



MENTAL CAPACITY ACT POLICY

This policy is underpinned by:

- Use of Reasonable Force, Advice for Head Teachers, Staff and Governing Bodies, Department of Education, April 2012. (Expires April 2013)
- Mental Capacity Act, Code of Practice, Department for Constitutional Affairs, 2005.

The Mental Capacity Act

The Mental Capacity Act (MCA) is a legal framework to support individuals aged 16 or over in England and Wales who lack mental capacity i.e. the capacity to make particular decisions for themselves. Equally, it also provides support those for individuals who do have mental capacity but wish to make preparations for a time in the future when they may not. In both instances it is intended to protect these individuals and maximise their ability to make decisions, or participate in decision-making processes as far as they are able to do so. The Mental Capacity Act applies to everyday decisions and life-changing decisions such as long-term accommodation moves, serious medical treatments, advanced medical treatments and Restrictive Physical Interventions (RPI). All people working with or caring for an adult (16 or over) that may lack capacity to make specific decisions must comply with this act when making decisions or acting on behalf of that person.

The Mental Capacity Act Code of Practice

The Mental Capacity Act Code of Practice provides guidance and information on the responsibilities of those with a duty of care for individuals who lack mental capacity. Whilst it is not a legal requirement to comply with the guidance given in the code of practice, those with a duty of care are expected to act with regard to it. Thus if the guidance has not been followed, justification would be required to explain why the code of practice has been departed from.

Five statutory principles underpin the legal requirements of the Mental Capacity Act:

1. A person must be assumed to have capacity unless it is established that they lack capacity.

2. A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because s/he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Determining a lack of mental capacity

A person is deemed to lack mental capacity if they are unable to make a particular decision.

Section 4.14 of the Mental Capacity Act Code of Practice states that a person is unable to make a particular decision if the person has:

- An impairment of or disturbance in the functioning of the brain;
- That impairment is sufficient to make the person unable to make the decision;

Or they cannot:

- Understand the relevant information about the decision to be made;
- Retain that relevant information in their mind;
- Use or weigh up that information as part of the decision-making process; **or**
- Communicate their decision by talking, using sign language or any other means.

If a person is deemed to lack mental capacity to make a specific decision then a decision maker must be designated to make that specific decision. The decision maker is required to make a decision that:

- Is in the best interests of the person;
- And**
- Adopts the least restrictive option.

The Mental Capacity Act at Tor View Community Special School

Students at Tor View School present with a wide range of intellectual disabilities that can directly affect the functioning of their brain and prevent them from being able to make decisions for themselves. This means staff supporting these students are making decisions on their behalf and acting in the students' best interests in order to support their

access of the curriculum, their personal and social development, to address their most basic needs, and to maintain their safety and well-being.

Consequently, where these students are aged 16 and over our staff may be placed in the position where they are required to make decisions that fall within the remit of the Mental Capacity Act. It is therefore important all staff are aware of the Mental Capacity Act and the underlying principles that support it.

Restrictive Physical Intervention at Tor View and the Mental Capacity Act

A number of students at Tor View have conduct targets that are addressed throughout their day and may shape the curriculum that is provided for them.

Staff work towards conduct targets documented in a Conduct Support Plan which outlines the short term and long term behaviour goals and provides staff with the appropriate proactive strategies to support students and keep them safe.

These Conduct Support Plans also outline where the use of reasonable force including Restrictive Physical Intervention may be required and the protocols for carrying this out.

All staff are trained in the use of Restrictive Physical Intervention and will only use this in situations where it is deemed reasonable, proportional and necessary to keep our students safe; other students and staff safe; and to prevent damage to the environment. (The use of reasonable force and Restrictive Physical Intervention is supported in documentation provided by Lancashire County Council (LCC) and the Department of Education which stipulates when reasonable force is acceptable within the school setting.) see Appendix 1

Where Restrictive Physical Intervention is required with students over the age of 16 it is important that we are practising within our legal duty to regard the Mental Capacity Act and to understand and reflect on the importance of making decisions on our student's behalf.

The Process of the Mental Capacity Act at Tor View:

All students over the age of 16 that have a Conduct Support plan that incorporates the use of Restrictive Physical Intervention will have a capacity assessment.

A person is deemed to not have capacity if any of the below are true:

- Impairment of or disturbance in the functioning of the brain
- Impairment sufficient to make the person unable to make the decision
- The person is unable to understand the information relevant to the decision
- The person is unable to retain it at the time

- The person is unable to weigh up that decision
- The person is unable to communicate that decision

If in our professional opinion the student lacks capacity a best interests assessment will be completed involving parents, teachers and any other relevant professional parties.

This will then inform the strategies that are present on the Conduct Support Plan.

This ensures that our students are offered choice and decisions in every part of their school life and also allows us a further structure to ensure we are using Restrictive Physical Intervention in a proportional, reasonable and necessary manner.

This process of activating the Mental Capacity Act and the Capacity Assessment is outlined in diagram 1.1 and diagram 1.2. below.

Fig 1.1

Use of Restrictive Physical Intervention and Seclusion

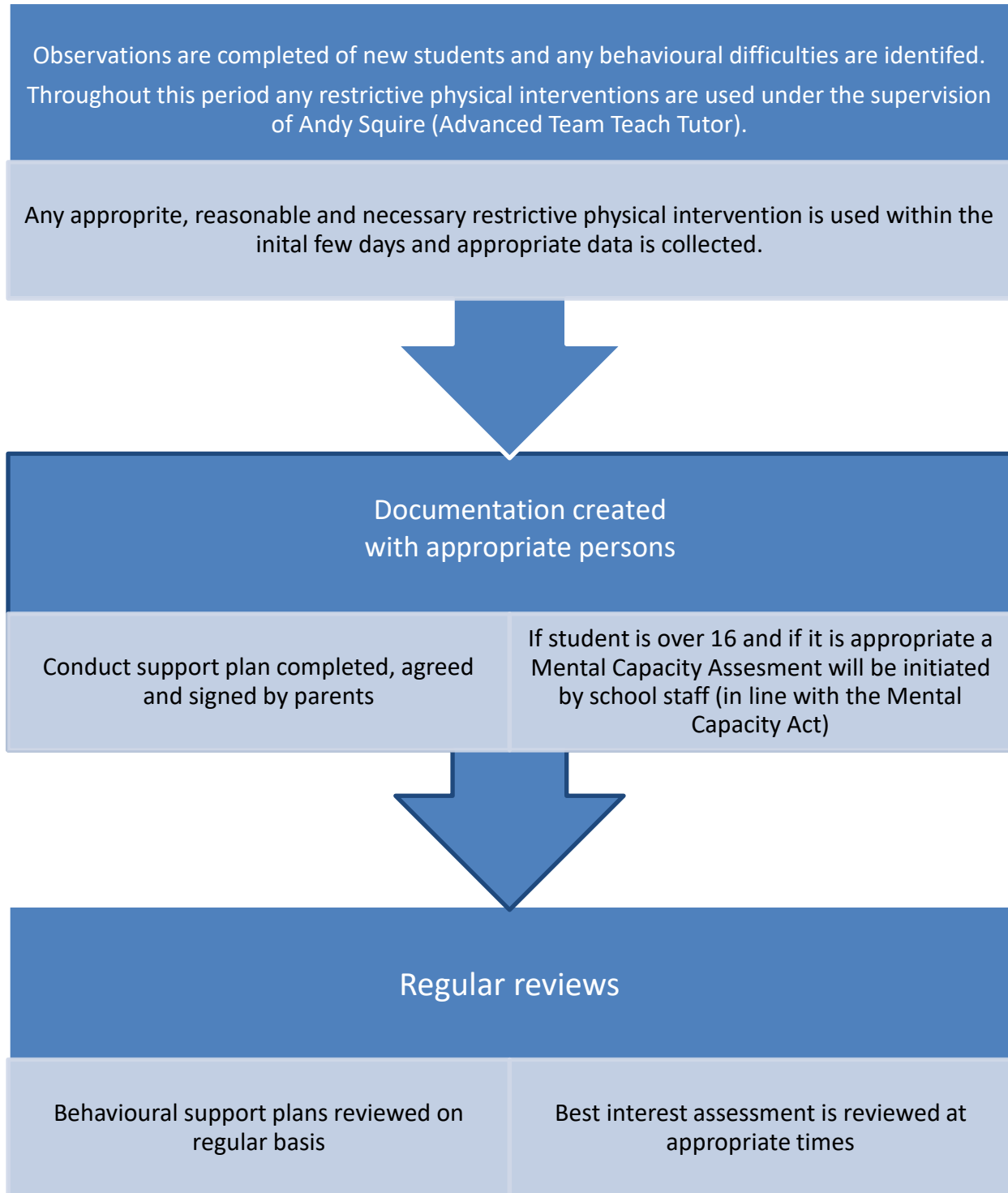
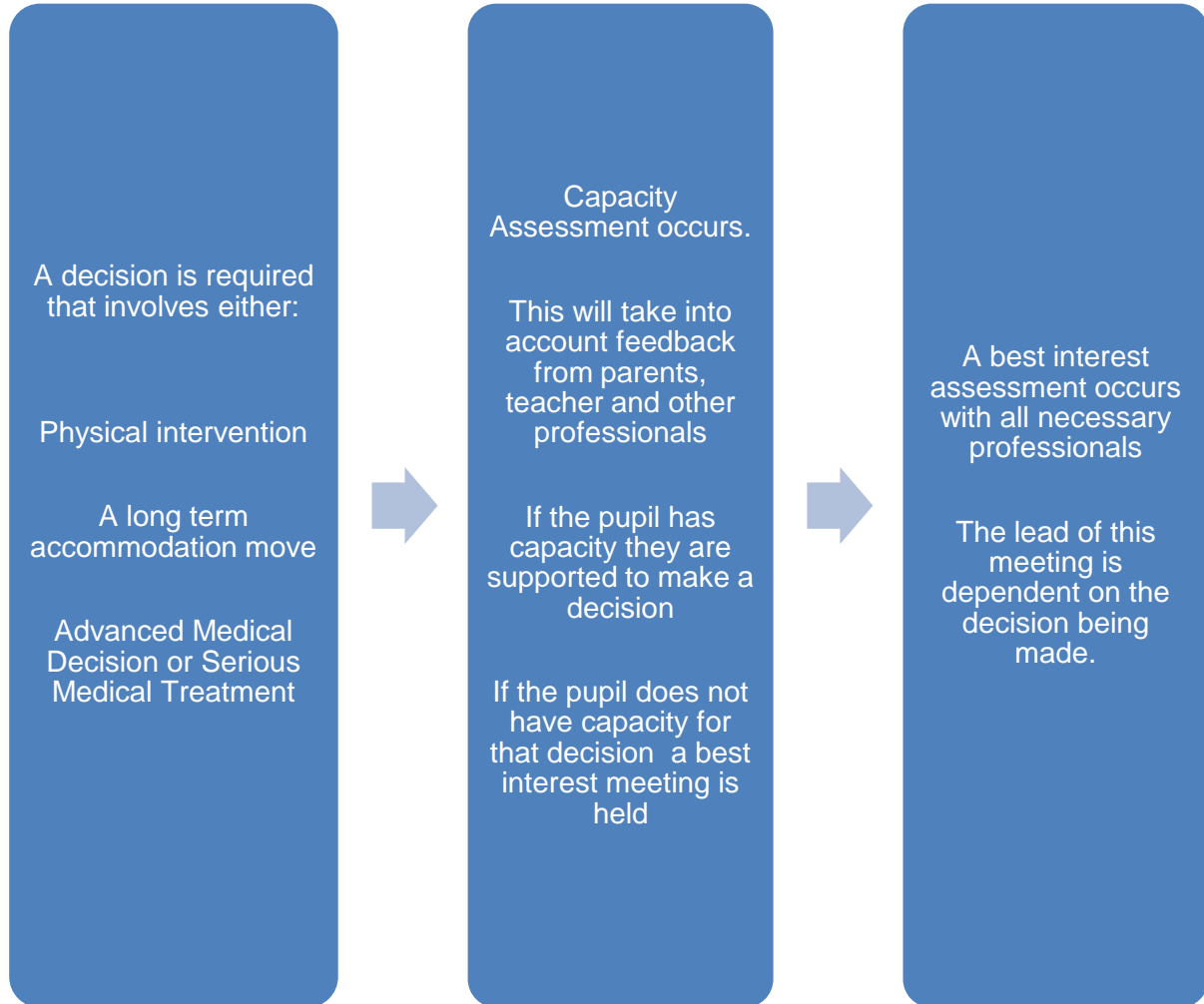


Fig 1.2

Process of assessing Capacity



Contribution to Mental Capacity Assessment, Best Interest Meetings and DOLS meetings outside:

As a school we recognise the importance of contributing to external meetings to support our students in medical meetings and also to work collaboratively with other services to aid transitions to other settings.

When we feel it is appropriate we will contribute and advocate for our students within these meetings including capacity assessments and best interest assessments.

However, we will only contribute within our remit and expertise and will rely on other professionals to lead these meetings when the decision is external to the school, as we have our own policies and procedures within this setting.

We will make a commitment to attempt to contribute to any decisions that involve:

- Long term accommodation move to aid with student transitions
Or
- Serious Medical Treatments or Advanced Medical Decisions

Deprivation of Liberty Act (DOLS)

We may also contribute any information that may be beneficial to students in adult placements that require referral to the court of protection. This includes any use of the Deprivation of Liberty Act (DOLS).

This act applies to adults over 18 years old that lack capacity. This is led and supervised by the Local Authority and involves an assessment under the Mental Health Act, Section 12. After a Best Interest Assessment (BIA) occurs a DOLS can be placed on an adult for 12 months where a restriction of liberty is needed to ensure the safety of that person.

	Name/Initials:	Date:
Written By:		Jul 2013
Reviewed:	LAP	Oct 2015
	LAP	May 2018

Appendix 1

Use of reasonable force

**Advice for headteachers, staff and
governing bodies**

July 2013 ²

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About this departmental advice

This is non-statutory advice from the Department for Education. It is intended to provide clarification on the use of force to help school staff feel more confident about using this power when they feel it is necessary and to make clear the responsibilities of headteachers and governing bodies in respect of this power.

Expiry or review date

This advice will be kept under review and updated as necessary.

Who is this advice for?

- School leaders and school staff in **all schools**¹ in England.

¹ "All schools" include Academies, Free Schools, independent schools and all types of maintained schools

Key points

- School staff have a power to use force and lawful use of the power will provide a defence to any related criminal prosecution or other legal action.
- Suspension should not be an automatic response when a member of staff has been accused of using excessive force.
- Senior school leaders should support their staff when they use this power.

What is reasonable force?

1. The term 'reasonable force' covers the broad range of actions used by most teachers at some point in their career that involve a degree of physical contact with pupils.
2. Force is usually used either to control or restrain. This can range from guiding a pupil to safety by the arm through to more extreme circumstances such as breaking up a fight or where a student needs to be restrained to prevent violence or injury.
3. 'Reasonable in the circumstances' means using no more force than is needed.
4. As mentioned above, schools generally use force to control pupils and to restrain them. Control means either passive physical contact, such as standing between pupils or blocking a pupil's path, or active physical contact such as leading a pupil by the arm out of a classroom.
5. Restraint means to hold back physically or to bring a pupil under control. It is typically used in more extreme circumstances, for example when two pupils are fighting and refuse to separate without physical intervention.
6. School staff should always try to avoid acting in a way that might cause injury, but in extreme cases it may not always be possible to avoid injuring the pupil.

Who can use reasonable force?

- All members of school staff have a legal power to use reasonable force².
- This power applies to any member of staff at the school. It can also apply to people whom the headteacher has temporarily put in charge of pupils such as unpaid volunteers or parents accompanying students on a school organised visit.

² Section 93, Education and Inspections Act 2006

When can reasonable force be used?

- Reasonable force can be used to prevent pupils from hurting themselves or others, from damaging property, or from causing disorder.
- In a school, force is used for two main purposes – to control pupils or to restrain them.
- The decision on whether or not to physically intervene is down to the professional judgement of the staff member concerned and should always depend on the individual circumstances.

² Section 93, Education and Inspections Act 2006

- The following list is not exhaustive but provides some examples of situations where reasonable force can and cannot be used.

Schools can use reasonable force to:

- remove disruptive children from the classroom where they have refused to follow an instruction to do so;
- prevent a pupil behaving in a way that disrupts a school event or a school trip or visit;
- prevent a pupil leaving the classroom where allowing the pupil to leave would risk their safety or lead to behaviour that disrupts the behaviour of others;
- prevent a pupil from attacking a member of staff or another pupil, or to stop a fight in the playground; and
- restrain a pupil at risk of harming themselves through physical outbursts.

Schools cannot:

- use force as a punishment – it is always unlawful to use force as a punishment.

Power to search pupils without consent

In addition to the general power to use reasonable force described above, headteachers and authorised staff can use such force as is reasonable given the circumstances to conduct a search for the following “prohibited items”³:

³ Section 550ZB(5) of the Education Act 1996

- knives and weapons
- alcohol
- illegal drugs
- stolen items
- tobacco and cigarette papers
- fireworks
- pornographic images
- any article that has been or is likely to be used to commit an offence, cause personal injury or damage to property.

Force **cannot** be used to search for items banned under the school rules. 6

Separate guidance is available on the power to search without consent – see the ‘Further sources of information’ section for a link to this document.

Communicating the school’s approach to the use of force

- Every school is required to have a behaviour policy and to make this policy known to staff, parents and pupils. The governing body should notify the headteacher that it expects the school behaviour policy to include the power to use reasonable force.
- There is no requirement to have a policy on the use of force but it is good practice to set out, in the behaviour policy, the circumstances in which force might be used. For example, it could say that teachers will physically separate pupils found fighting or that if a pupil refuses to leave a room when instructed to do so, they will be physically removed.
- Any policy on the use of reasonable force should acknowledge their legal duty to make reasonable adjustments for disabled children and children with special educational needs (SEN).
- Schools do not require parental consent to use force on a student.
- Schools should **not** have a ‘no contact’ policy. There is a real risk that such a policy might place a member of staff in breach of their duty of care towards a pupil, or prevent them taking action needed to prevent a pupil causing harm.
- By taking steps to ensure that staff, pupils and parents are clear about when force might be used, the school will reduce the likelihood of complaints being made when force has been used properly.

Using force

- A panel of experts⁴ identified that certain restraint techniques presented an unacceptable risk when used on children and young people. The techniques in question are:
- the ‘seated double embrace’ which involves two members of staff forcing a person into a sitting position and leaning them forward, while a third monitors breathing;
- the ‘double basket-hold’ which involves holding a person’s arms across their chest; and
- the ‘nose distraction technique’ which involves a sharp upward jab under the nose.

⁴ Physical Control in Care Medical Panel - 2008 7

Staff training

- Schools need to take their own decisions about staff training. The headteacher should consider whether members of staff require any additional training to enable them to carry out their responsibilities and should consider the needs of the pupils when doing so.
- Some local authorities provide advice and guidance to help schools to develop an appropriate training programme.

Telling parents when force has been used on their child

- It is good practice for schools to speak to parents about serious incidents involving the use of force and to consider how best to record such serious incidents. It is up to schools to decide whether it is appropriate to report the use of force to parents⁵.
- In deciding what is a serious incident, teachers should use their professional judgement and consider the:
 - pupil's behaviour and level of risk presented at the time of the incident;
 - degree of force used;
 - effect on the pupil or member of staff; and
 - the child's age.

⁵ References to parent or parents are to fathers as well as mothers, unless otherwise stated.

What happens if a pupil complains when force is used on them?

- All complaints about the use of force should be thoroughly, speedily and appropriately investigated.
- Where a member of staff has acted within the law – that is, they have used reasonable force in order to prevent injury, damage to property or disorder – this will provide a defence to any criminal prosecution or other civil or public law action.
- When a complaint is made the onus is on the person making the complaint to prove that his/her allegations are true – it is not for the member of staff to show that he/she has acted reasonably.
- Suspension must not be an automatic response when a member of staff has been accused of using excessive force. Schools should refer to the “Dealing with Allegations of Abuse against Teachers and Other Staff” guidance (see the ‘Further sources of information’ section below) where an allegation of using excessive force is made against a teacher. This guidance makes clear that a person must not be suspended automatically, or without careful thought.
- Schools must consider carefully whether the circumstances of the case warrant a person being suspended until the allegation is resolved or whether alternative arrangements are more appropriate.
- If a decision is taken to suspend a teacher, the school should ensure that the teacher has access to a named contact who can provide support.
- Governing bodies should always consider whether a teacher has acted within the law when reaching a decision on whether or not to take disciplinary action against the teacher.
- As employers, schools and local authorities have a duty of care towards their employees. It is important that schools provide appropriate pastoral care to any member of staff who is subject to a formal allegation following a use of force incident.

What about other physical contact with pupils?

- It is not illegal to touch a pupil. There are occasions when physical contact, other than reasonable force, with a pupil is proper and necessary.
- Examples of where touching a pupil might be proper or necessary:
 - Holding the hand of the child at the front/back of the line when going to assembly or when walking together around the school;
 - When comforting a distressed pupil;
 - When a pupil is being congratulated or praised;
 - To demonstrate how to use a musical instrument;
 - To demonstrate exercises or techniques during PE lessons or sports coaching; and
 - To give first aid.

Frequently Asked Questions

Q: I'm worried that if I use force a pupil or parent could make a complaint against me. Am I protected?

A: Yes, if you have acted lawfully. If the force used is reasonable all staff will have a robust defence against any accusations.

Q: How do I know whether using a physical intervention is 'reasonable'?

A: The decision on whether to physically intervene is down to the professional judgement of the teacher concerned. Whether the force used is reasonable will always depend on the particular circumstances of the case. The use of force is reasonable if it is proportionate to the consequences it is intended to prevent. This means the degree of force used should be no more than is needed to achieve the desired result. School staff should expect the full backing of their senior leadership team when they have used force.

Q: What about school trips?

A: The power may be used where the member of staff is lawfully in charge of the pupils, and this includes while on school trips.

Q: Can force be used on pupils with SEN or disabilities? A: Yes, but the judgement on whether to use force should not only depend on the circumstances of the case but also on information and understanding of the needs of the pupil concerned.

Q: I'm a female teacher with a Year 10 class - there's no way I'd want to restrain or try to control my pupils. Am I expected to do so? A: There is a power, not a duty, to use force so members of staff have discretion whether or not to use it. However, teachers and other school staff have a duty of care towards their pupils and it might be argued that failing to take action (including a failure to use reasonable force) may in some circumstances breach that duty.

Q: Are there any circumstances in which a teacher can use physical force to punish a pupil?

A: No. It is always unlawful to use force as a punishment. This is because it would fall within the definition of corporal punishment, which is illegal. 10

Further sources of information

Other departmental advice and guidance you may be interested in

- Guidance on the Use of Restrictive Physical Interventions for Staff Working with Children and Adults who display Extreme Behaviour in Association with Learning Disability and/or Autistic Spectrum Disorders (2002)
- Guidance on the Use of Restrictive Physical Interventions for Pupils with Severe Behavioural Difficulties (2003)
- Screening, searching and confiscation – advice for headteachers, staff and governing bodies.
- Dealing with allegations of abuse against teachers and other staff – guidance for local authorities, headteachers, school staff, governing bodies and proprietors of independent schools

Associated resources (external links)

- Police and Criminal Evidence Act 1984 (PACE) Code G: Revised Code of Practice for the Statutory Power of Arrest by Police Officers

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