

Annex 1: Mental Capacity

Young people over compulsory school age have the right to participate in decisions about the provision that is made for them and be consulted about provision in their areas, although there is nothing to stop them asking their parents, or others to help them make the decision. However, some young people, and possibly some parents, will not have the mental capacity to make certain decisions. Provision is made in the Children and Families Act to deal with this. Under the Act, lacking mental capacity has the same meaning as in the Mental Capacity Act (MCA) 2005. A separate Code of Practice provides guidance on how the MCA works on a day-to-day basis. Professionals and anyone who is paid for the work they do with someone who lacks capacity has a duty to 'have regard' to that Code. The Code is available from the Ministry of Justice website – a link is given in the References section under Annex 1.

In cases where a person lacks mental capacity to make a particular decision, that decision will be taken by a representative on their behalf. The representative will be a deputy appointed by the Court of Protection, or a person who has a lasting or enduring power of attorney for the person. In the case of a young person who does not have such a representative, the decision will be taken by the young person's parent. It is also likely that where a young person does have a representative, that representative will be the young person's parent. Therefore in most cases, where a young person lacks capacity, decisions will be taken on their behalf by their parent. However, it is important that people are helped to make decisions themselves wherever possible.

The MCA sets out five key principles which **must** underlie everything someone does in relation to someone who may lack capacity to make some decisions. The five key principles are:

- It should be assumed that everyone can make their own decisions unless it is proved otherwise
- A person should have all the help and support possible to make and communicate their own decision before anyone concludes that they lack capacity to make their own decision
- A person should not be treated as lacking capacity just because they make an unwise decision
- Actions or decisions carried out on behalf of someone who lacks capacity **must** be in their best interests
- Actions or decisions carried out on behalf of someone who lacks capacity should limit their rights and freedom of action as little as possible

If there is doubt about a person's mental capacity, consideration needs to be given as to whether the person lacks capacity to make that particular decision, as they may have capacity to make some decisions but not others. This does not necessarily mean that a person's mental capacity has to be reassessed each time a decision needs to be taken. If there is a reasonable belief that the person lacks the capacity to make a decision based on prior knowledge of that person then the decision can be made by a parent or representative, as appropriate. **Subject to the principles above**, there are four key questions to consider in determining whether someone is able to make a decision:

- Can the person understand information relevant to the decision, including understanding the likely consequences of making, or not making the decision?
- Can they retain this information for long enough to make the decision?
- Can they use and weigh the information to arrive at a choice?
- Can they communicate their decision in any way?

If the answer to any of these questions is **'no'** (**bearing in mind that if an individual needs a lot of support to make and communicate a decision it does not mean they are incapable of making a decision**) then the person lacks capacity to make that decision at that time.

The Special Educational Needs and Disability Regulations 2014 specify the particular occasions when a representative or parent has to act on behalf of a young person who lacks capacity or a representative if the child or young person's parent lacks capacity.

There are some occasions when a local authority **must** take account of the views of the young person as well as any representative. These are when the local authority is:

- having regard to the views and wishes of a child, the child's parent or a young person when carrying out its functions under Part III of the Act (Section 19)
- consulting children, their parents and young people when carrying out its duty to keep education and care provision for disabled children and young people and those with SEN under review (Section 27)
- publishing the comments of children, their parents and young people about its Local Offer and involving these people in preparing and reviewing the Local Offer (Section 30), and

- arranging for information and advice to be provided to children, their parents and young people and taking steps to make information and advice services known to those people (Section 32)

The Regulations also specify the following occasions when the local authority considers the views of the representative instead of the parent or young person. These are where the child's parent or young person is:

- expressing their wishes, being notified, consulted and copied documents, agreeing or taking decisions in relation to needs assessments, re-assessments and EHC plans (Sections 33, 36, 38, 39, 40, 42 and 44)
- being admitted to special provision where they do not have an EHC plan (Section 34)
- requesting a Personal Budget (Section 49)
- appealing to the Tribunal (Section 51)
- participating in mediation and resolving disagreements (Sections 52, 53, 54, 55, 56 and 57)
- being consulted about making special educational provision otherwise than in a school or post-16 institution (Section 61)
- being informed that special educational provision is being made for them or their child (Section 68)
- similar provisions in relation to detained persons

Further advice about the MCA is available from the Ministry of Justice website – a link is given in the References section under Annex 1.

Annex 2: Improving practice and staff training in education settings

Early years providers, schools and colleges are responsible for deciding what external support to seek and for setting their own priorities for the continuous professional development of their staff. The support described in this guidance can be delivered most effectively in education settings which adopt structured approaches to engaging parents and children, tracking and measuring progress of pupils with SEN, and where there is a good level of knowledge across all staff of different types of SEN and suitable teaching approaches and interventions. Where a setting has a SENCO, they should play an important role in advising on and contributing to the broader support provided by schools and the professional development of other teachers and staff.

A range of organisations offer support and training to schools on overall identification and teaching approaches for pupils with SEN as well as on specific conditions.

Many aspects of the approach set out in Chapter 6 draw on learning from the piloting and subsequent work of Achievement for All (www.afa3as.org.uk). This demonstrates that when a whole-school approach to supporting pupils with SEN is taken, along with effective engagement with parents, there can be a clear impact on attainment.

Schools, colleges and early years providers who need to improve the knowledge and skills of staff in relation to specific conditions can access information, advice and training materials that have been developed through the Department for Education's voluntary and community sector grants programme. NASEN provides a SEN Gateway that enables access to a broad range of materials and support services across the range of SEN (www.sendgateway.org.uk).

The Excellence gateway provides access to resources to support professional development in the FE and Skills sector (www.excellencegateway.org.uk).

Early Support provides a range of information materials to families and professionals www.ncb.org.uk/earllysupport.

The following organisations provide advice, information and training on specific impairments:

- The Autism Education Trust for children and young people on the Autism Spectrum (www.autismeducationtrust.org.uk)
- The Communications Trust for speech, language and communication difficulties (www.thecommunicationtrust.org.uk)

- The Dyslexia SpLD Trust on dyslexia and literacy difficulties (www.thedyslexia-spldtrust.org.uk)
- The National Sensory Impairment Partnership for vision impairment, hearing impairment and multi-sensory impairment (www.natsip.org.uk)

Each of these organisations is working with funding from the Department for Education to support the reforms to the SEN system.

MindEd (www.minded.org.uk) is an e-learning portal aimed at supporting all adults working with children and young people. It provides simple, clear guidance on children and young people's mental health, wellbeing and development.

Glossary of terms

Academy: A state-funded school in England that is directly funded by the Department for Education, through the Education Funding Agency. Academies are self-governing and independent of local authority control.

Access to Work: An Access to Work grant from the Department for Work and Pensions helps to pay for practical support for young people and adults who have a disability, health or mental health condition so they can start work, stay in work or start their own business. It can pay for things like special equipment, fares to work if public transport is not practical, a support worker or coach in the workplace or a communicator at a job interview.

Annual review: the review of an EHC plan which the local authority must make as a minimum every 12 months.

Armed Forces Covenant: The armed forces covenant sets out the relationship between the nation, the government and the armed forces. It recognises that the whole nation has a moral obligation to members of the armed forces and their families and it establishes how they should expect to be treated. The Covenant states that the children of service personnel should have the same standard of, and access to, education (including early years services) as any other UK citizen in the area in which they live.

Care Plan: A record of the health and/or social care services that are being provided to a child or young person to help them manage a disability or health condition. The Plan will be agreed with the child's parent or the young person and may be contained within a patient's medical record or maintained as a separate document. Care Plans are also maintained by local authorities for looked after children – in this instance the Care Plan will contain a Personal Education Plan in addition to the health and social care elements.

Child and Adolescent Mental Health Services (CAMHS): These services assess and treat children and young people with emotional, behavioural or mental health difficulties. They range from basic pastoral care, such as identifying mental health problems, to specialist 'Tier 4' CAMHS, which provide in-patient care for those who are severely mentally ill.

Children and young people's secure estate: This comprises three types of establishment – secure children's homes, secure training centres and young offender institutions.

Comprehensive Health Assessment Tool (CHAT): An assessment tool for young people in the youth justice system. It ensures that young people in the secure estate and in the community receive a comprehensive assessment of their

physical and mental health, substance misuse and neuro-disability needs on entry to the system.

Compulsory school age: A child is of compulsory school age from the beginning of the term following their 5th birthday until the last Friday of June in the year in which they become 16, provided that their 16th birthday falls before the start of the next school year.

Disabled Students Allowance (DSA): An allowance for undergraduate or post-graduate students who have a disability or long-term health condition, mental health condition or specific learning difficulty such as dyslexia or dyspraxia which affects their ability to study. It can be used to pay for things such as special equipment, a note-taker or transport costs.

Disagreement resolution: This is a statutory service commissioned by local authorities to provide a quick and non-adversarial way of resolving disagreements between parents or young people and bodies responsible for providing education, whether the child or young person has an EHC plan or not, or health and social care in relation to EHC assessments and plans. Disagreement resolution services can also be used in cases of disagreement between local authorities and health commissioning bodies during EHC needs assessments, the drawing up of EHC plans or the reviewing of those plans.

Early Help Assessment: A social care assessment of a child and his or her family, designed to identify needs at an early stage and enable suitable interventions to be put in place to support the family.

Early Support Programme: The Early Support Programme co-ordinates health, education and social care support for the parents and carers of disabled children and young people from birth to adulthood. A key worker is assigned to families that join the Programme.

Early Years Foundation Stage (EYFS): The foundation stage begins when children reach the age of three. Many children attend an early education setting soon after their third birthday. The foundation stage continues until the end of the reception year and is consistent with the National Curriculum. It prepares children for learning in Year 1, when programmes of study for Key Stage 1 are taught.

Early years provider: A provider of early education places for children under five years of age. This can include state-funded and private nurseries as well as child minders.

Education Funding Agency (EFA): An arm of the Department for Education that manages the funding for learners between the ages of 3 and 19 years and for those with SEN or disabilities between the ages of 3 and 25. The EFA allocates funding to 152 local authorities for maintained schools and voluntary aided schools. It is also responsible for funding and monitoring academies, University

Technical Colleges, studio schools and free schools, as well as building maintenance programmes for schools and sixth-form colleges.

Education, Health and Care plan (EHC plan): An EHC plan details the education, health and social care support that is to be provided to a child or young person who has SEN or a disability. It is drawn up by the local authority after an EHC needs assessment of the child or young person has determined that an EHC plan is necessary, and after consultation with relevant partner agencies.

Elected members: The elected members of a county council or unitary local authority (as opposed to the salaried officials of the council or local authority). Some elected members have a lead responsibility for specific areas of policy, for example the Lead Member for Children's Services.

First-tier Tribunal (Special Educational Needs and Disability): An independent body which has jurisdiction under section 333 of the Education Act 1996 for determining appeals by parents against local authority decisions on EHC needs assessments and EHC plans. The Tribunal's decision is binding on both parties to the appeal. The Tribunal also hears claims of disability discrimination under the Equality Act 2010.

Free school: A free school is a type of academy, which is free to attend, but is not controlled by the local authority. Free schools receive state funding via the Education Funding Agency. Parents, teachers, businesses or charities can submit an application to the Department for Education to set up a free school.

Further education (FE) college: A college offering continuing education to young people over the compulsory school age of 16. The FE sector in England includes general further education colleges, sixth form colleges, specialist colleges and adult education institutes.

Graduated approach: A model of action and intervention in early education settings, schools and colleges to help children and young people who have special educational needs. The approach recognises that there is a continuum of special educational needs and that, where necessary, increasing specialist expertise should be brought to bear on the difficulties that a child or young person may be experiencing.

Health and Wellbeing Board: A Health and Wellbeing Board acts as a forum where local commissioners across the NHS, social care and public health work together to improve the health and wellbeing of their local population and reduce health inequalities. The boards are intended to increase democratic input into strategic decisions about health and wellbeing services, strengthen working relationships between health and social care and encourage integrated commissioning of health and social care services.

Healthwatch England: Healthwatch England is an independent consumer champion, gathering and representing the views of the public about health and social care services in England. It operates both at a national and local level and ensures the views of the public and people who use services are taken into account. Healthwatch England works as part of the Care Quality Commission.

Healthy Child Programme: The Healthy Child Programme covers pregnancy and the first five years of a child's life, focusing on a universal preventative service that provides families with a programme of screening, immunisation, health and development reviews, supplemented by advice around health, wellbeing and parenting.

Independent Reviewing Officer (IRO): The appointment of an IRO is a statutory requirement for local authorities under the Adoption and Children Act 2002. IROs make an important contribution to the goal of significantly improving outcomes for looked after children. Their primary focus is to quality assure the care planning process for each child, and to ensure that his or her current wishes and feelings are given full consideration.

Independent school: A school that is not maintained by a local authority and is registered under section 464 of the Education Act 1996. Section 347 of the Act sets out the conditions under which an independent school may be approved by the Secretary of State as being suitable for the admission of children with EHC plans.

Independent supporter: A person recruited locally by a voluntary or community sector organisation to help families going through an EHC needs assessment and the process of developing an EHC plan. This person is independent of the local authority and will receive training, including legal training, to enable him or her to provide this support.

Information, Advice and Support Services: Information, Advice and Support Services provide advice and information to children with SEN or disabilities, their parents, and young people with SEN or disabilities. They provide neutral and factual support on the special educational needs system to help the children, their parents and young people to play an active and informed role in their education and care. Although funded by local authorities, Information, Advice and Support Services are run either at arm's length from the local authority or by a voluntary organisation to ensure children, their parents and young people have confidence in them.

Joint Strategic Needs Assessment (JSNA): Joint strategic needs assessments (JSNAs) analyse the health needs of populations to inform and guide commissioning of health, wellbeing and social care services within local authority areas. The JSNA's central role is to act as the overarching primary evidence base for health and wellbeing boards to decide on key local health priorities.

Local Offer: Local authorities in England are required to set out in their Local Offer information about provision they expect to be available across education, health and social care for children and young people in their area who have SEN or are disabled, including those who do not have Education, Health and Care (EHC) plans. Local authorities must consult locally on what provision the Local Offer should contain.

Maintained school: For the purposes of this Code, schools in England that are maintained by a local authority – any community, foundation or voluntary school, community special or foundation special school.

Mediation: This is a statutory service commissioned by local authorities which is designed to help settle disagreements between parents or young people and local authorities over EHC needs assessments and plans and which parents and young people can use before deciding whether to appeal to the First-Tier Tribunal about decisions on assessment or the special educational element of a plan. Mediation can cover any one or all three elements of an EHC plan and must be offered to the parent or young person when the final plan is issued, but they are not able to appeal to the Tribunal about the health and social care aspects of the plan.

National curriculum: This sets out a clear, full and statutory entitlement to learning for all pupils, determining what should be taught and setting attainment targets for learning. It also determines how performance will be assessed and reported.

National Offender Management Service (NOMS): NOMS is an executive agency of the Ministry of Justice. It is responsible for the running of prison and probation services, rehabilitation services for prisoners leaving prison, ensuring support is available to stop people re-offending, contract managing private sector prisons and services such as the Prisoner Escort Service and electronic tagging, and contract managing 35 Probation Trusts.

NHS Continuing Care: NHS Continuing Care is support provided for children and young people under 18 who need a tailored package of care because of their disability, an accident or illness.

NHS Continuing Healthcare: NHS Continuing Healthcare is the name given to a package of care that is arranged and funded solely by the NHS for individuals aged 18 and over who are not in hospital but have complex ongoing healthcare needs. It can be provided in any setting, for example in the home or in a residential care home.

NHS England: NHS England is an independent body, at arm's length to the government and held to account through the NHS Mandate. Its main role is to improve health outcomes for people in England by providing national leadership for improving outcomes and driving up the quality of care; overseeing the

operation of clinical commissioning groups; allocating resources to clinical commissioning groups, and commissioning primary care and specialist services.

NHS foundation trust: NHS foundation trusts are not-for-profit corporations that provide NHS hospital, mental health and ambulance services. NHS foundation trusts are not directed by the Government, but are accountable to their local communities through their members and governors, to their commissioners through contracts and to Parliament through their annual report and accounts. Foundation trusts are registered with and inspected by the Care Quality Commission.

NHS Mandate: The NHS Mandate is issued by the government to NHS England. It sets out the government's ambition for the National Health Service and provides direction to NHS England. The mandate will be reviewed annually.

NHS trust: NHS trusts are public sector bodies that provide community health, hospital, mental health and ambulance services on behalf of the NHS in England and Wales. Each trust is headed by a board consisting of executive and non-executive directors, and is chaired by a non-executive director.

Non-maintained special school: Schools in England approved by the Secretary of State under section 342 of the Education Act 1996 as special schools which are not maintained by the state but charge fees on a non-profit-making basis. Most non-maintained special schools are run by major charities or charitable trusts.

Ofsted: Office for Standards in Education, a non-Ministerial government department established under the Education (Schools) Act 1992 to take responsibility for the inspection of all schools in England. Her Majesty's Inspectors (HMI) form its professional arm.

Parent: Under section 576 of the Education Act 1996, the term 'parent' includes any person who is not a parent of the child, but has parental responsibility (see below) or who cares for him or her.

Parent Carer Forum: A Parent Carer Forum is a group of parents and carers of disabled children who work with local authorities, education, health and other providers to make sure the services they plan and deliver meet the needs of disabled children and families.

Parental responsibility: Parental responsibility is defined under Section 3 (1) of the Children Act 1989 as meaning all the duties, rights, powers, responsibilities and authority which parents have with respect to their children and their children's property. Under Section 2 of the Children Act 1989, parental responsibility falls upon:

- all mothers and fathers who were married to each other at the time of the child's birth (including those who have since separated or divorced)

- mothers who were not married to the father at the time of the child's birth, and
- fathers who were not married to the mother at the time of the child's birth, but who have obtained parental responsibility either by agreement with the child's mother or through a court order

Under Section 12 of the Children Act 1989, where a court makes a residence order in favour of any person who is not the parent or guardian of the child, that person has parental responsibility for the child while the residence order remains in force.

Under section 33 (3) of the Children Act 1989, while a care order is in force with respect to a child, the social services department designated by the order will have parental responsibility for that child, and will have the power (subject to certain provisions) to determine the extent to which a parent or guardian of the child may meet his or her parental responsibility for the child. The social services department cannot have parental responsibility for a child unless that child is the subject of a care order, except for very limited purposes where an emergency protection order is in force under Section 44 of the Children Act 1989.

Personal Budget: A Personal Budget is an amount of money identified by the local authority to deliver provision set out in an EHC plan where the parent or young person is involved in securing that provision. The funds can be held directly by the parent or young person, or may be held and managed on their behalf by the local authority, school, college or other organisation or individual and used to commission the support specified in the EHC plan.

Personal Education Plan: An element of a Care Plan maintained by a local authority in respect of a looked after child, which sets out the education needs of the child. If a looked after child has an EHC plan, the regular reviews of the EHC plan should, where possible, coincide with reviews of the Personal Education Plan.

Portage: Planned, home-based educational support for pre-school children with special educational needs. Local authorities usually provide Portage services. The Portage service is named after the town of Portage, Wisconsin, USA. There is an active and extensive network of Portage services in the UK, developed by the National Portage Association, which provides a Code of Practice and accredited training.

Pupil Referral Unit (PRU): Any school established and maintained by a local authority under section 19 (2) of the Education Act 1996 which is specially organised to provide education for pupils who would otherwise not receive suitable education because of illness, exclusion or any other reason.

Service Children's Education (SCE): SCE oversees the education of UK Service children abroad. It is funded by the Ministry of Defence and operates its own schools as well as providing advice to parents on UK and overseas schools.

Special Educational Needs (SEN): A child or young person has SEN if they have a learning difficulty or disability which calls for special educational provision to be made for him or her. A child of compulsory school age or a young person has a learning difficulty or disability if he or she has a significantly greater difficulty in learning than the majority of others of the same age, or has a disability which prevents or hinders him or her from making use of educational facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

Special Educational Needs Co-ordinator (SENCO): A qualified teacher in a school or maintained nursery school who has responsibility for co-ordinating SEN provision. In a small school, the headteacher or deputy may take on this role. In larger schools there may be a team of SENCOs. Other early years settings in group provision arrangements are expected to identify an individual to perform the role of SENCO and childminders are encouraged to do so, possibly sharing the role between them where they are registered with an agency.

Special educational provision: Special educational provision is provision that is different from or additional to that normally available to pupils or students of the same age, which is designed to help children and young people with SEN or disabilities to access the National Curriculum at school or to study at college.

Special school: A school which is specifically organised to make special educational provision for pupils with SEN. Special schools maintained by the local authority comprise community special schools and foundation special schools, and non-maintained (independent) special schools that are approved by the Secretary of State under Section 342 of the Education Act 1996.

Speech and language therapy: Speech and language therapy is a health care profession, the role and aim of which is to enable children, young people and adults with speech, language and communication difficulties (and associated difficulties with eating and swallowing) to reach their maximum communication potential and achieve independence in all aspects of life.

Virtual School Head (VSH): The Virtual School Head (VSH) is an officer of a local authority who leads a virtual school team that tracks the progress of children looked after by the authority as if they attended a single school. The Children and Families Act 2014 requires every local authority to appoint an officer who is an employee of that or another authority to discharge this duty.

Young person: A person over compulsory school age (the end of the academic year in which they turn 16). From this point the right to make decisions about matters covered by the Children and Families Act 2014 applies to the young person directly, rather than to their parents.

Youth Justice Board (YJB): The Youth Justice Board for England and Wales is an executive non-departmental public body. Its board members are appointed by the Secretary of State for Justice. The YJB oversees the youth justice system in England and Wales, works to prevent offending and reoffending by children and young people under the age of 18 and ensures that custody for them is safe, secure and addresses the causes of their offending behaviour.

Youth Offending Team (YOT): Youth offending teams are part of local authorities and are separate from the police and the justice system. They work with local agencies including the police, probation officers, health, children's services, schools and the local community, to run local crime prevention programmes, help young people at the police station if they're arrested, help young people and their families at court, supervise young people serving a community sentence and stay in touch with a young person if they're sentenced to custody.