

PRIOR HEATH INFANT SCHOOL POLICY & PROCEDURES STATEMENT

**TITLE: The Use of Restrictive Physical Intervention
Policy (Surrey Model)**

**DATE: March 2022
REVIEW: October 2024**

**APPROVED/MONITORED BY: Children & Learning Committee
AGREED BY: Whole school staff and Governors**

OBJECTIVES

This school endeavours to ensure that all children are safe and that all aspects of the every child matters agenda are addressed. The main objective of this policy is to ensure all staff, parents and children or young persons are aware of the procedures and practice that will be carried out to ensure that this is the case at the school. This policy links with the school's Behaviour Policy, Anti-Bullying Policy and Special Educational Needs and Inclusion Policy. It is intended to ensure that it will prevent serious breaches of school discipline and prevent injury to individuals or serious damage to property.

In order to minimise the need to use force or restrain child or young persons at our school staff will strive to:-

- Create a calm environment that minimises the risk of incidents that might require using force and apply school rules consistently and fairly.
- Develop an effective relationship between staff and a child or young person that is central to good order.
- Ensure all supervision of children is carried out in a consistent manner so children and staff are comfortable within the setting.
- Use relevant materials for approaches to teach children or young person's how to manage conflict and strong feelings.
- Ensure all staff have appropriate instructions and training to enable them to be effective in their various roles in and out of the classroom.
- Ensure that handling plans will be put in place and training given to ensure staff are equipped to deal with individual children or young persons who have been identified.
- Whenever possible, warn a child that force may have to be used before using it.

RESPONSIBILITIES

It is the Headteacher's duty to ensure all staff are aware of their statutory powers to use force and or restrain a child or young person. As part of the induction process into school the

Headteacher will inform staff if they have the powers to restrain, and who they can turn to if they are in a situation with a child or young person that may be causing concern.

The Headteacher will inform the governors through the heads report those people that have been authorised to use force or restrain a child or young person in school. All staff at school may have the statutory powers to use force to restrain a child or young person or remove them from a classroom. A record of 'authorised' staff is indicated in Appendix A of this policy.

When and where to use restraint

The judgement on whether to use force and what force to use should always depend on the circumstances that staff find themselves in. Time in these circumstances is often short with little time for reflection. Nevertheless, staff needs to make the clearest possible judgements. Staff will need to decide the seriousness of the incident and the injury, disorder or damage that could occur if force is not used. The chances of achieving a desired outcome by other means and the risks associated with physical intervention compared with using other strategies. Staff will have been made aware of any significant children or young persons i.e. those on SEND/Child Protection Registers and in any extreme cases where there is a need to engage the police to avoid danger to themselves and others.

If a member of staff decides that the use of force is appropriate and an action of last resort then they should always:-

- Advise giving a warning to the child or young person that a physical intervention may have to be used.
- Suggest how the child is to be handled ensuring that no form of restraint is used that could constrict breathing. Appropriate means are passive physical contact such as standing between children or young persons or blocking a child's path, leading a child or young person by the hand or arm, ushering a child or young person away by placing a hand in the centre of the back or in more extreme circumstances using appropriate restrictive methods that a member of staff has been trained to perform.
- Try to ensure that they do not use force unless or until another responsible adult is present to support, observe or call for assistance.

Examples of situations that particularly call for judgements of this kind include:

- A child attacks a member of staff or other child.
- Children are fighting, causing risk or injury to themselves or others.
- A child is causing or on the verge of committing deliberate damage to property.
- A child is causing or is at risk of causing injury or damage by rough play or use of an object.
- A child absconds from a class or leaves school at an unauthorised time.
- A child persistently refuses to follow an instruction to leave a classroom.

- A child is behaving in a way that seriously disrupts a lesson, a school event or school visit.

In these examples use of force would be reasonable (and therefore lawful) if it is clear the behaviour is dangerous and the situation could not be resolved in any other way. Account must be taken of the individual needs of the child their understanding of the situation.

Recording of incidents

A record sheet will be completed by all staff engaged in any incident where handling has taken place even if they did not handle the child. The record sheets will be kept centrally in the school office. Once completed, they must be passed to the Headteacher or a member of the SLT in the Headteacher's absence. They must be completed once the situation has been dealt with to ensure accuracy and that it is a true and honest report. The Headteacher will inform the parents of the child by phone followed by a letter and if necessary arrange to meet them. The report will then be filed in the child's records in the school office.

All accident, incident or near miss reports must be recorded. Surrey schools can access the SCC on line health and safety event reporting portal surreycc.oshens.com

In line with our school safeguarding procedures, incidents will also be recorded using CPOMS and any paperwork that has been completed should be copied and uploaded as part of the incident report.

Following any incidents where force has been appropriate the Headteacher will make arrangements to support the staff and children as these can be upsetting times.

First aid will be administered by a trained first aider and emotional support will be provided as required.

Staff will discuss the situation within 2 days with the Headteacher to see if all Procedures were followed and how we could try to avoid further repercussions, learning from the experience.

Complaints procedures

The school has a clear complaints procedure and any complaints would be received in the first instance by the Headteacher. If matters were not resolved then the complainant would take the matter to the Governing Body. Parents wishing to make a complaint will be issued with the guidance booklet detailing the procedures from the school.

Caring touch

There may be circumstances when physical contact is appropriate and recovery other than that covered by Section 93 of the Education Inspection Act of 2006 i.e.:-

- Contact in PE demonstrating technique or exercises.
- Administering first aid.
- Congratulating a child or young person or where a child is in distress and needs comforting.

- Young children and those with SEN may need staff to provide physical prompts or help.

In all these cases teachers must use their own professional judgement when they feel a child or young person needs this kind of support, which should always respect the wishes of the individual.

This policy will be monitored by the school and governors and will be reviewed on a regular basis. The Headteacher and staff will review the schools use of force strategy following any incidents and make any relevant changes to the policy.

Appendix A

Prior Heath Infant School procedures for the use of restrictive physical interventions by staff

This procedure supports the application of the Surrey County Council policy and guidance on the use of Touch and Restrictive Physical Intervention

1. The person responsible for authorising staff to use restrictive physical intervention as part of a structured and planned intervention within this school is the Headteacher.
2. The person responsible for ensuring that all planned use of restrictive physical intervention is risk assessed is the Headteacher.
3. Copies of all risk assessments are held **on the server** and are reviewed after every use of force and termly.
4. As of **January 2023** the people who are authorised to use reasonable force in planned restrictive physical interventions are listed here. No other person should engage in a planned intervention.

Mrs Burditt
Mrs Diovisalvi
Mrs Turner

5. Only those trained in appropriate techniques within the last twelve months may be authorised. The person responsible for ensuring that appropriate training is provided, including regular updates, is the Headteacher.
6. Training records are held **on the Admin server**.
7. Those not involved in risk assessment but whose roles include the supervision of children may use reasonable force in an emergency unplanned intervention where it is necessary to prevent a serious injury from occurring.
8. Those not involved in risk assessment but whose roles include the supervision of children may use reasonable force in an emergency unplanned intervention where it is necessary to prevent a serious injury from occurring.
9. Every use of restrictive physical intervention is to be reported the same day to the Headteacher or the deputy in charge if the Headteacher is offsite. The Headteacher, their deputy or an appropriate senior manager with responsibility for safeguarding, will ensure that a parent of the child who has had force used against them is notified that day.
10. All incidents should be recorded using the school's CPOMS system.

11. In addition, the details of each use of physical intervention must be recorded on the Child or young person Incident Report Form that is held **in the physical intervention file**. This form can also be found in [Appendix E](#) of this document. The person leading the planned or unplanned intervention must complete this form. The Headteacher will review every use of physical intervention.

Appendix B

Risk assessment

When the use of a restrictive physical intervention is appropriate, it is important that steps are taken to minimise the risk to both staff and children.

Among the main risks to children and young people are that a restrictive physical intervention could:

- be used unnecessarily, that is when other less intrusive methods could achieve the desired outcome
- cause injury, pain, distress or psychological trauma
- become routine, rather than an exceptional method of risk and behaviour management
- increase the risk of abuse
- undermine the dignity of the staff or children and young people or otherwise humiliate or degrade those involved
- create distrust and undermine personal relationships.

The main risks to staff include the following:

- they suffer an injury whilst carrying out a restrictive physical intervention
- as a result of applying a restrictive physical intervention they experience distress or psychological trauma
- the legal justification for the use of a restrictive physical intervention is challenged in the courts (even if it were clear that the member of staff acted recklessly, unreasonably or against the policy of the school or authority, the employer would usually be required to justify its actions)
- disciplinary action or a child protection enquiry that does not reach the Courts, but nevertheless contains similar inherent stresses.

The main risks of not intervening appropriately may include:

- children, staff or other people being injured or abused
- staff leaving the profession
- serious damage to property occurring
- the employer being in breach of the duty of care to staff and/or others
- the possibility of litigation arising out of not intervening.

There are three main pieces of health and safety legislation which are relevant to violence at work. These are:

- The Health and Safety at Work etc Act 1974 (HSW Act)
- The Management of Health and Safety at Work Regulations 1999 and successor legislation
- The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR)

Regulation 3 requires employers to carry out a risk assessment of the work

- Employers have a legal duty under this Act to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their employees.
- Employers must notify their enforcing authority in the event of an accident at work to any employee resulting in death, major injury or incapacity for normal work for seven - or more consecutive days. This includes any act of non-consensual physical violence done to a person at work.

Whenever it is foreseeable that a child or young person might require a restrictive physical intervention, a risk assessment should be carried out which identifies the benefits and risks associated with the application of different intervention techniques with the person concerned.

Planning should also be undertaken to see if trigger situations can be avoided and other positive strategies employed to minimise the likelihood of such incidents occurring.

Management teams are advised to assess the frequency and severity of incidents requiring use of force that are likely to occur in their school/establishment. Historical patterns usually provide a good starting point. These assessments will help to inform decisions about staff training.

An individual risk assessment is essential for children or young persons whose special educational needs and/or disabilities (SEND) are associated with:

- communication impairments that make them less responsive to verbal communication;
- physical disabilities and/or sensory impairments;
- conditions that make them fragile, such as haemophilia, brittle bone syndrome or epilepsy; or
- dependence on equipment such as wheelchairs, breathing or feeding tubes.

It is important that all school and service settings develop appropriate documentation and approaches to assessing risk. The assessment tool must be appropriate for use in that setting. A model individual risk assessment form is included with this guidance ([Appendix C](#)).

There are rare occasions when it may be appropriate to act with only minimal assessment of risks – for example, in exceptional circumstances, where there is an immediate risk of injury, a member of staff may need to take any necessary action that is consistent with the concept of “reasonable force”. Whilst not an exhaustive list, examples include:

- to prevent a child or young person running off a pavement onto a busy road, or falling into water
- where a child or young person uses tools dangerously or inappropriately
- to prevent a child or young person hitting someone else • throwing stones (etc...) at a window where there is an immediate risk of injury from broken glass
- misuse of substances (e.g. cleaning fluids, etc...) where there is a likelihood of immediate harm

Whenever possible assistance must be sought;

- when the member of staff believes that he or she may be at risk of injury
- when managing an older or physically larger child or young person
- where there is more than one child or young person
- where a child or young person appears to be under the influence of drugs or alcohol, or who is ill
- where a child or young person appears to have a weapon

Elevated levels of risk are associated with:

- the use of clothing or belts to restrict movement
- holding someone who is lying on the floor or forcing them onto the floor
- any procedure which restricts breathing or impedes the airways
- seclusion, where a child or young person is forced to spend time alone in a room against their will
- extending or flexing the joints or putting pressure on the joints
- pressure on the neck chest abdomen or groin areas.

[Appendix C - Individual child or young person risk assessment](#)

Surrey County Council – child or young person risk assessment

A plan for assessing and managing foreseeable risks for children or young people who are likely to need Restrictive Physical Intervention

School/Setting:

Name of Child:

DOB:

Class group/setting:

Name of teacher/support worker:

Name of parents/Carers:

Name of Support Service Member/s:

Identification of Risk	
Describe the foreseeable risk (i.e. what specific behaviours have occurred)	
Is the risk potential or actual (i.e. has this happened before?)	
List who is affected by the risk	

Assessment of risk	
In which situations does the risk occur?	
How likely is it that the risk will arise (i..e has it happened before?)	
If the risk arises, who is likely to be hurt or injured?	
What kinds of injuries are likely to occur?	
How serious are the adverse outcomes?	

Assessment completed by:

Date of review:

Signature:

Date:

Agreed plan and risk management strategy		
Focus of measures	Measures to be employed	Level of risk
Proactive interventions to prevent risks		
Early intervention to manage risks		
Reactive interventions to respond to adverse outcomes		

Agreed by:
Parent/Carer

Date:

Child (if appropriate)

(Class teacher)

(Support Service Member/s)

Communication of plan and risk management strategy		
Plans and strategies shared with	Communication method	Date actioned
Proactive interventions to prevent risks		
Early intervention to manage risks		
Reactive interventions to respond to adverse outcomes		

Staff training issues		
Identified training needs	Training provided to meet needs	Date training complete

Evaluation of plan and risk management strategy		
Measures set out	Effectiveness in supporting the child	Impact on risk
Proactive interventions to prevent risks		
Early interventions to manage risks		
Reactive interventions to respond to adverse outcomes		

ACTIONS FOR THE FUTURE

Plans and strategies evaluated by:

Title:

Date:

Appendix D

Child or young person Incident Report Form

Schools and other similar establishments are responsible for creating their own incident reports. Such reports can be as extensive or as brief as required. The following basic information must however be recorded as a minimum:

- Name of School/Establishment
- Child or young person's name/Date of Birth
- Staff member name and status
- Incident date/time/duration
- Nature of incident
- Events leading up to incident
- Description of what happened
- Consequences
- Names of those involved
- Names of witnesses
- De-escalation techniques used
- Justification for restrictive physical intervention
- Response and view of child or young person
- Details of any injuries
- Other relevant information
- Signatures of head teacher/manager and report author.

Schools and other similar establishments are free to create their own versions or to use the template provided below

At the end of each term the Head teacher should submit data via the s157/175 audit which will then be passed by the Education Safeguarding Team to the school effectiveness team. This will be followed up with the MAPA training team where there are any concerns raised

[Appendix K](#)

Restrictive Physical Intervention Recording Form

Name of young person..... Date of incident.....

WHAT DE-ESCALATION TECHNIQUES WERE USED PRIOR TO PHYSICAL CONTROLS:

(tick the appropriate box below)

Defusing	<input type="checkbox"/>	Time out offer	<input type="checkbox"/>
Deflection	<input type="checkbox"/>	Time out directed	<input type="checkbox"/>
Distraction	<input type="checkbox"/>	Changes of task	<input type="checkbox"/>
Appropriate Humour	<input type="checkbox"/>	Choices	<input type="checkbox"/>
Proximity control	<input type="checkbox"/>	Limits	<input type="checkbox"/>
Verbal advice/support	<input type="checkbox"/>	Consequences	<input type="checkbox"/>
Rule reminder	<input type="checkbox"/>	Another member of staff	<input type="checkbox"/>
<u>Hurdle help</u>	<input type="checkbox"/>	Take up time	<input type="checkbox"/>
Planned ignoring	<input type="checkbox"/>	Other (please state):	<input type="checkbox"/>
	<input type="checkbox"/>		<input type="checkbox"/>

JUSTIFICATION FOR USE OF RESTRICTIVE PHYSICAL INTERVENTION:

(tick the appropriate box below)

To prevent/interrupt;	A criminal offence	<input type="checkbox"/>
	Injury to pupil/staff/others	<input type="checkbox"/>
	Serious damage to property	<input type="checkbox"/>
	Significant Disruptive behaviour	<input type="checkbox"/>
	Pupil absconding	<input type="checkbox"/>
	<u>Other (please state)</u>	<input type="checkbox"/>
		<input type="checkbox"/>
		<input type="checkbox"/>

NATURE OF RESTRICTIVE PHYSICAL INTERVENTION USED:

(Identify level of hold used, estimate of duration and factual staff accounts from each individual involved)

RESPONSE AND VIEW OF THE YOUNG PERSON: (this field **must** be completed if possible)

Name of staff:

Date:

DETAILS OF ANY RESULTING INJURY:

(injury to whom and any action taken)

First Aid Book completed	Yes <input type="checkbox"/> No <input type="checkbox"/>	Date:
OSHENS	Yes <input type="checkbox"/> No <input type="checkbox"/>	Date:

ANY OTHER RELEVANT FACTUAL INFORMATION:

NAME OF SENIOR PERSON NOTIFIED:		TIME/DATE	
--	--	------------------	--

HEADTEACHER'S COMMENTS:

SIGNATURE OF HEADTEACHER:			DATE:	
PARENTS INFORMED	Yes <input type="checkbox"/> No <input type="checkbox"/>	METHOD:	DATE:	
EXCLUSION OF YOUNG PERSON	Yes <input type="checkbox"/> No <input type="checkbox"/>	DETAILS:		

Pupil Significant Incident Form

For all incidents involving unsafe/risk or unacceptable behaviour where a physical intervention using force was not used.

Pupil name:	
Staff name/s:	
Incident date/time/place:	

Reason for intervention (tick boxes as appropriate)	Vandalism	<input type="checkbox"/>		Physical control	<input type="checkbox"/>
	Bullying	<input type="checkbox"/>		Absconding	<input type="checkbox"/>
	Assault	<input type="checkbox"/>		Substance abuse	<input type="checkbox"/>
	Diversion	<input type="checkbox"/>		Non-compliance	<input type="checkbox"/>
	Isolation	<input type="checkbox"/>		Serious disruption	<input type="checkbox"/>
	Time out	<input type="checkbox"/>			<input type="checkbox"/>
		<input type="checkbox"/>			<input type="checkbox"/>

ANTECEDENTS: (events leading up to incident)

BEHAVIOUR: (how did the pupil respond, describe what actually happened)

CONSEQUENCES: (how did the staff intervene, how did the child respond, and how was the situation resolved)

NAMES OF ALL INVOLVED: (observers/support staff)

HEADTEACHERS COMMENTS:

DATE:

NAME OF REPORT COMPILER:	DATE:
NAME OF SMT INFORMED:	DATE:
FIRST AID REQUIRED:	PAGE NO:
OSHENS RECORDED:	DATE:
PARENTS INFORMED:	Yes <input type="checkbox"/> No <input type="checkbox"/> METHOD: DATE:
EXCLUSION OF YOUNG PERSON	Yes <input type="checkbox"/> No <input type="checkbox"/> DETAILS:

Appendix E – Record of Physical Intervention

<p>Record of Physical Intervention</p> <p>Name of children's home/setting</p>

	Reference No.	
	Notifications to Ofsted	

Section 1

Name:	
Date of incident: Time:	Where did the incident happen?
Name and job title of staff involved:	Name of witnesses i.e. children, members of the public

Section 2

<p>Describe the trigger factors to the incident.</p>	
What de-escalation strategies were used?	
Verbal advice and support	Options offered
Distraction	Planned ignoring
Time out offered	Success reminded
Transfer adult	Positive handling
Choices, limits and consequences	Persuasion
Reassurance	Step away
Appropriate humour	Negotiation
Any other strategies?	

--

Section 3

Justification for hold		
If de-escalation was unsuccessful please state the reason for the intervention		
Danger to self		
Prevent severe damage to property		
Danger to others		
Was a choice given to the child before the hold was used? Yes/No		
If no, explain why		

Section 4

Description of hold
Holds used
Describe the hold used during the incident. Explain where each person involved was standing and describe how the child was being held. For example; staff AA was sat next to child BB's left side. AA's right hand was cupped around BB's left forearm.
What level of hold was used? Low, medium or high?

Please detail why was this hold used, thinking about the intent of the child, the size of the child and relationships between the staff and child.

How long did the hold last approximately?

Section 5

Medical attention

All children must be offered medical attention after a hold even if they do not appear to be injured.

Was the child offered medical attention? Yes/No

Did they decline this? Yes/No

If they accepted the examination, what was the outcome?

Has Health and Safety form been completed? Yes/no

Injury suffered by child	Yes/No	Details:
Treatment required	Yes/No	Details:
Injury suffered by staff	Yes/No	Details:
Treatment required	Yes/No	Details:
Injury suffered by others	Yes/No	Details:
Treatment required	Yes/No	Details:

Section 6

What need is being met for the young person by their behaviour?

How can we meet this need safely?

Section 7

Issues with environment

List any damage caused during the incident and steps taken to rectify this.

Section 8

Follow up

Record here the follow up work done after the incident. Consider the following questions; how did the child feel at the time? The incident must be discussed with them and their views, wishes and opinions heard and recorded. How can we help if this situation arises again? This information is very important to help staff manage behaviour in the future. If age appropriate they could complete this section themselves. Please signpost to a link work session if appropriate.

Young person's signature.....Date.....

Describe the follow up work/support given to the staff involved or witnessing the incident. Link to supervision if necessary.

Appendix F

Adapted ADASS Task Force Screening Tool.

The criteria should be used as an indicative guide only as it will generally be based on information provided by the managing authority in the application and each case must be judged on its own facts

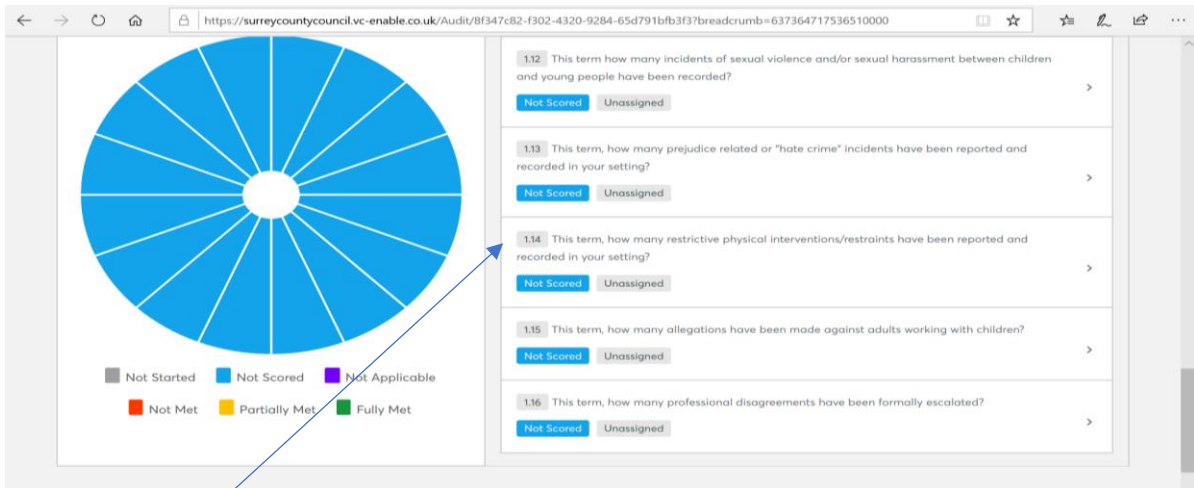
HIGHER	MEDIUM	LOWER
<ul style="list-style-type: none"> • Continuous 1:1 care during the day and/or night • Sedation/medication used frequently to control behaviour • Physical restraint used regularly – equipment or persons • Restrictions on family/friend contact (or other Article 8 issue) • Objections from relevant person (verbal or physical) • Objections from family/friends • Attempts to leave • Confinement to a particular part of the establishment for considerable period of time • New or unstable placement • Possible challenge to Court of Protection, or Complaint • Already subject to DoL about to expire 	<ul style="list-style-type: none"> • Asking to leave but not consistently • Not making any active attempts to leave • Appears to be unsettled some of the time • Restraint or medication used infrequently • Appears to meet some but not all aspects of the acid test 	<ul style="list-style-type: none"> • Minimal evidence of control and supervision • No specific restraints or restrictions being used e.g. in a care home not objecting, no additional restrictions in place • Have been living in the care home for some time (at least a year) • Settled placement in care home/hospital placement, no evidence of objection etc. but may meet the requirements of the acid test • End of life situations, intensive care situations which may meet the acid test but there will be no benefit to the person from the Safeguards.

Appendix G

Termly restrictive positive intervention data is submitted via “Surrey County Council Education Providers Safeguarding Data Collection. Academic Year 20??/20?? – Autumn/Spring/Summer Termly Data Collection

Education providers and alternative provisions access the ENABLE portal via their school account via this link

<https://surreycountycouncil.vc-enable.co.uk/Login>

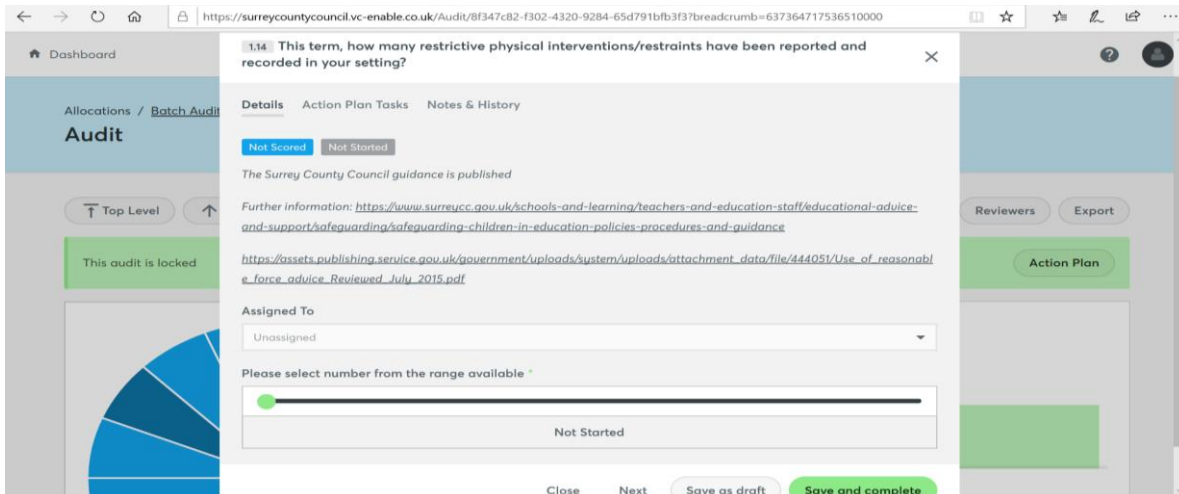


The screenshot shows a web browser window with the URL <https://surreycountycouncil.vc-enable.co.uk/Audit/8f347c82-f302-4320-9284-65d791bfb3f3?breadcrumb=637364717536510000>. On the left, there is a circular progress indicator divided into 16 segments, all of which are blue. Below the circle is a legend with six categories: Not Started (grey), Not Scored (blue), Not Applicable (purple), Not Met (red), Partially Met (yellow), and Fully Met (green). On the right, there is a list of audit items, each with a question number and a description, and two buttons: 'Not Scored' and 'Unassigned'. The items are:

- 1.12 This term how many incidents of sexual violence and/or sexual harassment between children and young people have been recorded? (Not Scored, Unassigned)
- 1.13 This term, how many prejudice related or "hate crime" incidents have been reported and recorded in your setting? (Not Scored, Unassigned)
- 1.14 This term, how many restrictive physical interventions/restraints have been reported and recorded in your setting? (Not Scored, Unassigned)
- 1.15 This term, how many allegations have been made against adults working with children? (Not Scored, Unassigned)
- 1.16 This term, how many professional disagreements have been formally escalated? (Not Scored, Unassigned)

Click on:

1.14 This term, how many restrictive physical interventions/restraints have been reported and recorded in your setting?



The screenshot shows the details of audit item 1.14: "This term, how many restrictive physical interventions/restraints have been reported and recorded in your setting?". The item is currently 'Not Scored' and 'Not Started'. The page includes the following information:

- Details:** Not Scored, Not Started
- Guidance:** The Surrey County Council guidance is published. Further information: <https://www.surreycc.gov.uk/schools-and-learning/teachers-and-education-staff/educational-advise-and-support/safeguarding/safeguarding-children-in-education-policies-procedures-and-guidance>
- Additional Info:** https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/444051/Use_of_reasonable_force_advice_Reviewed_July_2015.pdf
- Assigned To:** Unassigned
- Progress:** A progress bar is shown with a green dot at the start, indicating 'Not Started'.
- Buttons:** Close, Next, Save as draft, Save and complete

Please return this form to the Education safeguarding team

Appendix H – DOLS - The legal context

P v Cheshire West and Chester Council and another and P and Q v Surrey County Council UKSC 2012 clarified the 'acid test' for what constitutes a deprivation of liberty. A person is deprived of their liberty for the purposes of Article 5 if they:

- Lack the capacity to consent to their care / treatment arrangements
- Are under continuous supervision and control
- Are not free to leave

All 3 elements must be satisfied.

The Law Society [*Identifying a deprivation of liberty: a practical guide 2015- relating to 16-17 year olds only*] has identified the following liberty restricting measures:

- Decision on where to reside being taken by others;
- Decision on contact with others not being taken by the individual;
- Restrictions on developing sexual relations;
- Doors of the property locked, and/or chained, and/or bolted for security reasons or to prevent the children or young person leaving;
- A member or members of staff accompanying the person to access the community to support and meet their care needs;
- Access to the community being limited by staff availability;
- Mechanical restraint, such as wheelchairs with a lapstrap or specialist harness;
- Varying levels of staffing and frequency of observation of staff
- Provision of "safe spaces" or "chill out" rooms or spaces during the day or night from which the person cannot leave of their own free will;
- Restricted access to personal allowances;
- Searching of the person and/or their belongings;
- Restricting access to personal belongings to prevent harm;
- Medication with a sedative or tranquilising effect;
- Physical restraint/intervention, such as with personal care tasks, breakaway or block techniques, distraction methods, staff withdrawing, physical touches or holds;
- Restricted access to modes of social communication, such as internet, landline or mobile or telephone correspondence
- Positive behavioural reward systems to reward "good" behaviour which might thereby involve restrictions on favoured activities or aspects of the curriculum to improve behaviour;
- Disciplinary penalties for poor behaviour;
- Restricting excessive pursuance of activities;
- Lack of flexibility, in terms of having activities timetabled, set meal times, expected sleep times;
- Managing food intake and access to it;
- Police called to return the person if they go missing;
- Restricted access to parts of the property, such as the kitchen or certain cupboards therein to minimise health and safety risks.

In the case of children in residential care, the general Guidance and Regulations issued in respect of the Children Acts 1989/2006 and The Care Standards Act 2015 and

Children's Homes Regulations 2015 address the use of physical action such as restraint and holding

Deprivation of liberty will be lawful if warranted under statute, for example, under:

- [section 25 of the Children Act 1989](#), which provides for the placement of looked-after children in secure accommodation;
- [the Mental Health Act 1983](#);
- [the youth remand provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#); or
- the custodial sentencing provisions of the [Power of Criminal Courts \(Sentencing\) Act 2000](#).

Any child can be sectioned under the Mental Health Act, but it is a very grave step to take. Clearly, other options are preferable. Local authorities are under a duty to consider whether any children in need, or looked-after children, especially those in foster care or in a residential placement, are subject to restrictions amounting to a deprivation of liberty. The [Cheshire West](#) criteria must be rigorously applied to the individual circumstances of each case.

Secure accommodation

The local authority must first consider whether [section 25 of the Children Act \(secure accommodation\)](#) is applicable or appropriate in the circumstances of the individual case. Section 25 allows for the placement of a looked-after child in accommodation provided for the purpose of restricting liberty. This will require an analysis of:

- whether, under the [Children \(Secure Accommodation\) Regulations 1991](#), section 25 does not apply: for example if the child has been detained under the Mental Health Act, remanded to youth detention or given a custodial sentence for certain serious offences.
- whether the intended placement is accommodation provided for the purposes of restricting liberty and, thus, secure accommodation within section 25; and
- whether the test set out in section 25(1)(a) or (b) is met: such orders only apply to children who, without the order, would be likely to injure themselves or others, or those who have a history of absconding, would be likely to abscond from any other type of accommodation and, if so, would likely suffer significant harm.

Irrespective of the means by which the court authorises the deprivation of a child's liberty, whether under section 25 or what's called the inherent jurisdiction, (a residual jurisdiction to make decisions for people who need it where there is no other framework) the local authority should cease to impose such deprivation as soon as either: (1) the section 25 criteria are no longer met; or (2) the reasons justifying the deprivation of liberty no longer subsist.

Children under 16 without care order

If a child under 16 is *not* under a formal care order, his/her parents can authorise deprivation of liberty in the exercise of parental responsibility, for instance, in a hospital, or NHS facility or day care or with a private foster carer, regardless of the child's personal mental capacity. Logically, notwithstanding that the parents' own consent negates the subjective element – the lack of valid consent – that is an essential part of the definition of deprivation of liberty, the above proposition might need to be reconsidered in light of the [SRK](#) case. This is because of the State's own positive duties to keep purely private arrangements amounting to deprivation of liberty under human rights law – and an

apparently benign parent may not *actually be* benign; but there is no known case raising that question at the moment.

Accommodated children

If a child under the age of 16 is accommodated under [section 17](#) or [section 20](#) of the Children Act, the latter explicitly requiring the non-objection of the holder of parental responsibility, then the parent's consent renders the deprivation of liberty not imputable to the State, even if the State is paying for the regime. In those circumstances, the court will not need to make any declaration as to the lawfulness of the child's care regime (even if the child is not free to leave), because the regime has not triggered article 5 'process' protection.

If a child under the age of 16 is under a care order or accommodated under section 20 as a prelude to child protection proceedings, then *notwithstanding* a parent's consent, the inherent jurisdiction must be used for the lawful imposition of the regime in human rights terms.

Lack of capacity

If a child over the age of 16, lacking capacity to consent and not under a care order is deprived of his or her liberty, the commissioners must apply to the Court of Protection for authorisation. This is because the Mental Capacity Act's coverage of 16- and 17-year-olds, even though they remain children, trumps the parents' ability to consent to that which is otherwise not authorised.

Mr Justice Keehan, in [Birmingham City Council v D \[2016\]](#), which concerned a 16-year-old confined in a residential placement, said: "*I have come to the clear conclusion that however close the parents are to their child and however co-operative they are with treating clinicians, the parent of a 16 or 17 year old young person may not consent to their confinement which, absent a valid consent, would amount to a deprivation of that young person's liberty.*"

Care order

Where a child (regardless of mental capacity) is the subject of an interim care order or a care order, it is extremely unlikely that a parent could validly consent to what would otherwise amount to a deprivation of liberty. In those circumstances, a local authority cannot consent, in sufficiently independent terms, to a deprivation of liberty either – albeit being the holder of parental responsibility – because it is also being the commissioner of the care regime.

As mentioned, section 20 arrangements for accommodating any child with foster carers, for instance, as a prelude to care proceedings, require the parental responsibility holders' agreement. But the exercise of their parental responsibility rights would have been called into question in that context, so their consent could not be sufficient authorisation to avoid an article 5 issue based on a lack of valid consent. Use of the inherent jurisdiction is then necessary.

Section 20 concern

Mr Justice Keehan's statement in the [AB](#) case (the forerunner to the *D* case) about *this* group of children needs to be read with real care, however. Having said that where a child is *not* looked after, the exercise of parental responsibility may amount to valid consent to a child's confinement, he went on to say: "*Where a child is a looked-after child, different considerations may apply, regardless of whether the parents' consent to the deprivation of*

liberty.” More thought is required here because Mr Justice Keehan, in saying that if one is under 16 *and* ‘looked-after’, the Family Court must be applied to for authorisation, has perhaps overlooked that not *all* children accommodated under section 20 should be seen as having parents whose exercise of parental responsibility is ‘suspect’.

All such children count as ‘looked-after’ children, but the scope for section 20 duties does not merely cover those at risk of parental abuse or neglect – it extends to inability to provide suitable accommodation or care. It is unlikely that many ill or disabled children’s residential placements are properly seen as made under section 17 of the Children Act, (that being a mere power), when a duty could be regarded as having been triggered. So child aged under 16 could be placed in a specialist setting, with the agreement of his or her parent, under section 20, and parental responsibility would not have changed or been called into question. The parent’s consent to the explicit details of the care plan involving deprivation of liberty would still be valid.

Court of Protection application

If a child between 16 and 18 is *lacking in capacity* to consent or refuse accommodation under section 20, his/her parental responsibility holder(s) need to consent to the section 20 arrangement for it to be lawful. She/he or they would be (logically) consenting to deprivation of liberty, as parents – although scrutiny is still required by the MCA and that would at least make it a clear case for using the streamlined Re X type of application to the Court of Protection provided for by the new rules of court for an over 16-year-old.

Inherent jurisdiction

For an under 16-year old’s deprivation of liberty that *does* require scrutiny from the Court – where there is an interim or full care order – the criteria for the High Court’s granting a local authority leave to apply for it to exercise its inherent jurisdiction, as set out in [section 100\(4\) of the Children Act](#), are likely to be met. This states that the court may only grant leave if satisfied that: (a) the result which the authority wishes to achieve could not be achieved by any other order; and (b) there is reasonable cause to believe that if the inherent jurisdiction is not exercised the child is likely to suffer significant harm. Any *unlawful* deprivation of liberty is likely to constitute significant harm.

If a child between 16 and 18 is *not lacking in mental capacity* and is objecting to accommodation under section 20, his/her parents can (logically) give consent to authorise deprivation of liberty, as parents – but whether or not they would be *upheld* in that decision via proceedings in the Family Division of the High Court, is a moot point.

If you have any queries about DOLS contact Legal services (0208 541 9088).