

A New Secret Garden? Alternative Provision, Exclusion and Children's Rights

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November 2010





Online Report: November 2010

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Introduction

In 1976 the then Prime Minister James Callaghan called for a national debate on education, which ultimately led to the creation of the modern British education system. This system, controlled by central government, consisted of a national curriculum, standardised qualifications, and the independent inspectorate, Ofsted, as the Government's enforcer. Prior to Callaghan's speech, education was regarded by some as a 'secret garden' controlled by the teaching establishment, where politicians dared not seek control or reform.¹ Today, by contrast, central government control of education is very much the norm. For many critics, the growth of central control has been excessive, and to the detriment of the quality of education delivered in Britain.²

However, the waves of regulation and central control have been concentrated on *mainstream* education. The education provided to students who have been permanently excluded, or are otherwise not educated in mainstream schools, has been given comparably little attention by central government. This sector is known as 'alternative provision'. The argument of this paper is that alternative provision constitutes a 'new secret garden' that central government is now seeking to regularise, control and reform. The Labour Government published its White Paper for the sector, *Back on Track*, in 2008. For alternative provision, this was the equivalent of Callaghan's call for government intervention in mainstream education. Although some of the proposals contained in *Back on Track* have been implemented, the election of the new Coalition Government has created considerable uncertainty for the future of the sector.

This paper examines the changes to the practical and legal frameworks for excluding pupils to alternative provision that have taken place over the last decade. The results of a survey of local authority coordinators of alternative provision are presented, which give an insight into how exclusions to alternative provision operate in Britain today. The paper argues that political pressure to reduce permanent exclusions has led to the growth of new forms of 'effective exclusion', the referral and managed move, and to the growth of an associated industry of alternative providers to cater for those excluded children. It argues that children subject to these effective exclusions have virtually no legal rights to affect the education they receive after an exclusion, and that this situation must be changed.

In the light of the analyses set out in the paper, a new system for exclusions to alternative provision and the regulation of alternative providers is proposed. The multiple means of transferring students away from mainstream schools should be rationalised into a single system of referrals. It should no longer be possible to permanently exclude a pupil from a mainstream school, and thereby for the pupil to cease being the responsibility of that school. Instead, schools should be given additional funding

¹ For example see the quotation from Bernard Donoughue's memoirs in Adonis, A., '30 years on, Callaghan's words resonate', *The Guardian*, Tuesday 17 October 2006.

² Whelan, R. (Ed), *The Corruption of the Curriculum*, Civitas, London, 2007. de Waal, A., *Inspection, Inspection, Inspection*, Civitas, London, 2006.

to purchase off-site provision for pupils it wishes to remove from its main site, and the responsibility for the quality of that provision should lie with the referring school. The appropriateness of a school's exclusion decisions, and the care that schools take in placing these students, could be assessed by Ofsted as part of its inspection process. The new projects that have evolved as a result of the effective exclusions discussed in the paper should be monitored as part of those Ofsted inspections.

The paper argues that the lesson of the previous Government's attempt to reduce exclusions should be that schools place an overriding importance on their ability to remove disruptive pupils. The right of schools to exclude pupils should, it is argued, be respected. But by the same token, children subject to exclusions should be given effective rights to choose the form that their education will take after their exclusion. Such a system would strike a better balance between the interests of pupils subject to exclusions and the rest of the pupils in those schools who teachers are trying to protect.

Surveying the landscape

Alternative provision is the term for the education provided to students who are not in mainstream schools or special schools,³ but whose education is publicly funded. In this section we outline the types of student who are in alternative provision, the institutional forms that alternative provision can take, and the methods by which young people are transferred to alternative provision. In the following, we are concerned only with students who are below the current age of compulsory schooling, which is sixteen years of age.

The findings below are the result of a survey of officers responsible for alternative provision in London local authorities (LAs), a review of the relevant literature on alternative provision, and original legal research. The use of those sources was informed by the experiences of the primary author, Tom Ogg, who was a practitioner in an independent alternative provider from 2007 to 2010. There are thirty three LAs in London, although one of those – the City of London – contains no state schools. Officers from sixteen LAs were interviewed by telephone, on condition of anonymity, which when the City of London is excluded is half the total number of LAs in London.

Students in alternative provision

Alternative provision caters for a wide variety of young people. What unites all of the pupils in alternative provision is that either the pupils or their mainstream schools have decided that a mainstream school is not the appropriate place for that pupil to receive their education. A total of 89% of pupils in alternative provision are of secondary age (11-16), and 73% are male.⁴ The majority of pupils in alternative provision are, therefore, teenage boys.

³ Special schools are for young people with physical disabilities or special educational needs who cannot be catered for in mainstream schools.

⁴ *Schools, Pupils, and Their Characteristics*, Department for Education, January 2010. These statistics are somewhat misleading, as will be explained below, but they probably can be relied upon to provide a rough guide to the composition of the students in the sector.

There are, broadly, four types of student that alternative providers aim to cater for, although projects sometimes cater for more than one type:

1. Students with 'emotional and behavioural difficulties' (EBD) – that is, students who misbehave. Usually they have either been permanently excluded from mainstream school, or were at risk of being permanently excluded.
2. Students who are very vulnerable, who often have mental health problems, and students who have specific emotional or physical needs that cannot be accommodated by a special school (such as teenage mothers or school-phobics).
3. Students who have neither EBD or vulnerability issues, but who are nonetheless failing in mainstream school and who have been deemed to require a different educational approach.
4. Students who temporarily do not have a school place, usually because they have moved into a LA, often from abroad, late in the academic year and particularly during the final year of compulsory schooling (year 11).

These are not cut-and-dry categories; rather they should be thought of as a rough guide to the kind of students who are provided for in alternative provision. As a result, it is not possible to say what proportion of young people in alternative provision fall into each category. The majority of students in alternative provision, LA coordinators in our survey told us, were there to benefit from the different forms of curriculum on offer in those projects. For whatever reason, they were failing in mainstream school and required a different educational approach. One LA coordinator explained this in the following terms: 'For some young people, school is not the right place for them. So as far as you can, without undermining your own principles, you have to give them what they want. . . [in school] no matter what they do, they just can't hit the right message for these kids.'

Institutional forms of alternative provision

Alternative provision can be found in three institutional forms. First, there are pupil referral units, which are commonly known as PRUs. This is the legal name for LA controlled and funded schools set up specifically to provide for excluded children, in the broadest sense of 'excluded'. LAs have a duty under section 19(1) of the Education Act 1996 to provide education, which states:

Each local authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

Any school set up by a LA to fulfil this statutory duty must be known as a pupil referral unit, under section 19(2) of the 1996 Act. Many PRUs, however, tend to have operating names that are rather more welcoming. PRUs do not have to follow the national curriculum. The requirement is rather that

they provide 'efficient education suitable to his [or her] age, ability and aptitude and to any special educational needs' (section 19(6) of the 1996 Act). PRUs are inspected by Ofsted, and are perhaps the most established form of alternative provision. In the past they have catered for all four of the categories of pupil outlined above, but increasingly they now cater only for students with behavioural problems.

PRUs generally have a bad reputation, and this is often with some justification. An Ofsted report in 2007 found that one in eight PRUs were inadequate.⁵ Less than 1% of pupils at PRUs achieved 5 GCSEs at grades A*-C in 2008,⁶ and only 11.7% achieved at least one GCSEs at A*-C.⁷ There are, it should be said, some examples of outstanding practice and PRUs do tend to take the hardest students to turn around. Since most of the students at PRUs have been permanently excluded, PRUs often have the feel of a 'dumping ground' for young people that other institutions have given up on. As the legal last resort for students to receive an education, they also have little or no control over which students they receive.

The second type of alternative provision is provided by publicly funded and controlled colleges of further education (CFEs). CFEs normally cater for students who are over sixteen years of age, and often students in alternative provision will simply join those classes primarily intended for older students, but they also increasingly offer dedicated courses for under 16s. The courses are usually either in basic skills (mathematics and English) or in vocational subjects like information technology or mechanics. The majority are part time. CFEs are inspected by Ofsted, are not required to follow the national curriculum, and cater largely for the third category of student described above, those without behavioural or vulnerability issues but who require a different educational approach. The funding for alternative provision at CFEs is generally provided in the form of per-place fees charged by the CFE and paid for by another publicly funded institution such as a mainstream school or PRU, although a number of arrangements are possible. CFEs control admissions to their courses, and the courses available are generally of a good standard.

The third type of alternative provision is supplied by independent projects, which may be charities, limited companies, or community interest companies. We will refer to these projects throughout as 'independent alternative providers', or IAPs. IAPs receive indirect public funding, in the sense that the IAP will charge a per-pupil fee which is paid by a publicly funded institution, such as a mainstream school or PRU. They are not in any way publicly controlled. IAPs tend to supplement this indirect public funding by seeking charitable donations and ad hoc funding from a variety of sources such as private grant-making trusts or other state funded institutions. Technically, these projects are required to register as independent schools, but in practice very few in fact are registered (see discussion below). When not registered as independent schools, IAPs are *not* inspected by Ofsted, are not required to follow the national curriculum, and are not subject to the gamut of educational regulations other schools are required to follow.

The reasons for the attractiveness of IAPs, particularly when compared with PRUs, are that projects tend to be small in size, and focus upon fostering adult relationships with the students – in contrast to

⁵ *Pupil Referral Units: Establishing successful practice in pupil referral units and local authorities*, Ofsted, 2007.

⁶ Written Parliamentary Answer from Jim Knight MP, 4 June 2009

⁷ Written Parliamentary Answer from Jim Knight MP, 26 March 2008

the perceived child-like relationships required in mainstream schools. There is frequently a vocational or recreational element to the curriculum which serves to attract young people to the project; in, for example, mechanics, IT or forestry. Class sizes are kept small in order to give students a large amount of individual attention. Unlike PRUs, they are able to control their own admissions and therefore to control the culture of the school. The lack of an obligation to receive pupils does, however, have drawbacks in that there is the potential for 'skimming' – that is, accepting the easiest students to deal with whilst rejecting the most challenging pupils. Given that there are a range of reasons for students being in alternative provision, this is entirely acceptable – it would not be sensible to mix the students with behavioural problems with other students who are extremely vulnerable, because the members of the first group would likely bully and intimidate members of the second group. These independent projects are therefore able to pitch themselves at niche markets for particular types of student in an attempt to provide the best possible education to that group.

Evaluations of IAP and CFE courses have generally been positive, although the studies have by no means been exhaustive, and it is likely that there are some inadequate projects in the sector.⁸ In our survey, one LA coordinator compared PRUs with IAPs/CFEs in the following way: 'At PRUs, like-minded children come together and behave poorly. But often in alternative provision [IAPs/CFEs] there are a range of reasons why the students are there, particularly at college, where there are more adults around. As a result the students behave more maturely, in a more adult way. Whereas when they go to a PRU they all behave badly and childishly.'

Transferring students to alternative provision

There are three methods by which a student may be transferred to alternative provision: a permanent exclusion, managed move, or a referral. Each of these methods will be discussed in turn below, but first it should be noted that there are a substantial number of children who do not seem to be registered at any school at all. If a student is registered at a school, they will be on a list of students known as the 'school roll'. However, the Department for Education and Ofsted estimate that approximately 10,000 students are completely missing from school rolls; lost, somewhere, outside of the education system.⁹ In the survey, one LA told us that students who are not attending school and whom the school feels it has no prospect of attracting in to the school – particularly school phobics, the second group listed above – are simply removed from the school roll. The law states that a student may be deleted from a school roll after four school weeks of unauthorised absences, where the school does not know of a reason why the student is not attending school, and where the school and local authority 'have failed, after reasonable enquiry, to ascertain where the pupil is'.¹⁰ If a pupil is removed from the school roll,

⁸ Kendall, S., Kinder, K., Halsey, K., Fletcher-Morgan, C., White, R., and Brown, C., 'An Evaluation of Alternative Education Initiatives', National Foundation for Educational Research, 2003. Thompson, P. and Russell, L., 'Mapping the alternatives to permanent exclusion', Joseph Rowntree Foundation, 2007. However, Daniels, H., et al., *Study of Young People Permanently Excluded From School*, Department for Education and Skills, 2003, found that amongst students who had been permanently excluded there was no difference between the three forms of alternative provision.

⁹ Ofsted, *Out of School: A survey of the educational support and provision for pupils not in school*, Ofsted, London, 2004.

¹⁰ Section 8 of the Education (Pupil Registration) (England) Regulations 2006/1751.

they become the responsibility of the local authority. It seems odd, to say the least, that schools are able to release themselves from their obligations so quickly. Under the reforms proposed below, such an administrative procedure would no longer be possible.

The first means by which a student may be transferred to alternative provision, and by far the most well-known, is permanent exclusion. This measure was first legislated for in the Education (No. 2) Act 1986 (s.23-27), and is now governed by the Education Act 2002 and regulations from the Department of Education.¹¹ Permanent exclusion is an explicitly disciplinary power that only the head teacher of the school is able to exercise.¹² The majority of permanent exclusions are for either persistent disruptive behaviour, physical assault or verbal abuse.¹³ It is, therefore, primarily the first group of students listed above, with behavioural problems, who are permanently excluded.

Following the head teacher's decision to permanently exclude a pupil, there lie two possible consecutive appeals against the decision. The process is highly regulated, and detailed guidance from the Department of Education must be followed. The first appeal is to the governing body of the school, who must reconsider the decision if the pupil or his parents request this, and they must hear any oral representations from the parents or representative of the child. If the governors choose to uphold the permanent exclusion, the pupil may then appeal to an independent appeal panel appointed by the LA. This is composed of lay members, head teachers of other mainstream schools and former school governors.¹⁴ The appeal to the LA panel is a re-hearing of the original exclusion decision, which may take oral and written witness statements. The panel may either uphold the decision to permanently exclude the pupil, or order that the pupil should be reinstatement into the school. No further appeal is available if the panel upholds the exclusion decision, but it is possible to apply for a judicial review of the panel's decision, and there have been a relatively voluminous number of cases passing through the courts challenging the panel's decision to uphold a permanent exclusion.

The effect of a permanent exclusion is to remove the pupil from the school roll, and so the pupil becomes the responsibility of the LA under section 19 of the Education Act 1996 discussed above. This will normally mean that they are registered by the local authority at one of its PRUs. The pupil will have nothing at all to do with his or her former school: the school is absolved of all responsibility for the student. However, once registered at a PRU, the PRU may decide to send the student to an independent provider or college of further education by means of a referral (discussed below).

The second way of transferring a student to alternative provision is by means of a 'managed move'. This is a voluntary process whereby a pupil transfers to another educational institution, leaving the school roll of their first school and joining the roll of another institution. The new school is often another mainstream school, but it could be a PRU or an independent project. The previous Government encouraged the use of managed moves as a way of avoiding the disciplinary process of permanent exclusion. It was felt to be a positive development because the process encouraged a consensual

¹¹ The Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002 (SI 2002/3178); *Improving behaviour and attendance: guidance on exclusion from schools and Pupil Referral Units* (2008).

¹² Education Act 2002 s.52(10) and s.52(1).

¹³ Statistical First Release: Permanent Exclusions from Schools 2008/09. Department for Education.

¹⁴ SI 2002/3178 (see footnote 11).

approach to the problems of the pupil, and one that would allow for a fresh start at a new school.¹⁵ The Government's guidance on exclusions states that a managed move should 'only be done with the full knowledge and co-operation of all the parties involved, including the parents, governors and the LA, and in circumstances where it is in the best interests of the pupil concerned'.¹⁶

The final means of transferring a student to alternative provision is known as a referral. A referral is the name given to the process whereby mainstream schools can direct their pupils to be educated off-site at an independent project, CFE or PRU.¹⁷ The legal basis for referrals is section 29(A) of the Education Act 2002, which states that: 'The governing body of a maintained school in England may require any registered pupil to attend at any place outside the school premises for the purpose of receiving educational provision which is intended to improve the behaviour of the pupil.' This measure was first introduced by the Education Act 1996, and was repeated in subsequent statutes in 2005¹⁸ and 2008. The Education and Skills Act 2008 made clear that this power could be used to improve pupil behaviour, and therefore, in response to disciplinary problems. There are, unfortunately, no statistics available on the number of referrals made under this power given to mainstream schools.

In contrast to the other two methods outlined above, a referred pupil *remains on the roll* of the mainstream school,¹⁹ but is educated off-site. As a consequence, the mainstream school referring the pupil retains responsibility for the quality of education the child receives, and the examination results of the students are attributed to the mainstream school, even though they may not have provided any teaching to the student at the school itself. One LA coordinator told us that many mainstream schools in their borough 'throw the students out to alternative education [IAPs/CFEs], and whatever they get in the other project gets added to the school's record. It's like a bonus to the school statistics, because they weren't going to achieve anything anyway. And it saves the young people from having a permanent exclusion on their record.'

Section 29(A) of the 2002 Act came into force in March 2010. Prior to this, however, the power available to mainstream schools was less specific. Section 29 of the 2002 Act stated that: 'The governing body of a maintained school may require pupils in attendance at the school to attend at any place outside the school premises for the purposes of receiving any instruction or training included in the secular curriculum for the school.' This is almost exactly the same as section 29(A) save for the lack of any reference to behaviour. It seems likely, however, that the old section 29 was used for students with behavioural problems prior to the clarification of the law in the Education and Skills Act 2008, which added section 29(A) to the Education Act 2002. It might well be, for example, that the primary reason for a referral by a mainstream school was to provide a curriculum that was of greater interest to a referred pupil; but this does not mean that one of the motivations of the referring school

¹⁵ Abdelnoor, A., *Managed Moves: A complete guide to managed moves as an alternative to permanent exclusion*, Calouste Gulbenkian Foundation, 2007.

¹⁶ *Improving behaviour and attendance*, Department for Children Schools and Families, 2008.

¹⁷ *Commissioning Alternative Provision: Guidance for Local Authorities and Schools*, Department for Children Schools and Families, 2008.

¹⁸ It is worth noting the explanatory notes of the 2005 Act, which state at 241 that: 'Section 29(3) of the Education Act 2002 gives the governing body of a school the power to direct a pupil in attendance at that school to attend alternative provision'. This makes it quite clear that section 29 is about alternative provision, and that compliance with the school's power is mandatory.

¹⁹ The referring institution can be any state-funded body, such as a PRU or even bodies like Connexions. For clarity of exposition, however, the normal example of a mainstream school is used in the above text.

was to be free of the bad behaviour of the pupil associated with that pupil's dislike of the curriculum in the mainstream school. The 2008 exclusions guidance stated that there would be regulations accompanying the introduction of section 29(A) to guide its use, but at present no such regulations appear to be in place. The extremely stark power contained within section 29(A) can therefore be exercised simply as it is stated above, without any provision for pupil input into the process of referral or any requirement for the school to justify a decision to send a student to alternative provision.

Politics and statistics

During the 1990s, concern grew amongst academics and politicians about the number of young people being permanently excluded from schools. The high point of this concern was probably around the time of the publication of Professor Carl Parson's book *Education, Exclusion and Citizenship* in 1999. Permanent exclusions were criticised as punitive and unfair, and were found to be associated with a wide range of negative outcomes. For example, one study found that 50% of students who had been permanently excluded were not in education, employment or training (NEET) two years after the exclusion, and it took an average of three months to be offered any form of alternative provision at all.²⁰ The following passage from Professor Parsons' recent work sums up this criticism:

Permanent exclusion is punitive and damaging. It is a process which has no forward plan. These alternatives maintain a relationship with the pupil, are collaborative with parents and other education providers and designed to continue the child's general and social education and maximise chances of educational success. A transfer, respite or a managed move that is acceptably carried out is distinctly different from an exclusion.²¹

In response to these concerns, the newly elected Labour Government in 1997 pledged to reduce the number of permanent exclusions, and government targets were set to reduce permanent exclusions by a third by 2002.²² In July 1999 the Department for Education issued new guidance for permanent exclusions in the form of Circular 10/99, which 'raised the threshold for exclusion decisions'.²³ The effect of this political pressure upon schools to reduce permanent exclusions, whereby the number of permanent exclusions at a school became a performance indicator for that school, was to lead those schools to seek other solutions to the behavioural problems of some of their students. In many cases, it encouraged schools to place more emphasis upon inclusion, and upon solving the underlying problems that were leading to pupil misbehaviour, in line with the intentions of the Government. It also led to the greater use of managed moves to other mainstream schools to give a fresh start to troubled pupils, although there are no statistics available on how many of these moves took place. Some schools also sought to avoid permanent exclusions by creating so-called 'internal exclusion

²⁰ Daniels, H., Cole, T., Sellman, E., Sutton, J., Visser, J., with Bedward, J., *Study of Young People Permanently Excluded From School*, Department for Education and Skills, 2003.

²¹ Parsons, C., 'Promoting strategic alternatives to exclusions from school: a development project', *Esmée Fairbairn Foundation / Canterbury Christ Church University*, 2009.

²² Parsons, C., *Education, Exclusion and Citizenship*, Routledge, London, 1999.

²³ Ford, J., Hughes, M., May, K., *Education Law and Practice*, Jordan Publishing, Bristol, 2010.

units' where pupils were taught apart from their peers in special classrooms. These arrangements usually had the benefit of smaller class sizes and a more flexible curriculum, although the quality of the provision depended greatly upon the level of resources that the school was prepared to expend on such a project. All of these intended effects of tightening the regulations were beneficial.

However, there were a number of unintended effects of that political pressure that this paper seeks to document. It should be noted that the targets adopted by the Government were dropped before they were due to be fulfilled – although in the event they were in fact met – and the regulations in Circular 10/99 were relaxed somewhat a year after their introduction.²⁴ The primary unintended effect of this political pressure to reduce permanent exclusions was to increase the use of referrals and managed moves. There are very few statistics available to verify these effects, but the story told by the LA coordinators we spoke to was clear. They told us that the use of referrals and managed moves to alternative provision, and to independent projects in particular, had grown enormously since 2000. The use of independent projects 'has changed dramatically' one LA coordinator told us. 'Over the last five years it has become massive. . . but prior to this there wasn't much provision' said another. One LA predicted that 'schools will increasingly use referrals to [independent] alternative provision, and will begin to use it more as an early intervention method'.

The majority of LA coordinators explicitly agreed that the growth of referrals to independent projects and colleges of further education was in response to this political pressure to reduce permanent exclusions. Many, however, said that an equal motivation was their own LA's determination to reduce the number of permanent exclusions. For example, one LA said, 'there is pressure to reduce permanent exclusions and we've responded. . . but we're doing it because we think it's good practice, not necessarily because of government pressure'. Permanent exclusion, one LA coordinator told us, 'is the worst thing ever'. It is the process used 'when everything has failed'. Another LA coordinator said that 'students who are permanently excluded end up on the streets and in crime. So if we can engage them in something they enjoy doing [using IAPs or CFEs] then we can prevent that behaviour. The students enjoy doing work experience, and where they get one-to-one'. Moreover, whatever positive relationships did exist between the student and his or her teachers, and any special knowledge about the student, are rendered useless by the process of permanent exclusion.

In stark contrast to permanent exclusions, the LAs emphasised the extent to which referrals and managed moves allowed *early intervention* to stop further deterioration of a young person's problems. Referrals and managed moves, one LA coordinator told us, meant that 'when you see the writing on the wall, you can take action. . . you're not waiting until it all completely disintegrates' (and therefore results in a permanent exclusion). Several LA coordinators despaired that many of the students they had to find placements for had very long histories of behavioural problems that could have been better dealt with by a transfer to alternative provision at an earlier stage. Indeed research clearly shows that permanent exclusion 'usually follow[s] a long history of behavioural challenges from the young person'.²⁵

²⁴ *Education, Exclusion and Citizenship*, 1999; *Education Law and Practice*, 2010.

²⁵ *Study of Young People Permanently Excluded From School*, 2003.

Table 1 (p.13), sets out the number of permanent exclusions and students being educated at PRUs since 1989, where figures are available. The column 'N PRU (Jan)' refers to the number of students estimated to be educated at a PRU in January of the year in question (this data is included because it is the most up-to-date available). 'N PRU' refers to the number of students educated at PRUs by the end of the academic year, rounded to the nearest hundred.²⁶ Finally, the third column, 'permanent exclusions' refers to the number of children who have been permanently excluded from mainstream schools that year.

Table 1 shows that, although the flow of permanent exclusions did in fact fall by around a third in the late 1990s (as per the government targets), the stock of students being educated in PRUs in fact continued to rise, almost doubling during the period 1997-2007. This statistical aberration suggests that students were increasingly being transferred to be educated at PRUs using either managed moves or referrals. But as was indicated above, there are no statistics available on the number of managed moves or referrals, so we simply do not know how many students have left mainstream schools through these routes. The interviews with the LA coordinators strongly suggested, however, that a great many students fall into these categories.

²⁶ The 'N PRU' figures are higher than those of the 'N PRU (Jan)' column because students continue to join PRUs throughout the year after January.

Table 1: Permanent Exclusions and PRU Numbers 1989-2009

Year	N PRU (Jan)	N PRU	Permanent Exclusions
1989/90			0
1990/91			2,910*
1991/92			3,333*
1992/93			8,636
1993/94			11,181
1994/95		8,685	12,458
1995/96			12,476
1996/97			12,668
1997/98		8,200	12,298
1998/99		8,900	10,400
1999/00		9,100	8,300
2000/01		9,700	9,210
2001/02		10,400	9,540
2002/03	12,010	12,400	9,290
2003/04	13,040	13,400	9,880
2004/05	14,470	14,900	9,440
2005/06	15,240	15,600	9,170
2006/07	15,160	15,700	8,680
2007/08	16,100	16,700	8,130
2008/09	15,230	15,700	6,550
2009/10	12,800		

* Known to be under-reported.

Sources: Parsons (1999) for permanent exclusion figures 1989-1994; Statistical First Release: Permanent Exclusions from Schools 1999-2010 for permanent exclusion figures 1995-2009; Education and Training Statistics for the United Kingdom, DFE Bulletins 1999-1999 for overall numbers of students in PRUs 1997-2008; Parsons (1999) for 1994 figure for number of students in PRUs; Schools, Pupils, and Their Characteristics, January 2010 and 2007 for January figures for number of students in PRUs.

It is particularly interesting to note the low January 2010 figure for the number of students in PRUs, and the similarly low number of permanent exclusions in 2008/09. Unfortunately, these latest figures for PRU numbers coincided with a change in the way that the data was collected (to 'pupil-level' data collection), which according to the Department for Education 'may account for some of the change shown in pupil referral unit pupil numbers'.²⁷ There is clearly, however, a pattern in the table. Permanent exclusions have been falling considerably since their peak in 1996/97. PRU numbers seem to have peaked in 2007/08. The results of our survey, and these statistics, would therefore suggest that an increasingly large number of students are being referred to, and subject to managed moves to, independent projects and colleges of further education.

²⁷ Statistical First Release: Permanent Exclusions from Schools 2009/10.

Unfortunately, the statistics available on the number of students educated in independent projects and colleges of further education are extremely patchy. The Government began a limited form of data collection in the Alternative Provision Census 2009.²⁸ Statistics were only collected on the number of students at independent projects and colleges of further education who were on the roll of the *local authority*.²⁹ There are no available statistics on the number of students referred to independent providers and colleges of further education by *mainstream schools*, under their powers given by the Education Act 2002. Nonetheless, it is instructive to know that there are 19,170 pupils who are the responsibility of the local authority but are educated at independent projects or further education projects, almost double the number of students in PRUs in January 2010.³⁰

This raises the question of how many students are in fact referred by mainstream schools to forms of alternative provision for which the Government does not currently collect statistics. The Government's white paper, *Back on Track*, estimated in 2008 that around two thirds of children in alternative provision were provided for in independent projects and in colleges of further education, which amounted to around 47,000 pupils. The true number is at present simply unknown.

By way of historical contrast, it is useful to examine the destinations of pupils who were permanently excluded prior to the rise of the referral and managed move. In 1994 Professor Carl Parsons found the destinations of secondary age students who had been permanently excluded were as follows:

- 38% PRU,
- 27.1% home tuition,
- 14.8% returned to mainstream,
- 11.1% 'voluntary agency, collaborative arrangement, contracted out, other' (independent projects), and
- 8.4% colleges of further education.

There has clearly been a radical shift in favour of independent projects and colleges of further education, and away from home tuition and PRUs during the last fifteen years. The purpose of the survey of local authority coordinators was to get a better understanding of how referrals and managed moves operate in practice, and to try to get some idea of how many pupils are referred to alternative provision by mainstream schools.

²⁸ Unhelpfully, students educated at IAPs and CFEs are grouped together in government statistics as being educated in 'alternative provision', with students in PRUs counted separately. The Government also includes in its definition of alternative provision a wide variety of other categories of student, including: students educated in hospital, students in non-maintained special schools, and students for whom the LA has purchased home tuition.

²⁹ The reason that these statistics were collected in this way was that the survey was designed to assist the Government in allocating funding correctly between local authorities and schools, rather than to work out exactly how many students are being educated in independent projects and further education colleges.

³⁰ *Schools, Pupils and their Characteristics: January 2010*, Department for Education. This figure includes all young people of compulsory school age.

Local Authorities and the use of alternative provision

The interviews with local authority coordinators of alternative provision made plain that each local authority approaches the organisation of alternative provision in a somewhat different manner. Some LAs were very decentralised in their approach, and simply could not tell us how many students were being referred by mainstream schools: 'I couldn't say, there are 16 or 17 schools, I really, really couldn't say. Each school has its own format [for referrals].' When asked how many referrals by mainstream schools take place in their LA, another coordinator told us: 'We do try to find that out but it's quite a struggle to get schools to pass on that information. We spent a lot of time trying to find that out.' In another LA, of the 80 students being educated full-time in independent projects and colleges of further education, 37 were referred directly by mainstream schools. Another borough told us that all CFE/IAP placements were organised by the schools, and that this amounted to 'at least 400 students as a conservative guesstimate'. In some local authorities there was a high level of confusion over which officer in the LA was in fact responsible for alternative provision. Given this confusion, it is perhaps less surprising that so many children are missing from school rolls.³¹

We also asked the LA coordinators what proportion of the students who had been referred to alternative provision would have otherwise been permanently excluded. There was a wide range of answers, but it appears that as a very rough average, around 20-30% of students referred to alternative provision would have otherwise been permanently excluded. Almost all of the LA coordinators agreed that referrals were replacing permanent exclusions to an extent. The method used by a particular school to remove a student from its site simply depended on the practices of the school in question. We also asked the local authority coordinators to describe the process of managed moves and referrals to us. One LA coordinator described the process of a managed move in the following way:

It'd be put to the parent that we're forcing them in every day [to the mainstream school], but they don't really want to be here. So we might be looking at a permanent exclusion eventually, but we might as well look for something different that appeals to the student - mechanics, IT or something like that. The parent might then often agree to the move. It'd definitely be wrong for the school to say 'if you don't accept this then they'll be excluded', but it's couched in the terms that 'this is inevitable, and it's for the best'. Teachers are very experienced at predicting the way things are going, so they have strong views on that. They also try to be fairly flexible.

Clearly, the good intentions of all concerned are evident from this passage. All the LAs we spoke to emphasised the extent to which the voluntary cooperation of parents and students was sought at almost any cost. The problem, as this passage shows, is that mainstream schools are able implicitly to threaten to permanently exclude the student, or subject the student to a referral, if their parents do not agree to the move. This leaves the potential for unscrupulous head teachers to make use of referrals and managed moves to get rid of challenging students without the need for a permanent

³¹ *Out of School: A survey of the educational support and provision for pupils not in school, 2004.*

exclusion. These processes could be used even when it would not necessarily be appropriate to send the pupil to alternative provision, because they might well flourish in a mainstream school given the right attention. Certainly, the LAs reported that some schools 'exclude really quickly' by means of a referral or a managed move, although generally those schools were in the minority. As we have seen, in these decentralised LAs, the mainstream schools sometimes do not even inform the LA how many of their students have been referred to alternative provision. LA coordinators stressed that the way in which referrals were conducted entirely depended on the culture of the school in question. One LA told us that: 'It all depends upon the attitude of the referring school. For some schools, there is almost an "out of sight and out of mind" attitude. Others give a lot of thought and care to their use of alternative provision.'

Other LAs had an approach which was very centralised and coordinated. In these highly coordinated LAs, any referral, managed move or permanent exclusion was subject to the sanction and facilitation of a central LA body. When a school found it had a problem with a student, a potential transfer of the student would be dealt with by a dedicated multi-agency meeting organised by the LA to find the best provision for the child. At the meeting there would be representatives from the mainstream school, PRUs, the LA's children's services department, youth offending team, and the parents of the students. Other LAs went even further, organising committees of head teachers, who met to consider the best options for the troubled young people in their area. Usually these coordinated LAs had a powerful individual in control of alternative provision, who controlled all exclusions, referrals and managed moves, and 'bashed heads together' to ensure the best provision for the child. This often included putting pressure on recalcitrant head teachers of mainstream schools to receive disruptive students from other mainstream schools via what was described as a 'full and frank discussion'. One of those centralised LAs reported that of their 70 students in independent projects and colleges of further education, 12 were referred by mainstream schools, but only after going through the centralised process.

The LAs that were interviewed all lay somewhere on a spectrum between a fully coordinated system, where everything was done via the LA, to the other extreme of an uncoordinated LA which allowed the mainstream schools to organise their own managed moves and referrals with minimal interface with the LA. Some LAs, for example, offered referral services to their mainstream schools because they were able to buy places at projects in bulk, and therefore at lower prices. Some schools opted in to this service, and others did not. The LA coordinators we spoke to told us that academies generally had no dealings with the LA on the issue of alternative provision, which is to be expected given that academies are independent of the LA. The greater the number of academies, this would suggest, the more difficult it will be to sustain the centralised models seen in some of the LAs we spoke to. Given that the Coalition Government's stated intention is for most schools to become academies, it seems likely that the coordinated model may no longer be viable.³²

³² For example, see Shepherd, J., 'Most schools will become academies, says Gove', *The Guardian*, Wednesday 26 May 2010.

Children's rights as interpreted by the courts

It is instructive at this point to examine the outcomes of several important legal challenges to transfers to alternative provision, where the judges have been forced to explain the legal rights of the young people subject to these transfers. In most of the cases that follow, the circumstances are somewhat extreme – often involving threatened industrial action by teachers – but the importance of the judgments is that they are of more general application than just to the particular facts of these cases. The cases illustrate the limited extent to which children have any right to influence the process of being transferred to alternative provision. The second issue to note is that all the cases below are explicitly disciplinary in nature, and in consequence they may speak only to the first group who are to be found in alternative provision, that is, pupils with behavioural problems.

The most important case for our purposes is *R. (L) v J School Governors*.³³ In this case, a head teacher decided to permanently exclude a pupil, L, who was believed to have participated in an assault upon another pupil in the school. L claimed that he had aimed a kick at the victim but had in fact missed. The school governors upheld the decision of the head teacher, but the independent appeal panel appointed by the local authority decided that L was probably not guilty of the behaviour he was accused of, and ordered his reinstatement to the school. In response to the panel's decision, the teachers' unions in the school balloted their members on taking industrial action if any teachers were instructed to teach the pupil.³⁴

The head teacher decided that drastic action was required. It was decided that L was to be taught alone in a separate room, by a retired teacher especially employed by the school to teach L, and that L should be barred from all contact with the rest of the school community. A majority of the House of Lords decided that the decision of the head teacher was legal. In a split 3 to 2 decision, it was held that all that was required for a valid reinstatement of L was that he (or she) was returned to the school roll. The manner of the reinstatement ordered by the local authority panel, and the arrangements for L's teaching, were entirely a matter for the school. The decision was a matter of some controversy in the House of Lords, sitting in its judicial capacity. In their dissenting judgements, the minority made their uneasiness with the decision very clear. Lord Hoffman said that: 'The majority decision achieves this result by deeming the pupil to have been reinstated even though he remains entirely excluded from the school community. On the one hand, the school is treated as having complied with the direction of the appeal panel and on the other hand none of the teachers are required to teach him or supervise him in or out of the classroom.' The senior law lord, Lord Bingham of Cornhill, put it this way: 'It is true that the room in which he was confined was within the school, and to that extent he was not physically excluded, but his exclusion from the communal and educational life of the school was all but complete and the room could have been anywhere.'

R. (L) v J School Governors established the basic legal principle that a school can do more or less as it wishes with students with behavioural problems. The next case established the validity of referrals

³³ [2003] AC 633 29. This case, like many of the others, uses letters to preserve the anonymity of the school and the child challenging their exclusion.

³⁴ Industrial action of this kind by teachers' unions was found to be legal in the parallel case of *P (A Minor) v National Association of School Masters/Union of Women Teachers [2003] 2 A.C. 663*. The House of Lords found that strikes such as these were in furtherance to a trade dispute, and therefore legal.

to off-site alternative provision, despite a prior reinstatement order from an independent appeal panel following an unsuccessful permanent exclusion. In *R. (O) v Governing Body of Park View Academy* a boy verbally assaulted and injured the manager of the school canteen.³⁵ He lost his temper, knocked a sandwich out of her hand, and despite senior staff in the school trying to calm him down, he grabbed the wrist of the manager and twisted it, causing her injury. The head teacher decided to permanently exclude the pupil, a decision that was upheld by the governing body of the school, but was reversed by the independent appeal panel appointed by the local authority. The panel felt that the boy had certainly committed the offence of which he was accused, but that a permanent exclusion was not appropriate given that the boy's actions were agreed to be out of character and in the background of an otherwise unblemished record. As in *R. (L) v J School Governors*, the teachers' unions threatened industrial action, and in response the head teacher decided to send the boy to be educated at an external college of further education, Waltham Forest College, which was arranged by the dedicated 'alternative provision worker' who dealt with referrals. Again, the court held that this was an entirely legal approach for the school to take.

These cases clearly made a mockery of the process of appeals against permanent exclusions. What is the point of an appeal against a permanent exclusion if a pupil can be effectively excluded even when the appeal is successful? The meaning of the 'reinstatement' that an independent appeal panel may grant to a pupil has been utterly hollowed out by the results of these cases.

What the cases also highlight are the lengths to which the teachers in a school will go to ensure that pupils they want to see excluded are, in fact, excluded. Indeed in *R. (L) v J School Governors*, Lord Hoffman suggested that it might well be the case that 'whatever might be the views of an independent panel, it is not in the end practical to force people to teach a pupil whom they consider is preventing them from fulfilling their professional obligations to the other children in the class'. This paper proposes that this educational reality should be reflected in the law: schools should be able to exclude pupils if they wish to do so. The point made here is in part a pragmatic one. The lesson of the Labour Government's experience in trying to reduce exclusions is that schools will remove students they do not want to teach by one means or another. Indeed if referrals and managed moves are seen as 'loopholes' which can be closed and regulated in the same way that permanent exclusion has been since 1999, it seems likely that schools would simply create more elaborate 'internal' exclusion centres that effectively exclude the child in any case – but without any additional funding for the child's education, or any right for the child to influence the form of that exclusion. A more fundamental re-think of the way that exclusions work is required. Before tackling this issue any further, however, it is necessary to consider the issues of children's rights and the proposals contained in *Back on Track*.

The most disturbing aspect of the judgements above and the laws on which they are based is the lack of any *right* on the part of excluded children to influence the education that they receive in place of their mainstream education. The survey made clear that in most cases, particularly in coordinated LAs, the cooperation of the pupils (and their parents) who are transferred to alternative provision is keenly sought. But the law, as it stands, makes it clear that there is no obligation on the part of a mainstream school to take notice of those wishes. This situation for pupils transferred to alternative provision sits

³⁵ [2007] EWCA Civ 592; [2007] E.L.R.. 454.

extremely uneasily with an education system that for all other pupils emphasises ‘choice’. Although many of these students have behaved extremely badly, it surely does not follow that they should sacrifice all rights to choose the kind of education they should receive.

There is a further tension in the process of referrals and managed moves discussed above. In the very act of transferring a pupil to alternative provision – by whichever means – the school is generally preferring the interests of the school (i.e. the rest of the pupils in the school) over those of the student being transferred to alternative provision. Again, the survey made clear that this is not always the case: in many instances the pupil will be far better off in some form of alternative provision, for example on a vocational course with a more adult ethic, than by continuing at school. But the fact remains that the school no longer wishes to have the student on site, and under section 29(A) of the Education Act 2002, a referral can be for the purpose of improving a student’s behaviour. So given that the school is to some degree already overlooking the interests of a student being referred to alternative provision, why should the school have sole legal right to dictate what form that alternative provision will take? There is no good reason for this situation to continue.

As an illustration of the lack of rights accruing to students sent to alternative provision, consider the following case, *C v The London Borough of Brent*.³⁶ In this case, C was involved in a serious incident of violence against a teacher and a student. She had assaulted a boy, and then refused to calm down when instructed to by the teacher. She hit the teacher with a bell, her fist, and threw coffee and a vase at him. There was evidence that C had been bullied over a period of time, and C claimed she had reached the end of her tether and had exploded. The incident was, however, sufficiently serious that the head teacher decided to permanently exclude C, and the decision was upheld by both the governors of the school and the independent appeal panel. The issue in this case was the suitability of the educational provision that the local authority provided to C under its duties in section 19(1) and 19(6) of the Education Act 1996 (see above for details). The London Borough of Brent decided that C should be sent to a PRU, but after a visit, C and her parents were extremely unwilling to attend the PRU. In the Court of Appeal, Lady Justice Smith summarised the situation as follows:

They agreed to pay an introductory visit to the PRU. They did so on 20 October, and they then met Ms Siobhan Crawley, the head teacher. During the visit it appears that Ms Crawley explained that some of the pupils of the unit had been in quite serious trouble, for example for carrying knives. C and her father were noted to say that they were shocked at what they saw and heard. Their view was that this unit was quite unsuitable for C. The pupils there were very violent, disruptive and badly behaved. C claimed that some of the pupils had verbally abused her even during her visit. The parents’ stance was and is that C is not violent or disruptive, rather she is vulnerable and needs a protective environment, quite unlike what the parents perceived to be the environment at the PRU. C was said to be very frightened at the thought of having to go to the PRU even for a short time.

Nevertheless, the *legal* question was whether the local authority had fulfilled its duty to provide ‘efficient education suitable to his [or her] age, ability and aptitude and to any special educational

³⁶ [2006] EWCA Civ 728.

needs' (section 19(6) of the 1996 Act). The Court of Appeal held that the local authority had complied with its statutory duties. The fact that C was very frightened of going to the PRU was irrelevant. The second judge in the case, the Master of the Rolls Lord Justice Laws, made clear the legal position by saying that for reasons of law: 'It is, I think, of the first importance to recognise that the decisions falling to be made as to the provision of education facilities for C after she had been excluded were quintessentially for the local education authority to make.'

There is, moreover, little solace to be found for these students in the European Convention on Human Rights. In successive cases lawyers for excluded children have tried to argue that local authorities and schools have breached the right to education under Article 2 of the First protocol of the convention: 'No person shall be denied the right to education'. Repeatedly, perhaps as a backlash against the feeling that too many rights were being claimed under the convention, the courts have found that there was no breach of the right to education. Only in the most extreme cases, where no education has been offered at all, have the judges been willing to find that the right education had been breached. The unfortunate principle thereby established is that as long as *something* resembling education is provided, that is enough, regardless of its quality.³⁷

The extent to which students transferred to alternative provision lack any rights at all becomes increasingly clear. If they are permanently excluded, they have no right to influence the form of alternative provision they are allocated; they must accept whatever the local authority provides. If an unsuccessful attempt to permanently exclude a pupil has taken place, the school can effectively exclude the pupil using a referral to alternative provision or by an internal form of exclusion in any case. And if a student is being asked to consider a managed move, they can be threatened with a permanent exclusion or compulsory referral if they refuse to cooperate with the managed move. All the rights and decision making power lies with the authorities, and none with the excluded children themselves.

***Back on Track* and the 'Secret Garden' of independent providers**

The previous Labour Government's White Paper, *Back on Track*, contained a number of positive proposals for improving the alternative provision sector. A common problem for alternative provision projects is the poor transfer of information about students who are transferred to them. For example, when a mainstream school refers a student to alternative provision, the school is not *required* to tell the IAP if that student has a statement of special educational needs (SEN). There are in fact no legal requirements as to the information that a mainstream school must provide to an alternative provider. This occasionally leaves some projects struggling to find out basic information about the students being educated at their project, such as the home address or telephone number of the pupil's parents or guardians. *Back on Track* recognised the ridiculousness of this situation and proposed a common format for referrals with requirements for information transfer during the process. This is entirely positive, but does not appear to have been implemented as of yet.

³⁷ In addition to the cases already mentioned, see *A v Head Teacher and Governors of Lord Grey School* [2006] 2 AC; *Belgian Linguistic Case (No 2)* 1968 I EHRR 252; and *S, T and P v Brent London Borough Council* [2002] ELR 556.

There are further issues relating to SEN that the responses to the survey highlighted. Many LAs allocate additional funding to schools for each student with a SEN statement of a sufficiently serious nature, in order to assist the school in ensuring that the legally binding requirements within that statement are met. Where students are referred to alternative provision, and so remain on the roll of the mainstream school, the LA will continue to transfer the relevant monies to the mainstream school. But this funding may not be transferred from the mainstream school to the alternative provider – normally, only the standard per-pupil fee is payable by the mainstream school to the alternative provider. One LA coordinator told us that the LA's SEN funding was transferred appropriately within her LA, but only because she was the SEN coordinator in addition to being the alternative provision coordinator. In other LAs, the funding for the SEN may remain with the mainstream school despite the fact that the student is educated off-site at another institution. This is clearly a misallocation of funding that ought to be remedied in future reforms of the sector.

The most serious problem with *Back on Track*, however, was a knee-jerk requirement that all independent alternative providers register as independent schools. This requirement is to be found in the Department for Education's guidance³⁸ accompanying the white paper, which in line with the Education and Skills Act 2008, requires that any institution providing education for at least 15 hours a week, during the normal school year, must be registered as an independent school.³⁹ It is a criminal offence to operate such a school without it being registered, punishable by up to a year in prison and a large fine.⁴⁰

The problem is that almost none of these independent alternative providers are in fact registered as independent schools. For example, as part of the announcements accompanying *Back on Track*, the Government launched the National Database of Providers of Alternative Education. There was no obligation for any alternative providers to join the register, and the department undertook no auditing of the projects that joined the register. As is made clear on the department's website: 'The DCSF is not responsible for the quality and conduct of any of the providers registered... commissioners [of alternative provision] must ensure that private providers are registered with the DCSF as independent schools, where appropriate. Local authorities and schools should not offer contracts to a provider which should be registered as an independent school but is not registered as such. Any provider which operates in these circumstances is acting unlawfully.'⁴¹

To illustrate the problem, we compared the projects registered on the National Database of Providers of Alternative Education with the Government's official list of registered educational institutions, both state and independent.⁴² This list, available from the Government's Edubase website, contains details of all educational institutions that are registered in any way with the Government. But we found that only 70 of the 350 projects in the alternative education database were registered with the Government. It seems likely, therefore, that some of those 80% who do not appear to be registered with the Government are operating schools illegally. A proportion of those projects are likely to provide

³⁸ *Commissioning alternative provision: Guidance for local authorities and schools*, Department for Education, 2008.

³⁹ Section 92 of the Education and Skills Act 2008. The relevant number of hours is 12.5 where the children in question are under 12 years of age.

⁴⁰ Section 96 of the Education and Skills Act 2008.

⁴¹ See <http://www.teachernet.gov.uk/wholeschool/behaviour/altprov/database/n> [last checked on 09/07/10].

⁴² This list is available from EduBase, the Government's database portal: <http://www.edubase.gov.uk/>

only part time tuition, falling within the 15 hours per week stipulation of the 2008 Act, and therefore not requiring to be registered. Nonetheless, it is clear from the survey that there are many full-time projects and some of them will fall foul of the law as it currently stands. Given the good work that many of these projects undertake, this is an absurd situation for the Government to have created.

The reason why these projects have not registered as independent schools is that it is extremely difficult for IAPs to comply with the relevant regulations for independent schools.⁴³ The regulations are simply too stringent for the kinds of projects operating in the alternative provision sector, largely because the regulations were drawn up with very wealthy private schools in mind, who have the resources available to meet these regulations. It is also likely that the stringency of the regulations was intended to prevent new independent schools being established.

The specific reasons why independent school status for these projects is inappropriate are as follows. The first problem is that independent schools are required to be registered prior to the opening of the school. This requirement clearly cannot be met by the thousands of independent alternative providers already operating in the UK. More seriously, independent schools require D1 planning permission, which is very hard to acquire, and are required to fit into a local authority's traffic plan, thereby giving the local authority an effective veto over the opening of the school. Moreover, many of the small independent alternative providers are based in unusual accommodation, such as community centres. These venues have the advantage of cost-effectiveness and informality which may be positive for students sent to alternative provision, but such sites would certainly fail any full health and safety inspection by Ofsted. The fundamental problem is that this level of regulation markedly reduces the dynamism of the alternative provision sector, which according to the responses to our survey was one of its strengths.

For example, one LA coordinator told us about her experience commissioning alternative provision in the following terms: 'There's always up and coming projects, different and new providers, who're always innovating to do something new. I spend a lot of my time networking with them so I can offer those projects to the students in the borough, and tell the schools about them so they can offer them too.' Another LA coordinator told us that the provision in the borough was previously based largely in colleges of further education, but that they have now switched to using independent projects as the main providers in their borough. They told us that the problem with their local college of further education was that they were unable to provide a curriculum that offered a mix of both GCSE subjects and vocational elements. A new independent company, however, started in the borough and offered both elements in a single course: 'Since this company does both, so we use them instead of the college. They are very good. They've got people into NESCOL, Lambeth College, you know, the proper places where people do vocational qualifications and get good jobs out of it.' Some of the LAs we spoke to were clearly rather concerned at our mention of this requirement to be registered as an independent school. One response to a question on this issue elicited the response: 'You're not reporting back to the Department for Education, are you?'

A further problem is that by requiring the same standards of alternative projects as of mainstream independent schools, the whole point of having an alternative sector is defeated. If the 'secret garden'

⁴³ Civitas' experience in setting up the New Model School Company, for example, was indicative of the problems of registering as an independent school.

of alternative provision is simply made to operate in the same way that mainstream schools operate, it eliminates any sense that the sector is 'alternative'. For example, Ofsted lay great importance upon the *documentation* of the student learning process, to the detriment of informal methods of feedback, such as speaking one-to-one with a student.⁴⁴ Yet it is exactly these latter forms of personal, informal interaction that account for the successes of alternative provision. To take another example, Ofsted expect teaching in independent schools to be differentiated; that is, to set different tasks according to the ability of the students in the class. But this precludes the whole class working towards a single goal, and risks students being labelled as either low-achievers or high-achievers within a class according to the difficulty of the work set by the teacher. Clearly, such labelling would be highly undesirable amongst vulnerable children who are likely already to have behavioural problems or vulnerability issues.

Although independent school status is inappropriate for independent alternative providers, there is a need for greater accountability of the sector.⁴⁵ If the independent sector projects that some LAs use were subject to rigorous assessment, one LA coordinator told us, 'I think that some authorities would think twice about placing their children with them... some of them have accommodation that is not being as good as it needs to be, staff are not properly qualified, and there's not enough monitoring from the school.' *Back on Track* described the problem in the following way: 'The accountability framework for Pupil Referral Units and alternative provision is seriously under-developed compared with mainstream schools. Much of the performance data that are available for schools are simply not available for this sector.' The LA coordinators we spoke to were in general keen for reform of the sector to take place – 'the whole area needs to be looked at', one told us. Independent school status for these projects is, however, as we have argued, inappropriate. Below are our proposals for reform.

A reformed system of exclusions and transfers to alternative provision

Before discussing the proposed new system, it is worth briefly re-examining the role of permanent exclusions, the 'official' means of exclusion from mainstream schools, in the education system today. Clearly, permanent exclusion is being used less and less by mainstream schools, as a result of political pressure to exclude fewer pupils and out of a desire to intervene earlier in a pupil's educational career with a less punitive process. As a consequence, permanent exclusion is more often useful as a threat than as a tool that schools will actually use. In other respects, permanent exclusion is a red herring, in the sense that where it is attempted but a pupil successfully appeals against the decision,

⁴⁴ These examples are drawn from de Waal, A., *Inspection, Inspection, Inspection!*, Civitas, London, 2006.

⁴⁵ There have been some ad hoc attempts to regulate the sector. In 2009 the Government Office for London facilitated London local authorities to agree a Memorandum of Understanding on the principles under which alternative provision ought to be commissioned. This led many LAs to undertake 'quality assurance' of the alternative providers that they send their students to, although there is no legal requirement to do so. For more details see *The London Quality Assurance Framework for Alternative Provision (14-16 year olds) - A Coordinated Approach*, Government Office for London, May 2009. One of the local authorities, referring to this document, commented that the move to using independent alternative provision had occurred over the last ten years, and 'now everyone is trying to get things done properly'.

the school can effectively exclude the pupil anyway – making a mockery of the whole appeals process associated with permanent exclusion. Permanent exclusion, we find, serves no useful purpose and broadly in line with the proposals of other think tanks, we believe it should be abolished in favour of a new system of transfers to alternative provision.⁴⁶

However, the lesson of the previous Government's attempts to reduce exclusion is that where schools wish to remove a pupil from the school, they will go to some lengths to do so. The importance that schools place upon being able to enforce moral boundaries is, it seems, a high one – the teachers in the above court cases were willing to go on strike, in effect, to protect those boundaries. And the unintended consequence of the pressure to reduce permanent exclusions was the spawning of an entire industry to cater for those students who are subject to the effective exclusions described above, in place of permanent exclusions. This cannot be a sensible way to operate an education system.

Therefore, our proposal is that once a pupil is placed on the roll of a secondary school it should not be possible for the pupil to be removed from the school roll, except in the case of a transfer to another school initiated by the parents of the child.⁴⁷ In a situation where a school believes that it can no longer cater for a student, it should be given additional funding by the Government to pay for specialist provision for that young person. The threshold required for a school to take this decision would be lower than for a permanent exclusion, allowing for early intervention to deal with a pupil's problems before they develop into more serious problems. To balance the school's right to exclude, the pupil and their parents should have effective rights to choose a form of specialist provision, whether it be a course in mechanics, a sports based curriculum, or an academic route at a college of further education.

This process should begin as soon as a school wishes to remove a student from normal lessons. Internal exclusion units, it is clear, can be just as much an exclusion as an exclusion to an off-site unit. Where a school wishes to remove a student from normal lessons, a meeting of the professionals involved with the pupil should be held where the pupil is given a range of options that he or she can choose between. The only right that the school should possess is to require that the student be educated off-site, and therefore away from the other staff and students at the school. The pupil could then opt for a dedicated internal exclusion centre, if the school were happy with this, in order to keep in contact with his or her friends. If the school insisted on off-site provision, then the pupil should have effective rights to choose what form that provision should take. One of the rights possessed by those young people should be that they are able to request a managed move to another mainstream school, and the school should be bound to attempt to facilitate this. Although the Government put a

⁴⁶ Sodha, S., and Margo, J., *Ex Curricula*, Demos, London, 2010. Reed, J., *Towards Zero Exclusion: an action plan for schools and policy makers*, IPPR, London, 2005.

⁴⁷ This would account for situations where the parents of a child wish the child to move schools; where the family is moving home; or where other circumstances (such as illness or disability) require that the pupil is educated elsewhere. It would also include the case of the pupil requesting a managed move to another mainstream school. Note also that we confine our comments here to secondary education. Exclusions from primary schools are an altogether different and more tragic phenomenon that may require different solutions from those considered here. In particular, excluding a young child from a mainstream school is far more damaging than excluding an older child of secondary age.

stop to compulsory requirements on schools to accept managed moves into schools⁴⁸ – the so-called ‘one out, out in’ rule – there is surely a need to find some means of encouraging schools to take on students who require a fresh start, perhaps through additional funding attached to that student. To deal with unusual and bizarre requests on the part of the student, a test of reasonableness could be imposed upon the choices available to the student (within the stipulated budget). Upon a dispute, the issue could be dealt with by a tribunal such as the SENDIST tribunal which currently deals with cases regarding appropriate provision for disabled children. The legislation should be drafted in such a way to make a finding of ‘unreasonableness’ the exception, so that the decision of the child and his or her parents prevails in the vast majority of cases.

Currently, students in alternative provision receive starkly differing levels of funding. At a PRU, a student will have up to £15,000 spent on his or her education.⁴⁹ But where a student is referred to alternative provision, this must be paid for out of the general funds of the school, and so the school is reluctant to pay much more than the roughly £4,000 per pupil that it receives from the Government. Given that, as the evidence above shows, referrals are being used in place of permanent exclusions there would seem to be no good justification for such disparities in funding. At PRUs, for example, statistics show that the incidence of pupils with special education needs is six times that of mainstream schools.⁵⁰ There is, presumably, a similar rate of special educational needs amongst pupils who are referred. Therefore, we propose that the same level of funding that PRUs receive – £15,000 per head – should be made available to mainstream schools for the purpose of purchasing alternative provision for the pupils it wishes to exclude, and that if there is any surplus, that this is returned to central funds.

It is true that not all the pupils in alternative provision require this level of funding. There are a range of reasons for pupils to be in alternative provision. But the evidence above shows there is some overlap between those students being permanently excluded and those subject to referrals, and that such pupils tend to have an extremely high incidence of special educational needs. It is, therefore, trite to argue that if independent alternative providers can cater for the same students as PRUs for far less funding, then all forms of alternative provision should be able to do likewise. These are the most vulnerable children in our education system, and many of them require one-to-one tuition in basic English and mathematics; a range of specialist support from speech and language therapists to anger management coaches; and given the deprived backgrounds of many pupils in alternative provision, funding simply to pay for extra trips and experiences aimed at broadening their horizons. If the funding is not available, then these resources simply will not be provided. This seems likely to be the situation at many of the independent alternative providers currently working with students who might otherwise be at PRUs. Whatever the virtues of independent projects, this is one of the tragedies of the clamp-down on permanent exclusions that began in 1999.

To regulate the independent alternative providers, in place of the knee-jerk requirement that they register as independent schools, we propose that those independent projects should be inspected by Ofsted as subsidiaries of the mainstream school referring students to the independent project. The

⁴⁸ Sharp, H., “‘One in, one out’ school exclusions rules on hold”, *BBC News Website*, 12 August 2010: <http://www.bbc.co.uk/news/education-10949644> [last checked 29/10/10].

⁴⁹ DCSF, *Back on Track*, 2008.

⁵⁰ *Schools, Pupils, and Their Characteristics*, January 2010.

independent projects would therefore only be inspected when a mainstream school was inspected. Ofsted could assess the mainstream school on the appropriateness of its exclusion decisions, and provide a grade for the school's 'inclusiveness'. Schools that wished to have an extremely low threshold for excluding its pupils would still be free to exclude, but this practice would be noted in any Ofsted inspection, and would provide a source of pressure to ensure that its exclusion decisions were, in fact, just and appropriate. Schools could also be assessed on the level of care and attention provided to the students whilst they are with the alternative providers, who after all remain on the roll of and are the responsibility of the mainstream school.

There are, in fact, models for this approach already in existence. New Vision PRU in Hackney operates a 'virtual PRU', which is discussed in *Back on Track*. In this arrangement, New Vision PRU do not provide any education or training directly, but instead send its students by means of a referral to a range of independent alternative providers. These providers are inspected as part of New Vision PRU's Ofsted inspection, whilst the projects retain their independence. In its 2007 inspection, Ofsted described New Vision PRU as 'new, innovative and visionary'.⁵¹ This approach would, moreover, allow schools to continue using the coordinated approach seen in some LAs. Schools would be free to coordinate with the local authority and other schools to gain economies of scale and to share expertise. It is, however, true that some of the benefits stemming from the centralised approach in these local authorities may be lost. It is important, however, that the lines of responsibility for these pupils is made clear. Given the expected growth in academies being encouraged by the Coalition Government, who are independent of the local authority, the coordinated approach may no longer be possible in the future. Importantly, this approach would also have the benefit of neutralising the charge against academies that their rates of permanent exclusion are too high - a process which at present makes those permanently excluded students the problem of the other schools and PRUs in the local authority. Under the proposed system, the students any academy wished to exclude would remain on the roll of the academy and would still be the responsibility of that academy.

A further beneficial effect of this change would be to reduce the large number of young people 'missing' from school rolls mentioned above. The Government has already legislated to reduce the amount of time in which a pupil is allowed to receive no education during the process of an exclusion.⁵² By making the school responsible for the commissioning of alternative provision, which would also allow for earlier intervention, this gap could be almost eliminated.

Conclusion

It is salutary to ponder whether the quantity of effective exclusions that we have highlighted in this paper will, when the statistics are finally collected, in fact, be larger than the number of young people who were permanently excluded prior to the introduction of restrictions upon permanent exclusions. Indeed it seems likely to be the case that the recent headlines regarding permanent exclusion have been entirely misleading.⁵³

⁵¹ Ofsted inspection report for 'The New Vision PRU at The Learning Trust', unique reference number 134612.

⁵² So-called '6th day provision', whereby schools or local authorities are obligated to provide alternative provision by the 6th day of an exclusion.

⁵³ See, for example: Shepherd, J., 'Sharp fall in pupils expelled from school', *The Guardian*, 29 July 2010.

It was only in 1992 that statistics on the number of permanent exclusions were first collected, and five years later in 1997 that the effort to crack down on their number began. One must hope that when statistics on managed moves and referrals are finally collected, there is not an outcry and bureaucratic crackdown similar to that seen after 1999. What is required is a much more honest approach to exclusions. It is a fact that some young people will not succeed in mainstream schools and will be much happier and more successful in other institutions. Greater acceptance of this fact amongst the liberal political classes would go a long way to improving the lot of the troubled young people who do not actually benefit from being educated in a mainstream school.

Perhaps the most important general observation regarding exclusions was made by Professor Parsons in his 1999 book.⁵⁴ Parsons argued that the greater the pressure upon schools to achieve high academic standards, imposed through league tables and such like, the greater the pressure upon head teachers to exclude their most difficult students. This pressure to achieve high examination results, as opposed to favouring the rounded development of all the students in a school, skews teaching priorities. It undermines the professional and inclusive ethic of teachers who would normally wish to do the best for all their students, rather than the majority who can do well in their exams. For example, the survey above made clear that low-achieving students who are unlikely to contribute to the league table rankings of a school are much more likely to be referred to alternative provision. The school is thereby free of any bad behaviour of those pupils, and anything that those pupils achieve in alternative provision is regarded as a 'bonus' for that school. Conversely, the incentives for schools to hang on to intelligent students, no matter how bad their behaviour, is strong. This is hardly a just state of affairs, but the fundamental source of this problem is the pressure on schools to achieve high examination results. If it is a more inclusive education system that is desired, then it is the measures undermining the professionalism of teachers that should bear the wrath of reformers, rather than the fact of exclusion itself.

⁵⁴ *Education, Exclusion and Citizenship*, 1999.