

Scottish Government
Physical intervention in schools guidance: consultation
25 October 2022

Introduction

1. The NASUWT welcomes the opportunity to comment on the Scottish Government *Physical intervention in schools guidance consultation*.
2. The NASUWT is the Teachers' Union, representing teachers and school leaders in all sectors of education.

Specific

Question 1 - Do you think the guidance is easy to understand?

3. This is a lengthy document, with multiple links to further source material. There is also a lot of repetition around schools' culture and ethos across the document which could be removed without affecting the overall purpose and intent. Taken in the context that it is the third in the *Included, Engaged and Involved* (IEI) series and that, overall, they provide a substantial policy framework, it will be absolutely necessary to ensure that appropriate training and resources are provided to local authorities, schools, headteachers and teachers in order to support implementation. The NASUWT has a number of further specific points in relation to the drafting and these are set out in more detail below.
4. While the guidance states explicitly in paragraph 1 that '*guidance... replaces the existing guidance on physical intervention and seclusion*

within Part 2: preventing and managing school exclusions’, it would be clearer to have Part 2 updated and reissued at the same time to avoid any confusion between both documents.

5. The introductory paragraph states that the purpose of the guidance *‘is to improve a child or young person’s learning experiences’*. I think the use of the singular here will give rise to confusion. The reader will assume that we are considering the rights of one child, whereas the United Nations Convention on the Rights of the Child (UNCRC) does not single out the rights of an individual child; rather they are there to support all children. This principle has been established clearly by the UN Committee on the Rights of the Child (CRC) in respect of Article 3 of the Convention.¹ Any Scottish Government guidance that purports to advance children’s Convention rights, as in this instance, must take account of this critical consideration. This slanted narrative will impact on the perception of the reader in considering how to balance relevant rights under both the UNCRC and other human rights. It also reflects a profound misunderstanding of how the Convention should be interpreted in the context of domestic child-related policy.

6. The statement in paragraph 5 that reads *‘[i]n all circumstances, it is important that the principles of preventative practice outlined, in this guidance, as part of a restraint reduction approach, are applied’* is very broad. Indeed, when you look at the principles, the Union would suggest some reframing: for example, when it states: *‘all behaviour is communication and a child or young person’s distressed behaviour may indicate unmet needs. All efforts should be jhmade to understand and address those needs.’* It would be clearer to state ‘all reasonable and proportionate efforts’ because otherwise this principle will conflict with the fourth principle that talks about restraint being used *‘to avert an immediate risk of injury to the child or young person’*. It may not be possible in a given circumstance where there is the immediate risk of

¹ See, for example: Committee for the Rights of the Child. General Comments on Article 3. Paragraph 32.

injury to seek to understand or address the need in that instance: rather a triaged response would be required which considered the immediate health and safety of all present to be taken as the initial and immediate priority.

7. Equally, the principles are not clear where they state *'restraint...should only be used... where they do not degrade, punish or deprive a child or young person of their liberty'*. By its very definition, 'restraint' deprives a young person of their liberty. It should also be noted that in the context of the UNCRC, the definition set out in the guidance goes beyond that set out in the UNCRC or the CRC's relevant General Comments, where there is no general prohibition on actions that may deprive children of their liberty. As a minimum expectation, the Scottish Government should confirm that this aspect of the principles would represent a choice on its part rather than a requirement of the UNCRC. The NASUWT is concerned that by failing to address head on, and indeed resolve, the tensions in that statement, the Scottish Government is placing undue pressure on schools, local authorities and teachers. Where there is a lack of clear information, different employers will also interpret the legislation differently. There are clear implications in terms of additional workload and distraction for teachers from their core role of teaching and learning.
8. There is a significant risk that publishing guidance before the UNCRC has been incorporated and, as set out in paragraph 14, before the judgement of the Supreme Court has been fully considered and implemented, will, in the longer term, create unforeseen challenges or conflicts in interpretation. Indeed, given that the 1990 Act predates devolution under the terms of the UNCRC, this would be outwith its competence.
9. Under the guiding principles in paragraph 19, there should be specific reference to ensuring that measures are in place to ensure the health, safety and wellbeing of staff and pupils.

10. In paragraph 26, while it is correctly identified that there should be references to preventative approaches in any child's Coordinated Support Plan (CSP), this takes no account of the current variety of approaches being undertaken in relation to the completion of CSPs. The Scottish Government should not be blind to the considerable variation in planning documents used on the ground, and greater time and effort is needed to build for this consistency with the use of better communication and training.

11. In paragraph 36, it states that *'[t]he Lundy Checklist of Participation may be a helpful starting point in assessing approaches for participation'*, and, while this statement stops short of a unilateral endorsement, it nevertheless points practitioners towards the Lundy approach. It is noteworthy that in a journal article by Laura Lundy, she sets out the view that the incorporation of the UNCRC would require a different approach to be adopted in cases where a pupil's behaviour disrupts the learning of others and presents a risk to the safety of staff and other pupils. The balancing of rights inherent in policy in Scotland (and elsewhere in the UK to date) has been that while all three parties (the pupil with behaviour that challenges, the other pupils, and staff) are all recognised to have rights, the impact of this behaviour on the learning of other pupils and the risks to their safety and that of staff will almost always outweigh the rights of the individual pupil concerned and would justify their removal from a classroom or, in some circumstances, their exclusion from a school. However, the Lundy article asserts that such cases, in which the rights of different parties might conflict, would be subject to a 'proportionality test', in which the UNCRC would be given substantial weight following incorporation. Under this post-incorporation test, the correct balancing of rights could indicate that a pupil should not be removed from a class or school as their rights might be viewed as having more weight than those of the other children or staff, even in cases where alternative education could be provided. The Lundy article points out that the relative weighting would depend on the circumstances, so that, in some cases, the correct result could still be removal, but this would be less likely to be acceptable

legally than has been the case in the past. The NASUWT considers this interpretation to be flawed and consequently would suggest references to Lundy be removed from the national guidance.

12. In paragraph 38, it states: *'It is important that restorative approaches only take place at a time when the child or young person feels able to engage in them'*. This statement should be broadened to recognise that restorative approaches can only take place at a time when the child, young person and relevant adult feel able to engage. Each participant in a restorative conversation is entitled to a supportive environment.

13. In paragraph 42, How Good is Our School? (HGIOS) is referenced as a vehicle for self-evaluation. The NASUWT is concerned with the continued use of HGIOS 4 as a self-evaluation tool, given that the terms of HGIOS 4 were never discussed and agreed with the profession. Feedback from members is clear that HGIOS 4 creates bureaucracy and excessive and unnecessary workload burdens for staff and schools; it is overdue for review.

Question 2 - The guidance includes definitions of practices in the 'physical intervention' section (pages 14-25). Please review these. Are these clear?

14. The definition of 'restraint' in paragraph 58 as *'[a]ny act which restricts a child or young person's freedom to move or act'* is exceedingly broad and, by that definition, would include a trip in a bus, or going in a lift, or being taken to a swimming pool where a learner was not a confident swimmer. It is helpful that paragraph 75 sets out the exception applied to blanket restrictions such as being in the school building itself, where learners cannot just leave during the day as part of routine security measures. However, this exception is very narrow and would still allow the examples above: further exemplification of exceptions would be helpful.

15. Paragraphs 61 and 82 state that '*local disciplinary procedures may also run parallel to the child protection investigation*'. It is important that there is no pre-judgement attached to any local investigation. This section should therefore be more significantly caveated; for example, by adding 'where appropriate'.
16. Paragraph 65 needs to make clear that there may be circumstances where an immediate risk to harm means it is impossible for a witness to be present.
17. Paragraphs 76 and 77, while clearly drafted, are simultaneously a clear and complete abdication of responsibility on the part of the Scottish Government in providing guidance for schools. The NASUWT insists that clearer, better-quality guidance is urgently needed.
18. In the event of an emergency incident which has involved violence, where a pupil has been secluded for their safety and that of others within the school, the following statement sits uncomfortably: '*as soon as the immediate risk of significant harm has passed, the child or young person should be free to leave the space they are in and should be offered support to return to an appropriate space.*' In such circumstances, should the police be called to attend to deal with an assault, it may not be appropriate or proportionate for the pupil to be permitted to return to an environment where there is a risk the violent behaviour will repeat: this would, after all, be a foreseeable risk and civil and criminal liability would rest with the employer for harms caused. To say otherwise would be to weight the balance of harms towards the one child as opposed to the risks to the others in the class/school, or indeed the teachers.

Question 3 - In addition to the safeguards (protections) to ensure lawful practice and protect the wellbeing of children and young people and staff listed in the 'physical intervention' section (pages 14-25), are there any other safeguards (protections) that should be included?

19. Teachers need detailed training and further exemplification. The Scottish Government needs to consider how it will maintain an overview of ongoing practice in local authorities and schools, and a review period should be built in to the updated guidance so that all parties have an opportunity to reflect on the successes or otherwise of implementation, and guidance can be amended accordingly.

Question 4 - In addition to the types of restraint in the 'physical intervention' section (pages 16-25), are there any other restraints used in schools that should be included in the guidance?

20. The NASUWT is aware that seclusion has been used as an alternative to exclusion. In many settings, whether because the school wishes to avoid a formal process of exclusion or because the home environment of the pupil would not make this a viable option, arrangements have been made to keep a pupil in school but ensure they are apart from their peers. It does not appear from the guidance that any thought has been given to recognising this current practice or providing a narrative or exemplification to accompany it. While it is noted earlier on in the guidance that sections of IEI2 will no longer be in force, there is no specificity. It would be better to be explicit about which parts or sections are to be removed. Although IEI2 set out clearly that cooling-off was no longer recommended, maintaining a pupil in school separate to their peers was permitted. It is, of course, to be anticipated that where this practice, now potentially defined as 'seclusion', occurs exclusion numbers may increase. The Union would strongly suggest that an equality impact assessment is undertaken to establish whether this decision will disproportionately impact on looked-after children and young people, or those with protected characteristics.

Question 5 - Are there any changes you would make to the recording, monitoring and reporting advice on pages 28 to 31?

21. It is important that we recognise there will be considerable variations in local practice on recording, monitoring and reporting. A guidance

document alone will be insufficient to embed practice and this will need to go hand in hand with a training, communication and support programme.

22. The NASUWT would also suggest that the Scottish Government looks to compare practice with the recording recommendations made by the Equality and Human Rights Commission (EHRC) in England and Wales. The Union has supported those recommendations in principle as they link to compliance with equalities legislation, including the Public Sector Equality Duty (PSED).
23. The recommendation for the Scottish Government was for mandatory national minimum standards to be set for recording the use of restraint in schools, including: the type of restraint; the reason(s) for the use of restraint; where and when the restraint was used; the length of the restraint; the impact on the child, including any injuries, and any risks to their physical or mental wellbeing; the protected characteristics of the child (including age, sex, disability – broken down by impairment type – and race); the outcome of any incident review, including any measures that will be taken to avoid or minimise restraint and the risk of harm in future; the pupil's involvement in the review; and when the parents were informed.
24. The recommendation for schools was for the data from these records to be analysed to: review support plans and interventions for pupils; inform staff development and practice; and tackle disproportionate use of restraint on children who share a protected characteristic. It is essential that the Scottish Government better embeds equalities and that protected characteristics form part of any requirement on recording, monitoring and reporting.
25. The key will always be about how recording operates in practice and the case studies produced by the EHRC might be of interest as they set out some positive examples referring to staff wellbeing, which is completely absent from the draft Scottish guidance. The NASUWT would consider these to be essential.

26. However, the EHRC model is not perfect and the teacher/staff perspective and voice is missing from many of the examples, which the NASUWT would also wish to stress as being essential.

27. It is also important that any advice or guidance considers the workload burdens associated with the approach outlined. Steps must be taken to ensure that staff in schools have the time to fulfil the responsibilities they will have. In particular, where staff may not be clear about the expectations on restraint, it is exceptionally important that there is a meaningful framework for monitoring.

28. Finally, it is important that there is a timeframe for national review of the guidance. It is anticipated that the public inquiry into the death of Sheku Bayoh may make recommendations for the public sector as well as the police, and so there must be appropriate mechanisms built in to the guidance to allow for further revision as appropriate.

Question 6 - Are there any changes you would make to the roles and responsibilities summary on page 47?

29. The summary on page 47 is clear, but it sets out responsibilities only, as opposed to roles.

30. There are no roles or responsibilities set out for pupils or children, which should be remedied.

Question 7 - Is there anything you would add to help people use this guidance in schools?

31. While it is acknowledged that this guide intends to provide a broad overview, some of the practicalities are overlooked. For example, when the document references pupil-led withdrawal, it is implied that there are a multitude of free spaces within a school just waiting for such a need when, in practice, this is challenging in the majority of schools because of

a lack of space and staffing. Any supportive guidance and training needs to provide a level of practical exemplification.

32. Given that the suite of options to deal with challenging behaviour within schools will change should the guidance be enacted in its current form, updated guidance for schools on behaviour will urgently be required to reaffirm the options available to schools to build positive relationships and manage behaviour issues.

Question 8 - Are there any other changes you would make to the guidance?

33. Page 33, paragraph 121: *As part of the package of support for all staff, including coaching, mentoring, supervision, staff will benefit from professional learning on how to remain emotionally resilient.* This is an unacceptable statement as a standalone response to violence in the workplace.

34. On page 43, there are a limited number of UNCRC articles quoted, but the Union is concerned that the duty of care to others, such as staff, may be missed in a first read of the document. The NASUWT have an overarching concern that rights issues are addressed almost exclusively in the guidance through the lens of the child who may be the subject of an intervention. This perspective is essential, of course, but decisions about the use of interventions involve taking into account the legitimate interests of other rights holders (i.e. other students and staff). There is the fact that considerations in relation to the rights of others is touched on almost in passing elsewhere in the document (e.g. when referencing safeguards for using staff-led withdrawal), but the need to take these rights into account should be referenced explicitly in the guidance. Given the stated commitment of the Scottish Government to the UNCRC, it will have noted the provisions of General Comment No.13 on Article 19 of the Convention which is centred on the right of children to be protected

from all forms of violence.² Specifically, paragraph 27 of the General Comment confirms that in cases involving violence between children, there is a duty on all responsible adults to react to and prevent such violence so that the UNCRC rights of children who are subject to such violence are respected. Similar considerations pertain where the actions of a child impacts adversely on Articles 28 and 29 on the rights of children to education.

35. Recognising the status of children who suffer adverse consequences as a result of the behaviour of other children as UNCRC rights-holders should be central to the approach of any government or administration that seeks to have its stated commitment to the Convention taken seriously: these children have a legitimate expectation that relevant authorities will act to uphold and protect these rights. The Scottish Government will be aware that in the context of the requirements of Article 3 of the Convention, in which relevant persons and authorities are required to act in the best interests of all children, the rights of children and adults impacted adversely by the actions of another child must be an active consideration in decision-making.³ As reflected in the comments made elsewhere in this submission, it is by no means clear that the approach recommended by the CRC in relation to the rights of other children and adults has been understood correctly in the development of this draft guidance.

36. The document takes no account of gender-based violence or any links to how to deal with it: the Union has noted that this issue arises frequently through casework where female staff are targeted.

² Committee on the Rights of the Child (2011). *General Comment No.13.*

³ Committee on the Rights of the Child (2001). Article 3.

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