

#2 MENTAL CAPACITY AND YOUNG PEOPLE'S RIGHTS TO MAKE DECISIONS

These Frequently Asked Questions have been prepared to provide a summary of the key duties on local authorities following the introduction of the Children and Families Act 2014. They are not to be treated as providing legal advice and should be used as a guide only.

If legal advice is required contact SEN4You directly on 01908 246034 or Advice@SEN4You.co.uk

KEY PROVISIONS

- The Mental Capacity Act 2005
- Section 80, 83 Children and Families Act 2014
- The Education (Special Educational Needs and Disability 2014) Regulations
- Chapter 8 SEN and Disability Code of Practice 2014

Is the local authority required to obtain the views of young people and parents in making decisions?

Local authorities must ensure that children, young people and parents are provided with the information, advice and support necessary to enable them to participate in discussions and decisions about their support. This should include information on their rights and entitlements in accessible formats and time to prepare for discussions and meetings.

Does the local authority have to liaise with young people aged 16 or over, or their parents?

The Children and Families Act 2014 gives significant new rights directly to young people once they reach the end of compulsory school age (the end of the academic year in which they turn 16). When a young person reaches the end of compulsory school age, local authorities and other agencies should normally engage directly with the young person rather than their parent, ensuring that as part of the planning process they identify the relevant people who should be involved and how to involve them.

At 16, what rights does a young person have?

The specific decision-making rights about EHC Plans which apply to young people directly from the end of compulsory school age are:

- The right to request an assessment for an EHC Plan (which they can do at any time up to their 25th birthday);
- The right to make representations about the content of their EHC Plan;
- The right to request that a particular institution is named in their EHC Plan;
- The right to request a Personal Budget for elements of an EHC Plan;
- The right to appeal to the First-tier Tribunal (SEN and Disability) about decisions concerning their EHC Plan.

Should the local authority just rely on the views of the child's parents or the young person?

Local authorities must not use the views of parents as a substitute for young people's views, particularly where the young person is 16 and over. Young people will have their own perspective and local authorities should have arrangements in place to engage with them directly whatever their age.

Whose views will the local authority use if the child/young person has different views to those of their parents?

Legally, it is the young person's decision which prevails, subject to their capacity to make decisions. Where there are disagreements, staff should work impartially and separately with both the parents and the young person to ensure that any decision is taken with the best interests of the young person in mind.

Can a young person make decisions on their educational placement contrary to the wishes of their parent/carer?

The rights of young people to make decisions will be subject to their capacity to do so, as set out in the Mental Capacity Act 2005 (MCA).

Can a young person ask the local authority to liaise with a parent, friend or advocate?

A young person can ask a family member or friend to support them in any way they wish, including, for example, receiving correspondence on their behalf, and filling in forms, attending meetings, making telephone calls and helping them to make decisions.

What happens if the local authority is concerned at the capacity of a young person to make decisions?

The local authority will consider whether some young people may require support in expressing their views, including whether they may need support from an advocate (who could be a family member or a professional). The local authority should set out clearly in their Local Offer where advocacy services can be obtained. Such services could be funded through the personal budget.

If the local authority is concerned about the young person's capacity to make decisions then they may refer to the Mental Capacity Act (MCA) and the accompanying Code of Practice which outlines the steps that should be taken. A mental capacity assessment will need to be undertaken and this should be undertaken by appropriate staff who have received training in mental capacity.

Who does the Mental Capacity Act apply to?

The Act applies to anyone aged 16 or over in England and Wales. It protects people with mental health difficulties as well as people with dementia, learning disabilities, a stroke or brain injuries.

The underlying philosophy of the MCA is that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves must be made in their best interests. The MCA applies in England and Wales. It affects anyone whose mental capacity to make decisions is affected by (what the MCA refers to as) "an impairment of, or a disturbance in the functioning of, the mind or brain."

Are there any circumstances where the Act would apply to young people under 16?

The Act does not generally apply to people under the age of 16 but there are two exceptions:-

- 1) The Court of Protection can make decisions about a child's property or finances (or appoint a deputy to make these decisions) if the child lacks capacity to make such decisions and is likely to still lack capacity to make financial decisions when they reach the age of 18;
- 2) Offences of ill treatment or wilful neglect of a person who lacks capacity can also apply to victims younger than 16.

How will a local authority approach concerns about a young person's capacity to make decisions?

The Mental Capacity Act (MCA) is governed by five core principles. These can be summarised as follows:

- Presumption of capacity (section 1(2) MCA). Every adult has the right to make their own decisions if they have the capacity to do so. Family carers and healthcare or social care staff must assume that a person has the capacity to make decisions, unless it can be established that the person does not have capacity;
- Maximising decision making capacity (section 1(3) MCA). People should receive support to help them make their own decisions. Before concluding that someone lacks capacity to make a particular decision, it is important to take all possible steps to try to help them reach a decision themselves;
- Right to make unwise decisions (section 1(4) MCA). People have the right to make decisions that others might think are unwise. A person who makes a decision that others think is unwise should not automatically be labelled as lacking the capacity to make a decision;
- Best interests (section 1(5) MCA). Any act done for, or any decision made on behalf of, someone who lacks capacity must be in their best interests;
- Least restrictive option (section 1(6) MCA). Any act done for, or any decision made on behalf of, someone who lacks capacity should be the least restrictive option possible.

How will capacity be assessed?

Section 3 of the MCA provides a fuller definition of how to assess whether someone lacks capacity to make a decision. It states that a person is unable to make a decision if he or she is unable to do one or more of the following things:

- Understand the information relevant to the decision;
- Retain the information for long enough to be able to make a decision;
- Use or weigh up the information as part of the process of making the decision;
- Communicate the decision by any possible method, such as talking, using sign language, squeezing someone's hand and so on.

The Code of Practice to the MCA also explains what does not mean that someone lacks capacity. A person must not be assumed to lack capacity because of:

- Their age;
- Their appearance;
- Any mental health diagnosis they may have;
- Any other disability or medical condition they may have.

What happens if there are disputes about a person's capacity to make decisions?

The Court of Protection was created by the MCA to oversee actions taken under the Act and resolve any disputes that involve mental capacity matters.

The Court has the same authority as the High Court and appeals can be made against its decisions, with permission, to the Court of Appeal.