 3 does not succeed.

## Ground 2

82. The Claimant submitted that the Panel erred in law by conducting a review of its earlier decision instead of considering the matter "afresh", as required by the paragraph 176 of the School Exclusion Guidance. The Claimant submitted that the Panel should have

stepped back and considered the points raised by the IRP holistically, recognising that mistakes were made, and taking account of all the issues raised on A Pupil's behalf. Instead, they conducted a point by point rebuttal of the issues raised by the IRP.

83. The Claimant submitted that the School Exclusion Guidance must be read as a whole, to give effect to its purpose, encapsulated by the requirement for exclusion decisions to be lawful, reasonable and fair. The Panel failed to carry out any proper reconsideration, as required by the School Exclusion Guidance. The Claimant referred to the cases of *R (Corner House Research) v Director of the Serious Fraud Office* [2009] AC 756, per Lord Bingham, at [32] and *R (Elgizouli) v Secretary of State for the Home Department* [2020] 2 WLR 857, at [219].

84. The form which a governing body's "reconsideration" should take is not prescribed in the EA 2002 or the 2012 Regulations. The School Exclusion Guidance provides:

> "172. It is important that the governing board conscientiously reconsiders whether the pupil should be reinstated, whether the panel has directed or merely recommended it to do so. Whilst the governing board may still reach the same conclusion as it first did, it may face challenge in the courts if it refuses to reinstate the pupil, without strong justification.
>
> …..
>
> 176. The reconsideration provides an opportunity for the governing board to look afresh at the question of reinstating the pupil, in light of the findings of the independent review panel. There is no requirement to seek further representations from other parties or to invite them to the reconsideration meeting. The governing board is not prevented from taking into account other matters that it considers relevant. It should, however, take care to ensure that any additional information does not make the decision unlawful. This could be the case, for example, where new evidence is presented or information is considered that is irrelevant to the decision at hand."

85. The Claimant relied in particular upon the word "afresh" in paragraph 176 the School Exclusion Guidance, but that is a term which is capable of more than one meaning. It could mean a complete re-hearing, at which written and oral evidence is adduced, the parties make their submissions, and the panel makes a fresh decision. However, that would not be consistent with the advice in the School Exclusion Guidance that "[t]here is no requirement to seek further representations from other parties or to invite them to the reconsideration meeting". Nor would it be consistent with the caution that the School Exclusion Guidance advises, should the Governing Body be minded to receive additional information and any new evidence.

86. Prior to the reconsideration, the Claimant also rejected the notion that it should be a re-hearing, with a fresh evidence and submissions. The Claimant's solicitors submitted to the Governing Body, in its email of 22 April 2021, that it should "confine itself to reconsidering the original decision, in the light of the finding of the IRP" and although the School Exclusion Guidance advised that it could consider new evidence if relevant,

that was "not the same as requiring further evidence to be produced to rectify the fundamental failings of the original decision, or conducting a rehearing".

87. In my view, the form of reconsideration that the School Exclusion Guidance envisages and that the Claimant's solicitors advocated, is for a governing body panel to review the material presented at the original hearing, and to consider whether or not its previous findings and decision should be changed or upheld. There is a residual discretion to consider new information, if relevant.

88. I consider that this is the form of reconsideration which the Panel carried out in this case. In the notes of the meeting on 4 May 2021, the Panel stated they had "looked afresh at all evidence with an open mind, paying attention to points raised by the IRP". In my view, that is an accurate description of the exercise that the Panel undertook.

89. In accordance with the advice in the School Exclusion Guidance, the Panel reconsidered the case "in light of the findings of the independent review panel". Contrary to the Claimant's submission, it did not use the IRP's decision merely as a check list. However, it would have been open to criticism if it had not applied its mind to the IRP's findings wherever relevant. I agree with Mr Line's submissions on this point.

90. I do not accept the Claimant's criticism that the Panel undertook a point by point rebuttal instead of a genuine holistic reconsideration. On my reading of the decision, the Panel conscientiously addressed each point in detail, analysing the evidence, and making its findings. That was the correct approach. Furthermore, it is also apparent from the decision that, on a number of occasions in its decision, the Panel took a broader, overall view of the issues, which was appropriate.

91. The Claimant submitted that the email exchanges between Panel members when setting up the Reconsideration meeting demonstrated their erroneous approach. I disagree. The informal observations made by the Governors were reasonable, and reflected their initial thoughts, not their considered conclusions. As Mr Line submitted, the Panel's findings and conclusions are to be found in the decision, not in private emails.

92. My conclusions on the specific concerns about the email exchanges, raised in paragraph 61 of the Claimant's skeleton argument, are as follows. First, Governors were justified in having regard to the risk of a judicial review against them. The Chair advised the other two panel members that she had received legal advice that if they did not carry out a reconsideration, they could be the subject of a judicial review. The risk of a legal challenge is also referred to in the School Exclusion Guidance at paragraph 172.

93. Second, it was not improper for a Panel member to consider whether the requirement to record the risk assessment in writing was a "technicality" (using that word as a layperson would to mean that it was a procedural rather than a substantive matter).

94. Third, the Claimant complains in paragraph 61.3 of her skeleton argument that the Chair did not intend to seek further information from the parent, or offer the opportunity of further submissions, other than on the issue as to what the Claimant hoped to obtain from the reconsideration, given that A Pupil was too old to return to the School. It is apparent that this was the Chair's initial view, upon taking legal advice, and no doubt upon reading the School Exclusion Guidance, which indicates that the Governing Body is not required to seek further representations. However, after the Panel met at its

preliminary meeting, it made written proposals, in the email from its clerk dated 21 April 2021, for A Pupil to have the opportunity to put forward a statement "regarding the images and anything he wants to say" and for the Claimant to make "a short input as to what they would like to achieve out of the governor reconsideration, given that reinstatement is no longer an option in practise". The response from the Claimant's solicitors was that the Panel should confine itself to reconsidering the original decision. It declined the offer for A Pupil to submit a statement, but accepted the proposal in respect of the Claimant. On 26 April 2021, the Claimant's solicitors submitted 5 pages of written submissions, going beyond the topic identified by the Panel. These submissions were considered by the Panel. In my view, there was nothing improper in the way in which the Panel dealt with these matters.

95. The Claimant submitted that the erroneous approach of the Panel was also demonstrated by three features found in the notes of the meeting. First, the view that the original decision to uphold the exclusion was "reasonable". Second, that the Panel confined its assessment to the evidence as it stood at the time of the initial exclusion and "paid attention" to the points raised by the IRP, but made no reference to the Claimant's arguments. Third, the Panel's approach to the absence of the requisite risk assessment, which was premised on whether its absence could be justified.

96. I have already considered the lawfulness of the Panel's decision-making, in regard to the issue of the risk assessment, under Ground 3. I rejected the Claimant's submissions that the Panel failed to take account of the factors which favoured A Pupil, and that the Panel's findings and conclusions were not supported by any evidence and were irrational. I concluded that the Panel was entitled to uphold its original decision, on the basis that (1) the Headteacher had been unable to obtain an updated risk assessment from the local authorities; (2) the Schools Exclusion Guidance did not require him to make and record a risk assessment before deciding to permanently exclude a pupil; (3) the Headteacher had in fact assessed the risks to the Complainant and A Pupil; his professional judgment was reasonable in all the circumstances; and (4) if he had recorded his assessment in writing, it would most likely have confirmed his view as to the existence of the risk.

97. The IRP's second reason for recommending a reconsideration was that the absence of any representations from A Pupil in relation to the detail of the allegation, and the subsequent letter from the police confirming that no action would be taken, made it difficult for the Governing Body to consider all the necessary evidence. Although this reason was not the subject of specific submissions by the Claimant, the breadth of the challenge under Ground 2 appears to encompass the entire decision, and so I have considered whether the Panel's decision discloses the errors of law identified under Ground 2.

98. In my judgment, the Panel was correct in its view that, as the letter from the police, notifying A Pupil that they had decided not to take further action, was not sent until 27 January 2021, which was more than 13 months after the Headteacher's decision, and nearly 12 months after the Governing Body's decision. This was well beyond the time when it would have been reasonable for the Headteacher or the Governing Body to have received such evidence and therefore they could not be criticised for not taking it into account. The Panel was entitled to rely upon paragraphs 190 to 192 of the School Exclusion Guidance in support of its position.

99. The Panel maintained the view that the Headteacher ought to have given A Pupil the opportunity to explain about the images found on his mobile phone and to answer the allegation that he had sent them on to the Complainant and anyone else, despite the constraints placed on the Headteacher as a result of the Police investigation. However, it concluded that, overall, the combined Headteacher and Governing Body process (described as a "single process" in the case law cited above) was fair since A Pupil was given the opportunity to give his account at the Panel meeting on 5 February 2020. In my judgment, the Panel was entitled to come to this conclusion, and it was not unlawful. I also note that the Claimant's solicitors declined the offer made by the Panel for A Pupil to make a statement in relation to the images and any other matters at reconsideration stage.

100. In conclusion, the Panel undertook a thorough and conscientious re-consideration, as required by the EA 2002, the 2012 Regulations and the School Exclusion Guidance. Both its decision-making process and its conclusions were consistent with the need for exclusion decisions to be "lawful, reasonable and fair" (School Exclusion Guidance, section 2, Key Points).

## Grounds 1 and 4

101. The Claimant made submissions on Grounds 1 and 4 together.

102. Under Ground 1, the Claimant submitted that the Reconsideration decision was vitiated by actual or apparent bias against A Pupil on the part of Panel members. Under Ground 4, the Claimant submitted that Panel members unfairly pre-determined their decision on reconsideration, and then reasoned accordingly.

103. In *Re Medicaments (No. 2)* [2001] 1 WLR 700, Lord Phillips gave a helpful description of bias, as follows:

> "37. Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him.
>
> 38. The decided cases draw a distinction between "actual bias" and "apparent bias". The phrase "actual bias" has not been used with great precision and has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. "Apparent bias" describes the situation where circumstances

> exist which give rise to a reasonable apprehension that the judge may have been, or may be, biased.
>
> 39. Findings of actual bias on the part of a judge are rare. The more usual issue is whether, having regard to all the material circumstances, a case of apparent bias is made out…."

104. The common law test for apparent bias was confirmed by Lord Hope in *Porter v Magill* [2002] 2 AC 357, at [102]-[103]*:*

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the [decision maker] was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the [decision maker] was biased."

105. In *R (Electronic Collar Manufacturers Association) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin), Morris J. set out the test for bias by predetermination:

> "137. Whilst actual pre-determination ….. involves a finding on the subjective attitude or state of mind of the decision-maker, a decision may be impugned on the grounds of an appearance of pre-determination. The question here is for the Court to consider whether a fair-minded and informed observer would think that the evidence gives rise to real possibility or risk that the decision-maker had pre-determined the matter, in the sense of closing his mind to the merits of the issue to be decided: *R (British Homeopathic Association) v NHS Commissioning Board* [2018] EWHC 1359 (Admin) at §73. That risk falls to be assessed by the Court: *Lewis v Redcar* §§96-97…."

106. It is appropriate to consider here the Claimant's general submission that the Panel's use of the word "victim" to refer to the Complainant reflected a presumption of guilt on the part of A Pupil which infected its decision-making. The Claimant objected to the Panel's insistence on the use of the term during the hearings. However, those who are involved in cases involving allegations of sexual abuse will be aware of the controversial debate over the use of the term "victim" versus "complainant", and the current preference in the public sector for use of the term "victim". I consider that the Panel's use of the term "victim" reflected the current cultural norm, rather than any presumption of guilt in this particular case. I have no doubt that the Panel was at all material times fully aware that, although allegations of sexual abuse had been made against A Pupil, there had not been any finding of guilt, and by the date of the Reconsideration, the Police had decided not to take any further action.

107. I turn to consider the evidence relied upon by the Claimant in support of the complaint of bias, under Grounds 1 and 4.

108. The Claimant pointed to the Governing Body's presentation of its case at the IRP hearing, which he contended was uncompromising, and indicative of the Panel

(particularly JM, the Chair of the Governing Body), having firmly resolved not to change its position. The Claimant requested that any reconsideration should be undertaken by Governors with no prior involvement in the case. Instead, the same Panel re-considered their own previous decision.

109. The Claimant was critical of the content of some internal emails passing between Panel members prior to the meeting, in which they touched upon the issues to be determined. The Claimant submitted that, in its Reconsideration Decision, the Panel failed to engage with the Claimant's representations, and the flaws in the original decision, and instead merely justified and defended their original decision. The Panel unfairly criticised A Pupil and his representatives as demonstrating little recognition of the impact upon the Complainant. The Claimant criticised the Panel's approach to the question of the risk assessment.

110. The Claimant submitted that this evidence demonstrated that the Governors pre-determined its decision, and then reasoned accordingly. In reality there was nothing that could be done to change the Governing Body's decision because they had already resolved to maintain it.

111. In my judgment, Mr Line correctly submitted that the high thresholds for a finding of actual or apparent bias, whether by pre-determination or otherwise, were not met in this case.

112. The Panel was comprised of individuals who are volunteers. The Panel had nothing to gain personally from the decision, whichever way it was made. There were no personal interests or relationships at stake. Panel members all brought experience from areas outside of the School, for example, JM has experience of holding lay-judicial roles in other contexts. I did not find any evidence of actual bias. Furthermore, in my view, a fair-minded and informed observer, who was not unduly sensitive or suspicious, upon considering all the circumstances, would not conclude that there was a real possibility of bias. In reaching my conclusions on the Claimant's specific criticisms of apparent bias, as set out below, I have adopted the perspective of the fair-minded and informed observer throughout.

113. The Panel was entitled to defend its original decision at the IRP stage, and the way in which it did so including the evidence of JM, was reasonable. The fact that the Panel defended its position before the IRP did not mean that they did not respect the decision of the IRP, and were not capable of undertaking a genuine reconsideration when it was recommended by the IRP. It is not unusual for a committee or individual exercising statutory powers to have to re-consider a decision in accordance with a ruling of a higher body.

114. JM explained, at paragraph 70 of her witness statement, that the Panel did consider whether another panel should be constituted to undertake the reconsideration, as this had been requested. It concluded that this would involve rehearing the case entirely (including the evidence), which was not recommended by the IRP in this case, and was not consistent with the Panel's understanding of what a reconsideration might involve, as a matter of ordinary language.

115. There was no statutory requirement, or policy guidance, for a differently constituted panel to undertake the reconsideration. Indeed, the advice in paragraph 176 of the

School Exclusion Guidance that there is no requirement to seek further representations, or for parties to attend the reconsideration, is consistent with an expectation that the same panel will be undertaking the reconsideration as it would be difficult for an entirely new panel to assess the case entirely on the papers. I agree with Mr Line's observation that, in a complex and long-running case, such as this one, there are likely to be advantages in retaining the same panel because of its knowledge of the evidence and history. The IRP's findings did not provide any basis for concluding that the original Panel either was, or might appear to be, too partial to undertake the reconsideration. Therefore the Claimant's request for a different panel was not reasonably made, and neither the IRP nor the Governing Body was required to comply with it.

116. The informal exchanges between the Panel members when setting up the Reconsideration meeting (such as the reference to potential legal proceedings and the observations about the risk assessment in the Panel member's email of 8 April 2021) were reasonable, and reflected their initial thoughts, not a final conclusion. They are not evidence of bias.

117. The Panel held a preliminary meeting to consider the most appropriate way forward, made proposals to the Claimant's solicitors, and conscientiously considered their response. The Panel did not hold a further hearing or seek full written representations because extensive submissions had already been made at the original hearing and at the IRP hearing. This approach was in accordance with paragraph 176 of the School Exclusion Guidance, and the Claimant's legal representatives did not disagree with it.

118. However, the Panel did offer A Pupil the opportunity to submit a statement regarding the images and anything else that he wanted to say, which the Claimant's solicitors declined on his behalf. The Panel also said they would find it helpful to receive a submission from the Claimant as to what the family hoped to achieve out of the Reconsideration, given that A Pupil was now too old to be reinstated in the School. The Claimant's solicitors agreed with this course.

119. The Claimant complained that the Panel did not engage adequately with the Claimant's submissions and failed to carry out a genuine reconsideration as it upheld the original decision on each point. On a fair reading of the decision and minutes, it is apparent that the Panel took a careful and conscientious approach, analysing the evidence taking into account the evidence and submissions made by the Claimant and A Pupil. To avoid repetition, I refer to the conclusions I have reached on Grounds 2 and 3.

120. The Claimant's submissions are essentially a challenge to the merits of the Panel's decision. As Mr Line submitted, the flaw in the Claimant's approach is that mere disagreement with a decision could always be elevated into a bias challenge – "the decision-maker was biased against the claimant because he found against him". To succeed in an allegation of actual or apparent bias, it is necessary to go further than this, and demonstrate an actual or apparent attitude of mind on the part of panel members which prevented them "from making an objective determination of the issues" (per Lord Phillips in *Re Medicaments No. 2,* at [37]). In this case, the high thresholds for a finding of actual or apparent bias, whether by pre-determination or otherwise, were not met.

121. Therefore, Grounds 1 and 4 do not succeed.

## Final conclusions

122. In view of my conclusions, I do not need to consider the parties' submissions on the effect of a judgment in the Claimant's favour, given that he cannot be reinstated.

123. For the reasons set out above, the claim for judicial review is dismissed.