

Children's Law Centre

BRIEFING

RESTRICTIVE PRACTICES IN EDUCATION SETTINGS

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Children's Rights
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Introduction and Background

The Children's Law Centre (CLC) is an independent charitable organization which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and where every child can achieve their full potential.

We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we provide a free legal advice, information and representation service. We have a dedicated freephone legal advice line for children and young people and their parents as well as a Live Chat service for young people.

Since its establishment in 1997, CLC has provided free legal advice and information as well as strategic legal representation on a growing and increasingly complex range of issues affecting children and young people under the age of 18.

CLC has developed considerable expertise in Special Educational Needs and Disability (SEND) Law across our advice and legal team and through employment of a SEND Specialist Legal Adviser. SEND casework has become a core part of CLC's work, due to an ever-increasing level of demand for support for children to enable them to access their right to education.

Importantly, CLC was founded upon the principles of the United Nations Convention on the Rights of the Child (UNCRC) and leads for the NI NGO sector in coordinating the submission to the United Nations Committee on the Rights of the Child to inform their monitoring and reporting work on the UK's compliance with children's rights standards.

Restrictive Practices – A Human Rights Issue

Restrictive practices in education settings is primarily a human rights issue, engaging the protection of the law by virtue of the Human Rights Act 1998¹, which incorporates the European Convention on Human Rights (ECHR) into domestic law. Relevant protections include, but are not limited to:

Article 3: Prohibition of torture or inhuman or degrading treatment or punishment

Article 5: Right to liberty

Article 8: Right to respect for private life

In tandem with –

Article 14: Prohibition of discrimination (e.g. disability)

In terms of minimum children's rights standards, the United Nations Convention on the rights of the Child (UNCRC) informs the application of human rights, alongside the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

Children's human rights are not setting-specific and apply regardless of a child's characteristics, background or status. They belong to all children, all the time, no matter where they are and no matter which service-provider is responsible for decisions.

Children currently do not enjoy the same standard of legal protection in education settings as they do in other settings. In CLC's view there are three key reasons for this:

1. Education legislation in relation to the use of force against children in education settings remains live, within Part 2 of the Education NI Order 1998, which governs discipline in schools. In particular, article 4 of this legislation² is, in CLC's view, incompatible with human rights;
2. Our education system is behind other systems, such as health and social care, in terms of the development and implementation of policies and practice which seek to recognize, record, monitor, minimize and eliminate the use of restrictive practices; and
3. Inclusive culture and practice and the policy of inclusion within education

are under-funded and insufficiently prioritised, so have not begun to approach minimum human rights and equality standards in Northern Ireland.

Parental Concerns

It is important to recognize the courageous and sustained efforts of affected families in coming forward into the public domain to highlight serious concerns about the use of restrictive practices in education settings. Through the efforts of parents and carers, this issue has been the subject of significant public debate and scrutiny for at least the past 6 years.

It is therefore extremely disappointing that legislative reform and statutory guidance are not yet in place to adequately safeguard children and young people and to support staff in education settings.

Delay in Legislative Reform

A key issue is the lack of legislative reform to date. There has been work ongoing for a significant number of years based on the understanding that legislative reform is necessary and shall be taken forward.

Issues around “restraint and seclusion” have been ongoing at a policy level since around 2019 with organisations (such as BASW³) raising concerns about the use of restrictive practices in education settings. For at least the past 6 years and more this issue has come to the fore within the public domain. The UN Committee on the Rights of the Child raised specific concerns in its last 2 sets of concluding observations (2016⁴ and 2023⁵) with the UK repeatedly falling short in terms of implementation of children's rights.

Education settings have been operating in a regulatory vacuum, with potentially unlawful restrictive practices becoming normalized because they are not recognized as such and are not always consulted upon or documented to enable concerns to be raised. Health staff, some of whom work in education settings, do have regional guidance as well as a human rights-based framework (Three Steps to Positive Practice⁶).

In 2017, NIPSO's education strand of work came onstream and they observed a flow of complaints about restrictive practices in schools. They conducted a strategic enquiry (in April 2019), noting concerns, and later produced an Overview Report on the use of Restrictive Practices in Northern Ireland Schools (2021) including a case study of a complaint about incidents concerning a 6-year-old child in a mainstream class with potentially unmet special educational needs who had been brought to an 8 x 4 foot room for the purposes of seclusion, by untrained staff, without parental knowledge and without any relevant record-keeping.

Another parent, Deirdre Shakespeare, raised issues publicly in June 2019 after a long struggle in trying to resolve a complaint about ill-treatment of her 5-year-old autistic and non-verbal son, Harry, who was restrained unnecessarily in a wheeled chair with foot straps and a lap belt within a special school setting. In October 2024, NIPSO released a report of an investigation⁷. There is a focus within the report on failings emanating from lack of health/education joint working.

The Committee for Education heard harrowing evidence from PABS and ICARS (parent-led organizations) in February 2021⁸ about the harm caused to children, predominantly young, non-verbal male children with Autism.

In February 2021 the NIHRC made a submission to the Education Committee on the “Human Rights Implications of Current Guidance Relating to the Use of Restrictive Practices in Schools”.

On 10th May 2021 the Department of Education released an interim circular (2021/13) highlighting disability rights and giving direction that children should never be locked in a room or left unaccompanied and must be able to leave when they want to⁹.

In May 2021, the Education Committee brought forward a motion calling for urgent action on the development of new guidance¹⁰.

In December 2021 the Northern Ireland Commissioner for Children and Young People (NICCY) released a report entitled “Neither Seen Nor Heard”. CLC was part of the Advisory Group for this collaborative piece of work¹¹. The report made a series of recommendations, having surveyed senior education staff and having carried out focus groups with parents and professionals.

Following this, the Department undertook a strategic review of restraint and seclusion, reporting on 25th March 2022¹². CLC was a member of the reference group for this review and the workflow was positive, inclusive and constructive. Six recommendations were made which were endorsed by the Minister of Education at the time, Michelle McIlveen MLA. These were, in summary:

- a. Repeal art 4(1)(c) of the Education (NI) Order 1998 at the earliest legislative opportunity.¹³
- b. The Department of Education should issue guidance for the year 2022/23 to protect pupils from mental and physical abuse.
- c. Sets out what the guidance should contain, which aligns broadly with NICCY's recommendations, including maximum alignment with Department of Health guidance.
- d. Department of Education should continue to work with the Department of Health on guidance about medical and equipment needs in schools.
- e. ETI has a role in checking that the guidance is being followed in schools.
- f. Periodic review and reporting on the use of restrictive practices

These recommendations are now over three years old. Legislative reform has not been taken forward, and guidance has not been issued to schools as recommended by the Department in its own strategic review.

CLC has worked with the Department of Education throughout this time

on a reference group and now more recently has participated in a “Task and Finish” group. CLC has responded in detail to a consultation on a draft of the proposed statutory guidance and we have raised a range of concerns within that response¹⁴.

Regardless of any recommendations or guidance (or the absence of guidance), education staff remain subject to the rule of law, including under the Human Rights Act 1998 and SENDO 2005 (protection from discrimination in schools).

The Department's Task and Finish Group which commenced in December 2023 has not run smoothly. The Royal College of Nursing (RCN), who were instrumental in drafting the Health guidance and have much expertise to offer, have left the group due to human rights implications of the current trajectory and the implications for members of the health workforce within education settings.

CLC, in the role of “critical friend” has corresponded with DE in January 2024 to seek assurances and the Department has responded. CLC is considering how best to protect and progress children's rights, mindful of the time and effort invested to date; the importance of collaboration in developing this work and the gravity of the issues involved for the most vulnerable children and families as well as for education staff.

Lack of Legislative Reform – Retaining a Policy on Using Force Against Children

It should be noted that the terminology, “reasonable force”, predates The Special Educational Needs and Disability (NI) Order 2005 (SENDO) and the UNCRPD. It is not human rights compliant and disproportionately adversely affects disabled children. We would not contemplate having a “reasonable force” policy in the workplace. Force is the entirely the wrong terminology, particularly in the context of young disabled children where there is a significant power imbalance with adult decision-makers. Guidance that flows from “reasonable force” provisions within the current legislation will therefore always be problematic.

The Department has stated within its Children and Young People's Strategy 2020- 2030 that it intends to progress children's rights. Work in the area of restrictive practices has clear potential to progress children's rights in this jurisdiction. That potential is in danger of being lost and replaced with a significant and serious regression in children's rights should the Department step back from the position that legislative reform of article 4 of the 1998 Order is required.

The UNCRC Committee, in its concluding observations of June 2023, in relation to violence against children, recommended that the State Party should “take legislative measures to explicitly prohibit, without exception, the use of solitary confinement, isolation, seclusion and restraint as disciplinary measures in schools and alternative care and health-care settings.”

The UNCRPD Committee in paragraph 37 of its concluding Observations of 2017 has recommended that restrictive practices ought never to be used for reasons related to disability.

The Department, in delaying on the necessary legislative reform in relation to school discipline over a period of years, has in essence reverted to designing a policy based on the “use of reasonable force,” as opposed to the minimisation and elimination of restrictive practices. This move back into the arena of “force” can be clearly seen in the draft guidance upon which the Department consulted in 2023¹⁵.

The language and concept of “force” being used against children and forming part of government policy is, in CLC's opinion, in breach of the Department's human rights obligations, particularly in the context of an evidenced need for reduction and elimination of restrictive practices. In that context it is notable that in the Department of Health's regional guidance, the only references to the word “force” relate to the need to protect children from coercive or physical force.

Children's Services Co-operation

A restrictive practice is a restrictive practice, no matter where it occurs or who carries it out. The child's human rights remain applicable, regardless of the environment they are in. As CLC has stated in our consultation response to the Department of Education's draft statutory guidance¹⁶, these issues are cross-departmental issues affecting the rights and wellbeing of children and young people, which require the Department of Education and the Department of Health to co-operate in line with their statutory duties under section 2 of the Children's Services Cooperation Act (NI) 2015¹⁷.

Failure of departments to co-operate effectively in design and implementation of regional policy and legislation on elimination of restrictive practices within children's services, including education, leads to gaps in protection for the most vulnerable disabled children which will have the opposite effect to that intended under the 2015 Act.

It is essential that Department of Education's statutory aligns with Department of Health regional guidance in terms of **scope** i.e. it must cover the same range of restrictive practices generally at a high level using the same set of **standard definitions**¹⁸.

Ban on Seclusion

Using a child-rights based framework, seclusion should never be used as an intervention in an education setting. CLC's position is that consultation and co-operation with colleagues in the Department of Health is essential in relation to this particular issue. Health colleagues with relevant expertise on the subject of seclusion should be enabled to enrich the Department's understanding of what this term means and why the Department should refrain from producing education guidance on "enforced seclusion" (apart from prohibiting it) and should delete this use of terminology from any final guidance which may be produced in due course.

Recording Reporting and Monitoring

Restrictive practices, whether planned or unplanned should be required by the Department to be documented and monitored by schools. Clear direction is required in this area. Many schools already have strong policies and practices in place in relation to documenting any health, care and safeguarding issues for children on a day-to-day basis. However, as documented in the reports referenced above, not all schools have the necessary skills and training to recognise a restrictive practice and to therefore record this. It is essential that all schools, whether mainstream or special are confident as to what is required and that no steps are taken which may result in lesser recording of restrictive practices in education. Poor processes will leave schools open to legal liability across a number of potential domains (including negligence). Clear direction on recording and monitoring processes for all restrictive practices which occur will enable staff in education settings to be confident in their risk management and children's rights compliance.

Mandatory Standardised Training

It is absolutely essential that all education staff receive mandatory standardized training and have regular refresher training on human rights and equality including the implications of the use of restrictive practices and why and how these should be reduced and eliminated.

Equality Data

In formulating and implementing any policy, the Department, in addition to its obligation to act in a manner which is compatible with human rights, is subject to mandatory statutory equality duties under section 75 of the Northern Ireland Act 1998, in particular, the duty to have due regard to the need to promote equality of opportunity.

Evidence to date, including compelling testimonies provided to the Education Committee by parents, carers and representative groups, suggests that young disabled children, particularly non-verbal male children, are particularly susceptible to harm caused by disproportionate use of force in education settings.

It is essential that systems to collect relevant disaggregated equality data around use of restrictive practices are put in place urgently. Without baseline data, it is impossible to see whether or not the policy is effective in reducing and eliminating restrictive practices and whether due regard has been had to the need to promote equality of opportunity.

What Am I Going to do Tomorrow?

The production of statutory guidance represents a significant opportunity to raise awareness and to train, support and empower staff who work in education settings, by providing a rights-based framework to guide them, to keep children safe and protect staff from legal liability, in an area which can be both legally and operationally complex.

Throughout the development of this area of work, CLC has had the benefit of liaising both with families and with colleagues who work with or on behalf of children in education settings and their position has consistently been in tune with CLC's position. That is, a children's rights-based framework is the way forward, with restrictive practices being used only as a very last resort, for the shortest possible time in order to keep children and others safe from serious harm. Recording and monitoring of any restrictive practices is essential for all involved. Transparency and partnership with parents, carers and interested professionals involved should be the norm. Regular training and support for education leaders and their staff is essential.

There has consistently been consensus that legislative reform is required and indeed the Department's own strategic review report recommends this. The legislative reform has not been taken forward and it is unclear why this is the case. This lack of clarity is undermining the understanding and collaboration upon which years of work has been based.

The reform of legislation and provision of statutory guidance, alongside regular training and access to support will only be the start of a journey. Our education leaders are telling us that they are often working in environments which are not suited to the needs of the pupil population, are overcrowded and are extremely difficult to manage safely on some occasions. They are working on a day-to-day basis trying to create solutions to very complex situations, often reporting they feel unsupported. The question will always be "what am I going to do tomorrow" to keep everyone safe and ensure children reach their full potential?

If environmental issues are preventing forward movement in terms of the elimination of the use of restrictive practices, or worse still, causing an escalation of the use of restrictive practices, then environments must urgently and systematically be redesigned, improved and adapted to enable equality of access to inclusive education for all children and young people.

As is clearly documented in all of the evidence presented, it is extremely distressing, harmful and traumatic for children and their parents and carers when fundamental rights and freedoms of pupils are curtailed or denied.

Summary of Key Issues

In summary, the key issues are:

- Legislative reform is urgently required.
- Restrictive practices are a cross-departmental issue requiring a cross-departmental approach.
- Close alignment with the Health guidance is essential.
- Seclusion should never happen in an education setting.
- Partnership with parents, carers and professionals enables decision-making that serves the child's best interests.
- Recording, monitoring and reporting of restrictive practices is a necessity.
- Collection of disaggregated section 75 data is essential so that the Department can determine and monitor equality impacts.
- Regular mandatory standardized training is required for staff in education settings.

Conclusion

The Department's policy on restrictive practices does not sit alone. The Department cannot bring it forward alone and nor can it act alone. This policy is closely interrelated with a raft of ongoing reviews and transformation processes, including policies around SEND and inclusion as well as health and social care reform.

None of these policies can achieve the desired outcomes in a vacuum or without a legally sound regulatory framework; active, ongoing and effective consultation with affected parties; sharing of good practice; joined up working across departments and sufficient funding allocations, alongside pooling of resources, knowledge and expertise.

CLC have raised concerns with the Department about the direction of travel and despite efforts made to work through the difficulties, significant concerns remain.

Ultimately, it is imperative that the forthcoming statutory guidance will progress children's rights as intended and that the process of legislative reform will commence urgently as had been anticipated by all concerned.

References

- 1 <https://www.legislation.gov.uk/ukpga/1998/42/contents>
- 2 <https://www.legislation.gov.uk/nisi/1998/1759/article/4>
- 3 <https://basw.co.uk/policy-and-practice/resources/basw-ni-policy-statement-concerning-restraint-and-seclusion-children>
- 4 CRC/C/GBR/CO/5. Concluding observations on the fifth report of the United Kingdom of Great Britain and Northern Ireland. July 2016. Accessible at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGBR%2FCO%2F5&Lang=en
- 5 CRC/C/GBR/CO/6-7. Concluding observations on the combined sixth and seventh periodic reports of the United Kingdom of Great Britain and Northern Ireland. June 2023. Accessible at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGBR%2FCO%2F6-7&Lang=en
- 6 <https://www.rcn.org.uk/Professional-Development/publications/three-steps-to-positive-practice-uk-pub-010-731>
- 7 <https://www.nipso.org.uk/nipso/latest/child-unnecessarily-restrained-after-trust-failed-monitor-use-specialist-seating-0>
- 8 Northern Ireland Assembly Committee for Education meeting, Wednesday 24th February 2021. Accessible at: <https://niassembly.tv/committee-for-education-meeting-wednesday-24-february-2021/>
- 9 <https://www.education-ni.gov.uk/publications/circular-202113-interim-guidance-use-restraint-and-seclusion-educational-settings#:~:text=This%20interim%20guidance%20provides%20educational,schools%20from%20the%20Education%20Authority>
- 10 <https://www.niassembly.gov.uk/news-and-media/press-releases/session-2020-2021/education-committee-calls-on-minister-to-urgently-develop-new-guidance-on-restraint-and-seclusion/>
- 11 <https://www.niccy.org/news/ni-pupils-trauma-of-restraint-and-seclusion-revealed/>
- 12 <https://www.education-ni.gov.uk/publications/report-review-restraint-and-seclusion-educational-settings>

13 Note: CLC believes that Part II of the 1998 Order on school discipline needs reviewed and in particular the whole of article 4

14 <https://childrenslawcentre.org.uk/consultation-responses/> - November 2023

15 <https://www.education-ni.gov.uk/consultations/statutory-guidance-reduction-and-management-restrictive-practices-educational-settings-northern-ireland#:~:text=The%20Statutory%20Guidance%20makes%20clear,views%20on%20the%20Statutory%20Guidance>

16 November 2023 - Available on CLC's website - <https://childrenslawcentre.org.uk/consultation-responses/>

17 <https://www.legislation.gov.uk/nia/2015/10/section/2>

18 For the standard definitions, see Page 9, DOH Regional Policy on the use of Restrictive Practices in Health and Social Care Settings and Regional Operational Procedure for the use of Seclusion, March 2023

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