



**RESTRAINT & SECLUSION IN THE
EDUCATIONAL CONTEXT: A LEGAL
PERSPECTIVE FOR PARENTS,
EDUCATIONALISTS AND PRACTITIONERS**

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SCOPE OF TALK

- ▶ Importance
- ▶ What is restraint and seclusion
- ▶ What is a deprivation of liberty
- ▶ Practical points for parents
- ▶ Applicable law
- ▶ Guidance
- ▶ Deprivation of Liberty
- ▶ Recent caselaw
- ▶ Resources

WHY THIS IS IMPORTANT FOR YOUR CHILD, PUPIL OR CLIENT

- ▶ **Fundamental human rights engaged when using restrictive practices/DOL**
- ▶ **Child welfare issue for vulnerable children and young people**
- ▶ **Lack of recording of usage of these techniques in many instances**
- ▶ **Guidance is required for practitioners and parents**
- ▶ **More supervision and vigilance is required to ensure that vulnerable children and young people have their rights protected and welfare promoted**

RESTRAINT AND SECLUSION

- ▶ **Restrictive practices:** limiting a person's freedom of movement or function. This can be through restraint or seclusion
- ▶ **Seclusion** is the placing and keeping of a person (alone) in a room or other space from which they are unable to leave. Inability to leave can arise from exits being locked or obstructed; instruction, or threat to the secluded person not to leave; belief on the part of the secluded person that they are being stopped from or are otherwise not allowed to leave, reluctance or refusal to leave because of fear of doing so
- ▶ Children should never be locked in a room or left unaccompanied and must be able to leave when they wish
- ▶ Current guidance in N Ireland does not seek to define seclusion or indicate what forms of seclusion, if any, are permissible, and in what circumstances

WHAT IS DEPRIVATION OF LIBERTY

- ▶ The use of restrictive practices can in certain circumstances, amount to deprivation of liberty, this can and does occur in school setting
- ▶ *Cheshire West* and *D (a Child)*, day-to-day care arrangements for certain young people are now considered to amount to a deprivation of liberty under Article 5 ECHR
- ▶ If a school deprives/intends to deprive a child of their liberty, this must be legally authorised. School personnel authority or a Statement does constitute authorisation
- ▶ If a 16 or 17 year old lacks the capacity to consent to care arrangements which, in the absence of consent, amount to a deprivation of liberty, then there is a deprivation of liberty for the purposes of Article 5 ECHR whether or not his or her parent consents

DEPRIVATION OF LIBERTY: RISKS

- ▶ There is no appropriate and codified framework for how deprivation of liberty is practiced within schools in Northern Ireland
- ▶ This has resulted in a situation whereby deprivation of liberty can occur, sometimes inadvertently or without full understanding, in certain cases
- ▶ Therefore it can occur without the proper oversight or regulation or guidance being sought

DEPRIVATION OF LIBERTY: THE TEST

- ▶ The leading case on the meaning of deprivation of liberty is **P v Cheshire West and Cheshire Council** [2014] UKSC 19
- ▶ Described as the “*Acid Test*” for deprivation of liberty, two questions are posed applying *Cheshire West*:
 1. Is the individual subject to continuous supervision and control?
 2. Is the individual free to leave?

PARENTS: WHAT CAN I DO AND WHAT SHOULD I DO ON RESTRICTIVE PRACTICES

- Ask for an explanation of what is actually being done to your child, what are the specifics
- If there is terminology used, e.g. safe handling, ask what that actually means in practice
- Ask if there is a school policy on restraint and seclusion and ask to see it
- Ask for what training or guidance is provided to staff members in the context of restraint and seclusion / DOL
- Ask if the school keeps a record of interventions and ask to see it for your child
- Ask if there is pastoral support available to help children who have experienced restrictive practice
- Be alive to changes in your child after restraint or seclusion

HOW TO CHALLENGE DECISIONS AND PRACTICES

- Engage teachers/staff to obtain information
- If necessary make a written complaint to the board of governors at the school
- Raise a safeguarding complaint to the school
- Inform the Northern Ireland Public Service Ombudsman (NIPSO)
- Raise a legal complaint, this is usually by way of judicial review

CURRENT NORTHERN IRELAND LEGAL AND POLICY CONTEXT

Staff of a school may only use reasonable force/restraint:

- ▶ to prevent a pupil from committing an offence
- ▶ to prevent a pupil causing personal injury to, or damage to the property of, any person (including the pupil himself/herself)
- ▶ to prevent a pupil from engaging in any behaviour prejudicial to the maintenance of good order and discipline at the school or among any of its pupils

Article 4(1) Education (Northern Ireland) Order 1998

RESTRAINT

Reasonable force/restraint should:

- ▶ only be used as a measure of last resort
- ▶ preserve the dignity and respect of all concerned
- ▶ never be used as a form of punishment or to make a child behave
- ▶ never deliberately cause pain/injury to a pupil

All instances of reasonable force/restraint ideally should be recorded, parents/carers should be informed and follow up support provided to the pupil and staff involved

No statutory obligation on schools to record restraint or seclusion incidents or to inform parents this is used on their child, although Department of Education guidance notes that informing parents of such incidents involving their children is always advisable

FURTHER LEGAL PROVISIONS

- ▶ **ECHR/HRA**

Sections 3 and 6 of the HRA apply, along with potentially Articles 3, 5 and 8

Article 3 No one shall be subjected to torture/inhuman/degrading treatment/punishment

Article 5 Right to liberty and security

Article 8 Right to personal life and family

- ▶ **CRC: The Committee on the Rights of the Child: inappropriate use of restraint and seclusion is a breach of children's rights which engages a number of articles of the UNCRC, particularly Articles 37, 25 and 19**

RESTRAINT AND SECLUSION GUIDELINES

- ▶ In May 2021, the Department of Education produced interim guidelines providing educational settings in relation to the use of restraint

- ▶ The interim guidance states:

“The issue of seclusion, including Deprivation of Liberty, is being considered as part of the Department’s review and, subject to Ministerial approval, guidance will follow once that process has been completed. Children should never be locked in a room or left unaccompanied and must be able to leave when they want to.”

- ▶ Further guidance due; awaiting an update as to when it will be published

DEPRIVATION OF LIBERTY: AUTHORISATION

- ▶ **Authorisation of a DOL:** The young person must either consent to a DOL (capacity allowing) or legal authorisation be sought
- ▶ **Cheshire West case:** gilded cage, even if the DOL is benign you still need authorisation
- ▶ Sometimes an appeal relating to a statement will come before SENDIST that includes restraint seclusion or a DOL. However, SENDIST can't authorise DOL, and the statement doesn't authorise it
- ▶ A parent can consent to confinement of a child 15 years of age or under
- ▶ A recent judicial review (Re D) concluded that no one can consent to confinement on behalf of a young person aged 16 or 17

RECENT NORTHERN IRELAND CASE

IN THE MATTER OF A MINOR JKL 2021

Key points

- ▶ SENDIST can determine a Statement if there's an outstanding DOL issue, so that doesn't hold up the determination as to whether the Statement is appropriate
- ▶ SENDIST does not address the DOL issue and can't authorise it, approval of a statement by SENDIST does not mean authorisation of a DOL
- ▶ Authorisation of the DOL runs parallel with the Statement review and approval
- ▶ Authorisation is required: school can't provide it, parents can sometimes but need MCA/High Court approval
- ▶ Who makes the application for authorisation: Trust to the Trust Panel in liaison with EA/High Court
- ▶ SENDIST can adjudicate on a Statement while the authorisation process is ongoing but the placement can't commence until the legal authorisation for the DOL is obtained

RESOURCES

- IN THE MATTER OF A MINOR JKL [2021]
- Cheshire West [2014] UKSC 19
- D (A child) [2019] UKSC 42
- [DE Circular 13 of 2021 - Restraint and Seclusion.pdf \(education-ni.gov.uk\) https://www.education-ni.gov.uk/sites/default/files/publications/education/DE%20Circular%2013%20of%202021%20-%20Restraint%20and%20Seclusion.pdf](https://www.education-ni.gov.uk/sites/default/files/publications/education/DE%20Circular%2013%20of%202021%20-%20Restraint%20and%20Seclusion.pdf)
- Human Rights Act <https://www.legislation.gov.uk/ukpga/1998/42/contents>
- Mental Capacity Act (Northern Ireland) 2016
- The Mental Capacity (Deprivation of Liberty) Regulations (Northern Ireland) 2019
- Deprivation of Liberty Safeguards Code of Practice