



Department
for Education



No decision about my education without me

**A guide for parents and carers helping young people (16-25 years)
make their own decisions about their education**

**Understanding the Mental Capacity Act 2005 and the
Mental Capacity Act Code of Practice**

January 2015

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Date: *26 January 2015*

Version: *P1*

Status: *For Publication*

Preface



This booklet was commissioned using funding provided by the Department for Education under contract with NatSIP, the National Sensory Impairment Partnership:



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A Brief Summary...

The Mental Capacity Act 2005 and the Children and Families Act 2014 are two laws that apply to all young people (16-25 years) making decisions about their education.

The law assumes that **all** young people, including those with special educational needs, and/or sensory impairment, will **make their own decisions** about their education, unless it is proved that they cannot do so.

A young person can make a decision for themselves if they have what the law terms the 'mental capacity' to do so. There is a formal definition in law of what this means.

In order for the young person **not** to be able to make a decision, it must be shown that they 'lack capacity'. There is a formal definition of what to 'lack capacity' means, and a defined process called a 'capacity assessment' which must be followed to determine that a young person lacks capacity.

If the young person lacks capacity, someone else (often a parent or carer) will need to make the decision for them. This person (known as 'the decision maker') must act in the young person's 'best interests'. There is a 'best interest checklist' to follow so the decision maker can show that they have acted in accordance with the law.

A young person's condition, label, diagnosis, appearance, behaviour or age are not reasons they can be considered to lack capacity.

Young people may be able to make some decisions and not others. Therefore, the process of determining if they lack capacity must be repeated for each decision. There is no such thing as general capacity, or a general lack of capacity. If a young person's capacity is in doubt, their capacity to make the decision must be assessed for each decision that needs to be made.

Introduction

The Mental Capacity Act 2005 (known as the MCA) states that from their sixteenth birthday onward, all young people can make their own decisions about their education.

The law stresses that it is expected that a young person will make their own decisions, unless it is shown they cannot do so. This means that education professionals (teachers, tutors, learning support assistants, communication support workers, interveners, specialist teachers and local authority officers) *must* take account of the young person's choices, even if they differ from those of their parents.

The guidance on how to use the Mental Capacity Act 2005 in practice is set out in the Mental Capacity Act Code of Practice.

This information booklet was written with parents and carers of young people in mind.

This booklet:

1. explains how the Mental Capacity Act 2005 and the Mental Capacity Act Code of Practice are used by school, college and Local Authority staff to help a young person with special educational needs make their own decisions about their education.
2. will help you understand the guidance in the Mental Capacity Act Code of Practice about how to support a young person to make their own decisions about their education.
3. explains how you should make a decision in their 'best interests' if the young person is considered to be unable to make the decision when they need to do so.
4. explains how the Mental Capacity Act 2005 links to the Children and Families Act 2014.

The Mental Capacity Act 2005 has to be followed by everyone, including parents who look after a young person who may not be able to make their own decision.

The Mental Capacity Act Code of Practice is the guidance for professionals (teachers, tutors, communication support workers, interveners, teaching or learning assistants, local authority officers) and other people being paid to work with young people who may not be able to make their own decision.

As parents, you do not have to follow the Code of Practice in the same way as staff in schools, colleges and Local Authorities. However, the Mental Capacity Act Code of Practice states that parents or family carers should follow the guidance set out in the Mental Capacity Act Code of Practice as far as they are aware of it.

What is a code of practice?

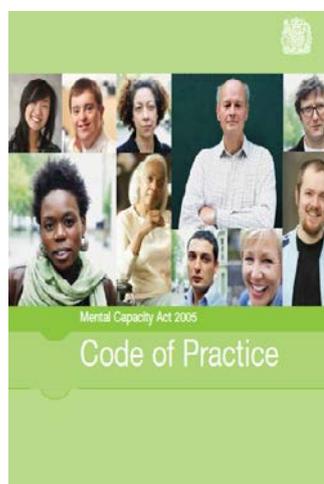
A code of practice is the guidance the government publishes about how a particular law should work on a day-to-day basis. It explains in more detail what the law means and gives practical steps. People in certain roles or jobs have to follow the Mental Capacity Act Code of Practice (MCA COP). These roles or jobs are set out in the Code of Practice itself. If someone who should follow a Code of Practice has not done so, they have to have a very good reason for not doing so.



As parents, you do not have to have regard to the MCA Code of Practice in the same way as educational professionals, but you are advised to follow the guidance in it as a way to help young people understand how to use the law. Even though the Code of Practice was written with people working in social care in mind, it is easier to read and understand than the wording of the Act.

This booklet looks at the Mental Capacity Act 2005 and how it links to the Children and Families Act 2014. Both these laws have their own Codes of Practice, but the Children and Families Act 2014 Code of Practice includes the Mental Capacity Act 2005 Code of Practice.

The Children and Families Act 2014 Code of Practice is titled *Special Educational Needs and Disability Code of Practice: 0 to 25 years*. This is shortened to *SEND COP*. The Mental Capacity Act 2005 Code of Practice is similarly shortened to *MCA COP*.



Section 1: Why people working in education have to follow the Mental Capacity Act 2005 and its Code of Practice

A core principle of the Children and Families Act 2014 is that young people take part as fully as possible in making decisions about their special educational provision. The Children and Families Act 2014 has included the Mental Capacity Act 2005, so that young people are both formally supported to make these decisions and protected if they are not able to do so. The Children and Families Act 2014 covers the age range 0-25 years, so it applies to both children and those who are in law adults. A young person becomes an adult on their eighteenth birthday and from then on, all adult laws apply to them. This includes the right to make their own decisions, as set out in the Mental Capacity Act 2005.

Some decisions may relate to their Education, Health and Care Plan (EHC Plan) which is a legal document and all the actions to do with it are governed by the law. For all such significant legal decisions it is important that the person who needs the decision to be made is sure that the young person making the decision is able to do so. The MCA has set out guidance about how to decide if a young person has capacity and how to make a decision on their behalf if they lack capacity.

The Mental Capacity Act 2005 came into force in 2007. The law is written in a way that makes it seem as if it is mainly for people working in health and social care. In the MCA COP, all the practical examples used to explain things are from health and social care. From 2007 until September 2014, the MCA and MCA COP were mainly used by health and social care professionals or parents for matters relating to the health and social care needs of their young person. It is also used by lawyers. Generally, it was not used by people working in education to support young people to make educational decisions, but the law is written in such a way that it can apply to other professionals. Through the Children and Families Act 2014, the MCA now applies to education professionals.

Remember that as parents you have to follow the law. You can do this by using the guidance in the MCA COP when making an educational decision on your young person's behalf to make the decision in their 'best interests'.

Although the Children and Families Act 2014 includes the MCA Code of Practice, it has not been changed to include examples from education. This may present some challenges for both education professionals and you as parents.

Section 2: Why a young person (16-25 years) should be supported to make their own decisions about their education

There are two reasons why young people should be helped to make their own decisions about their education:

1. One of the main principles of the Children and Families Act 2014 is that young people (1-25 years) are involved as fully as possible in making decisions about their education.



The Children and Families Act 2014 has a Code of Practice that all local authorities, school or college staff have to follow. This Code of Practice is known as the SEND COP, and emphasises that young people should make their own decisions about their education. Teachers and other staff working with a young person will need to help them make their own decisions as far as they are able to do so.

To support the fact that young people should be making their own decisions, the Children and Families Act 2014 includes the Mental Capacity Act 2005 and the MCA Code of Practice. Therefore, Local Authority officers, school or college staff working with young people aged 16 – 25 years must follow both the SEND COP and the MCA 2005 COP.

2. The Mental Capacity Act 2005 states that from the age of 16 years, young people must be helped to make their own decisions, as far as they are able to do so. The Mental Capacity Act 2005 says that it is assumed that everyone can make their own decisions until it is proved that they are not able to do so. When it is proved that a young person cannot make their own decision, the person making the decision for the young person must act in the young person's best interests. The SEND COP states that generally, it will be the young person's parent/carer who will make the decision if the young person lacks the capacity to do so. The Mental Capacity Act is explained in Section 5 and 'best interests' in Section 8.

The Children and Families Act 2014 has made a change to the age at which young people can make their own decisions about education. This law gives young people the right to make their own decisions about their education from the end of Year 11 (Y11), and very specifically from the last Friday in June of the young person's Y11 provided they are 16 years old. However, it is good practice to encourage young people to take part in making decisions even if these have to be communicated to the local authority by you as their parent until they are old enough to do so themselves.

Section 3: The young person in Year 11 and the Mental Capacity Act 2005

The Children and Families Act 2014 has only changed the age at which a young person can make a decision *about their special education provision*. For all other activities in school that are not related to special educational provision, a young person can make their own decision from their sixteenth birthday. For example: taking part in a school disco, show, charity fund raiser, clubs or sports, may not be related to a young person's special educational needs and the provision needed to meet these needs. Therefore, a young person who has an EHC Plan and is 16 years old before the end of June may be in a strange situation: They will be able to make their own decisions about some activities in school but not be able to make their own decision about matters that are part of their EHC Plan.

If the young person has care and treatment from healthcare professionals (GPs, hospital doctors, nurses, physiotherapists, occupational therapists, speech and language therapists, etc.) these professionals will expect young people to make their own decisions about their treatment from their sixteenth birthday if they are considered to have the capacity to do so. In these situations it is the treating healthcare professional who makes the decision about the young person's capacity.

So for the young person who has their sixteenth birthday before the end of June in Y11 the situation may be somewhat confusing. In school, a young person may find they can make decisions about taking part in activities, but not about their special educational provision. But from their sixteenth birthday, when a young person sees the doctor or other healthcare professional they are expected to make the decision.

Section 4: What is meant by ‘mental capacity’ and ‘to lack capacity’

Mental capacity means the ability to make **a decision** – any decision.

It is helpful to think of decisions as being one of three types:

1. Decisions about everyday life, such as what to wear, what to eat, what time to go to bed.
It is important to help young people make these types of decisions for themselves to become as independent as possible.
2. Bigger decisions (which the MCA COP refers to as ‘more serious or significant decisions’) such as which college to choose, how to travel to college, what support is needed, which course to study.
3. Decisions which may have legal effects, such as asking the Local Authority for a personal budget, or appealing to the Special Educational Needs and Disability Tribunal over disagreements about the young person’s Education, Health and Care (EHC) plan.

This booklet focuses on the bigger (2) and legal (3) types of decisions.

To be able to make a decision, the Mental Capacity Act 2005 states that the young person has to be able to do **all** of the following:

- Understand the information relevant to the decision
- Retain the information long enough to make the decision
- Use and weigh the information to arrive at a choice
- Communicate their decision

What does it mean to ‘lack capacity’?

A young person will be said to ‘lack capacity’ if they are unable to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.

It means that the young person is not able to do one or more of:

- Understand the information relevant to the decision
- Retain the information long enough to make the decision
- Use and weigh the information to arrive at a choice
- Communicate their decision

Why ‘a particular decision’?

A young person’s ability to make a decision will be looked at for each bigger or legal decision they have to make. There is no such thing as general capacity. A young person may be able to make some decisions for themselves but not others. A young person may be able to decide what to wear or what to eat, but find it more difficult to understand about choosing which college to attend or what support they will need at college. A young person may be able to choose the college but not understand the specialist equipment they will need to support them.

'My young person has special educational needs so they cannot make decisions....'



A key principle of the Mental Capacity Act 2005 is that everyone can make their own decisions until it is shown that they cannot do so.

The MCA and the MCA COP make it clear that a decision about a young person's capacity should not be based on the young person's condition, diagnosis, label, the way they look, the way they behave, or their age. A decision about a young person's ability to make the particular decision is based on the way the young person is able to understand the information about the decision that needs to be made and make a choice. This is called a 'functional approach'. People working with young people should focus on how the young person responds rather than the reason(s) for which they have special educational needs.

In summary:

- Mental capacity means the ability to make a decision.
- It should be assumed a young person can make their own decisions unless it is proved they cannot do so.
- To lack capacity means to be unable to make a particular decision when it is needed.
- Young people may be able to make some decisions but not others.
- The young person's ability to make a decision is looked at for each decision that they need to make.
- A young person's condition, label, diagnosis, appearance, behaviour or age are not reasons they can be considered to lack capacity.

Section 5: What the Mental Capacity Act 2005 says about young people making their own decisions

The Mental Capacity Act 2005 has five key principles which must be followed. These guide how staff in local authorities, schools or colleges will work with young people to support them to make decisions. The principles also set out how it is decided that a young person lacks capacity to make a specific decision and how to make a decision on behalf of a young person who is unable to make a particular decision when it is needed.

The Mental Capacity Act 2005 has to be followed by everyone (including parents) who looks after a young person who may not be able to make their own decisions. As parents you do not have to follow the Code of Practice in the same way as staff in schools, colleges and local authorities, but the Mental Capacity Act Code of Practice states that parents or family carers should follow the guidance set out in the Mental Capacity Act Code of Practice as far as they are aware of it.

Mental Capacity Act 2005: Five Key Principles

- 1. It must be assumed a young person can make their own decisions unless it is proved they cannot do so.**

The starting point is always to think that the young person can make the decision that needs to be made. The young person's particular special educational needs, diagnosis, label, appearance or behaviour are not a reason to think that the young person cannot make their own decision.

A decision about a young person's ability to make the particular decision is based on the way the young person is able to understand the information about the decision that needs to be made and make a choice. This is called a 'functional approach'. People working with young people should focus on how the young person responds rather than the reason(s) they have special educational needs.

- 2. A young person should have all the help and support possible to make and communicate their own decision before anyone decides that the young person lacks the capacity to make their own decision.**

In this principle it is '**all the help and support possible**' that is very important. This means giving the young person the information needed to make the decision in the way they can understand it best.

This may be through pictures, photographs, video/DVD, audio recordings, easy read, big print, braille or moon or sign language. It could involve using technology such as tablet computers as well as real life experiences. When the young person has to make the decision it is not a test or exam; they can have all the things they need to help them remember the information.

Rosie is eighteen years old. She has Down Syndrome and a bilateral moderate-severe hearing impairment and has received support from a Teacher of the Deaf. Rosie communicates mainly by signing, but she does sometimes use single words. She has an iPad which she enjoys using. Rosie can recognise a few words and can add numbers to 5. She can recognise coins but has little understanding of their actual value. Rosie can wash herself and clean her teeth. She likes fashionable clothes and is able to dress herself and choose what she would like to wear but needs prompting to make sure she dresses in suitable clothing for the weather. She can feed herself and go to the toilet unaided, except during her menstrual period.

In the company of her parent or member of staff she can travel by bus and buy an item in a shop. She can go unaccompanied to her local shop 100m from her home on the same side of the street. The shop staff know her well.

Rosie currently attends her local special school. Her annual review is due soon and Rosie needs to decide if she is going to remain in her current school for another year until she is nineteen years old, or transfer to the local FE college for a life skills course.

Rosie likes looking after animals. She has a cat and a rabbit at home. She does not like to see animals being hurt and becomes upset if she sees animals on television being killed or having an operation. If Rosie was attending college full-time she would have a choice of an animal care or horticulture option and work experience related to her chosen option. She would probably choose the animal care option.

Rosie has been attending the FE college for a day a week for the past year with other students and staff from her current school. To prepare her to make the decision, the school staff have been talking with Rosie, as well as using Rosie's iPad to take photos of key places in college and school and the staff. School staff have also used Rosie's iPad to make some video recordings of Rosie in school and at college doing various activities.

Three weeks before the annual review Rosie's class teacher meets with Rosie to support and help Rosie to make her decision about her education for the next school year.

3. A young person should not be treated as lacking capacity just because they make an unwise decision.

This may be difficult because as a parent/carer you would wish to protect your young person from making what you feel is a wrong, bad or odd decision. The Mental Capacity Act is clear that a young person should be allowed to make their own decision even if you feel it is not a good one if they are considered to have capacity. Everybody has had the experience of choosing the wrong option. Hopefully it has been a lesson, and led to a different decision the next time a similar choice is presented. It could be considered that allowing a young person to make a bad decision contributes to their learning and development.

Rosie likes clothes and is keen to have clothes she has seen celebrities wearing. She can apply simple make-up and is very particular about her hair.

Rosie is following a Life Skills course and has to choose between a personal care option which includes fashion, hair and beauty, and horticulture with related work experiences. The choices are explained to Rosie using photos, videos and visits to the potential work experience placements. When Rosie has to make her choice, her tutor explains and shows her all the information including the video of her visiting the two work experience placements. The tutor believes Rosie demonstrated that she understood the information as she was able to indicate what she thought was good about each of the choices. She seemed to like the idea of growing edible plants. To the tutor's surprise, Rosie chooses the horticulture option. Her knowledge of Rosie suggested she would choose personal care. The tutor is aware that Rosie lives in a ground floor flat with no garden. Rosie's EHC plan notes, in the aspiration section (Section A), that she wants to work in her aunt's hair salon. The tutor phones Rosie's mother, with Rosie's permission, to discuss the decision. Rosie's mother agrees this is an unexpected choice but questions Rosie's capacity to make the decision. Rosie's mother states she wants Rosie to take the personal care as it would provide the experience Rosie's aunt requires before she will let Rosie help at her hair salon. The tutor reminds Rosie's mother that the capacity assessment indicated that on the balance of probabilities it was reasonable to believe Rosie has the capacity to make the choice.

4. Actions or decisions carried out on behalf of a young person who lacks capacity must be in the young person's best interests.

If a young person is considered to lack capacity to make the decision that is needed, then someone will need to make that decision for the young person.

This booklet focuses on decisions about education. The SEND COP states these will generally be taken on the young person's behalf by their parent.

As a parent making a decision on behalf of a young person who lacks capacity to make the particular decision you will need to follow the best interests checklist. This is discussed in section 8.

5. Actions or decisions carried out on behalf of a young person who lacks capacity should limit their rights and freedoms as little as possible.

Everyone has some level of restrictions on what they can do. For young people who may lack capacity to make a decision for themselves, it is important to allow and help them to make the choices when they are able to do so. These may be everyday decisions such as what to wear, what to eat, what to watch on television.

For many young people there will be a focus on developing their independence to prepare for adulthood. It is important that outcomes and steps written into an EHC plan are supporting the young person making their own choices as far as possible. Preparation to make choice also applies to the way in which learning is supported by school or college staff. The school or college day has time in lessons and break times. At break times young people should be given options about what they do in that time and helped to make a choice. Within lessons, a young person should be supported to do things for themselves, even if this means the task is not completed but what is achieved was done by the young person themselves.

At the extreme end of restricting freedom is depriving someone of their liberty. The Mental Capacity Act 2005 covers this in the form the Deprivation of Liberty Safeguards known as DoLS.

This booklet is focussed on education and how staff in Local Authorities, schools or colleges work with young people aged 16 - 25 years. The only time that education staff will be in the position of considering whether a restriction in fact is a deprivation of liberty is in the residential section of a residential special school or college.

As parents making a decision on behalf of a young person because they lack capacity, you will need to ensure that the choice you make does not unduly limit the young person's rights and freedoms. The most likely time as parents you will need to think about this is if you are considering a residential school or college. See Section 8 for more information.

In March 2014 the Supreme Court gave a new definition of what is meant by deprivation of liberty. This is now the definition used by Local Authorities. Deprivation of liberty:

*The young person is under continuous supervision and control **and** is not free to leave **and** the young person lacks capacity to consent to these arrangements.*

All three conditions have to apply.

- 'continuous supervision and control' means that those that care for the young person at the school or college make all the choices for the young person such as where they can go, whom they see, whom they can contact and what they do. The young person is not able to do any of the things they wish to do.
- 'free to leave' means that the young person is able to leave the school or college and live where they choose.

For young people aged 16 - 17 years the Supreme Court added an additional definition in that determining deprivation of liberty this age group should be compared to other young people of a similar age and maturity without disabilities.

Section 6: How the Mental Capacity Act 2005 links to the Children and Families Act 2014

As explained in Section 5, a key principle of the Mental Capacity Act 2005 is that everyone should be able to make their own decisions.

However, there are times when a young person may not be able to make a particular decision. The Mental Capacity Act 2005 provides guidance for deciding if someone does have the capacity to make the decision, and provides a statutory framework for those making a decision on behalf of a young person to follow. This is to ensure that even when the young person lacks the capacity to make the particular decision their wishes, views and feelings are considered.

A key principle of the Children and Families Act 2014 is that young people should participate as fully as possible in decisions about their education and have their views, wishes and feelings considered.

The Children and Families Act 2014 gives young people the right to ask the local authority directly for some things relating to their EHC Plan, as well as to appeal to the First-tier Tribunal (SEN and Disability) in their own right, from the end of Y11.

From 18 years of age young people are legally adults and all adult legislation applies to them. To support the fact young people should be making their own decisions, the Children and Families Act 2014 includes the Mental Capacity Act 2005 and its Code of Practice (the MCA COP). Local authority officers, school or college staff working with young people aged 16 – 25 years have to follow both the SEND COP and the MCA COP.

Section 7: Who decides if a young person is unable to make a decision, and how is this done?

The person who needs the young person to make a particular decision is usually the person who has to decide if the young person has the capacity to make that decision. This may be a local authority officer, a member of school/college staff or a specialist teacher. For example, if it is a decision about support or specialist equipment, it may be a teacher or specialist teacher. For a decision about a Personal Budget, it may be the local authority officer responsible for Personal Budgets. For a decision about the content of an EHC Plan or educational placement it may be the SEN Officer who manages the young person's EHC Plan. It is likely to be different people for different decisions.

If the person who needs the decision to be made thinks that the young person **may** not have the capacity to make the decision, they will need to carry out a **capacity assessment**. The person needing the decision may think the young person lacks the capacity to make the decision because a teacher or other professional or parent/carer may have said they are concerned the young person may not be able to make this decision.

The **capacity assessment** process is set out in the Mental Capacity Act 2005, and explained in more detail in the MCA COP. It is only briefly referred to in the SEND COP. The person carrying out a capacity assessment will need to follow the process as set out in Chapter 4 of the MCA COP. The MCA COP Chapter 3 gives guidance about how to help a young person make a decision, such as the way information can be presented, and the importance of communicating with the young person in a way they can understand.

As part of the **capacity assessment** the person undertaking the assessment (the assessor) will usually talk to parents/carers as well as other members of staff who know the young person. Sometimes it may be that an educational psychologist or speech and language therapist is also involved in the assessment process.

The assessor should keep a formal record of the capacity assessment and this should be shared with the young person. If the young person lacks capacity for the decision, the completed record should also be shared with the person who will be making the decision on behalf of the young person. For decisions about the young person's education it will usually be the young person's parent/carer who will make the decision.

What is a capacity assessment?

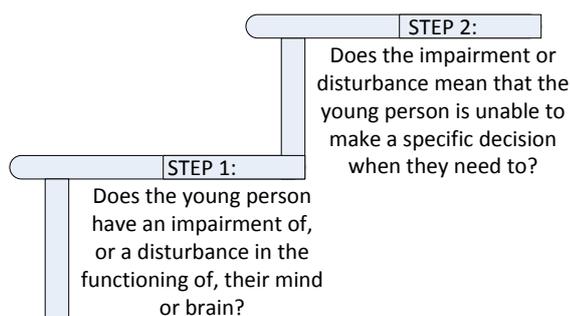
A two-stage process

A capacity assessment has two stages. Stage 1 decides if the young person meets the criteria to possibly lack capacity. Stage 2 is the capacity assessment. The person undertaking the capacity assessment should formally record the assessment.

The wording used in the Mental Capacity Act 2005 and the MCA for the capacity assessment is not the way a young person's functioning is talked about in education. This two-stage process has been reworded into terms that are more usually used in education to describe a young person's functioning in this document.

Stage 1 has two steps

Stage 1 is divided into two steps.



Stage 1 – Step 1

Does the young person have an impairment of, or a disturbance in the functioning of, their mind or brain?

Does the young person have a learning difficulty, or difficulties with their emotional well-being or mental health issues?

A learning difficulty means that the young person has a significantly greater difficulty in learning than the majority of others of the same age. As this booklet covers young people aged 16 - 25 years, this definition can be further defined as a significantly reduced ability to understand new or complex information and to learn new skills along with reduced ability to cope independently.

Difficulties with emotional well-being or mental health issues include autism, ADHD, anxiety, depression, obsessive-compulsive disorder, attachment disorder, eating disorders, and psychotic disorders such as bipolar.

If the answer to Stage 1 – Step 1 is Yes, then the young person meets the criteria to possibly lack capacity for the particular decision and the person undertaking the assessment moves to Stage 1 – Step 2.

If the answer is No, then the young person has capacity and the process ends.

Using the case study of Rosie choosing whether to stay at school or go to college introduced in Section 3 to look at Stage 1:

Rosie is 18 years old. She has Down Syndrome and a bilateral moderate-severe hearing impairment, and has received support from a Teacher of the Deaf. Rosie communicates mainly by signing, but she does sometimes use single words. She has an iPad which she enjoys using. Rosie can recognise a few words and can add numbers to 5. She can recognise coins but has little understanding of their actual value. Rosie can wash herself and clean her teeth. She likes fashionable clothes and is able to dress herself and choose what she would like to wear, but needs prompting to make sure she dresses in suitable clothing for the weather. She can feed herself and go to the toilet unaided, except during her menstrual period. In the company of her parent or member of staff she can travel by bus and buy an item in a shop. She can go unaccompanied to her local shop 100m from her home on the same side of the street. The shop staff know her well

Rosie has a significantly greater difficulty in learning than the majority of others of the same age. She has a reduced ability to understand new or complex information and to learn new skills, along with reduced ability to cope independently.

Rosie meets the Stage 1 – Step 1 requirement for a capacity assessment. She **may** lack the capacity to make the specific decision. This does not mean that she **does** lack capacity. Therefore the assessor should move to Stage 1 – Step 2.

Stage 1 – Step 2

Does the impairment or disturbance mean that the young person is unable to make a specific decision when they need to?

Does the young person's learning difficulty, emotional well-being difficulties or mental health issues mean that the young person is unable to make a specific decision when they need to?

If the answer to this question is Yes or Not Sure, the young person will need a capacity assessment using the Four Key Questions. If the answer to the question is No then the young person has the capacity to make this decision.

Rosie currently attends her local special school. Her annual review is due soon and Rosie needs to decide if she is going to remain in her current school for another year until she is 19 years old, or transfer to the local FE college for a life skills course. She has been attending the FE College for the past year with other students and staff from her current school. To prepare her to make the decision, the school staff have been talking with Rosie, as well as using Rosie's iPad to take photos of key places in college and school and staff. School staff have also used Rosie's iPad to make some video recordings of Rosie in school and at college doing various activities.

Stage 2 of the capacity assessment asks, in Rosie's case, whether her learning difficulty means she can make the decision to stay at school or attend FE College. To make the decision she has to understand the relevant information, remember it long enough to make the decision, use the information to make her choice and communicate her choice. If staff working with her think her learning difficulties do make it difficult or may make it difficult for her to make the decision, Rosie will need a capacity assessment. If those working with her believe, on the balance of probabilities, that she can make the decision, then Rosie will be considered to have the capacity to make the decision.

How a capacity assessment will be undertaken using the Four Key Questions

As noted above, it is likely that the person (the assessor) who will assess the young person's capacity to make the decision will depend on the decision to be made. Whoever the assessor is, they will need to be familiar with the young person's way of communicating and know how to communicate with the young person, such as by using simple language, giving time to absorb the information, and breaking the information into small chunks. The assessor also needs to be aware of the best format for information to be presented as well as knowing about the choice(s) to be made.

The assessment should be carried out somewhere in the school or college where the young person feels comfortable. It should be done at a time of day when the young person is alert and not tired. Late on a Friday afternoon is probably not the best time. The young person can choose to be supported by a member of staff or their parent/carer or a friend. If there are particular communication needs it may be that the specialist teacher or speech and language therapist is also present. As part of the assessment the assessor is likely to discuss the young person with other members of staff who know the young person as well as talking with parents/carers.

Using the Four Key Questions

1. Can the young person understand the information relevant to the decision?

The young person needs to have the information presented in a format they can easily understand. This could be pictures, photos, DVD/iPad videos and/or audio information, or actually visiting or experiencing the options and making a record of the experience. The young person needs to be given all the information they need to make the decision. They need to show they understand the key facts/concepts, not the fine details. They need to show a general understanding of what the decision is that they need to make, why the decision is needed and what will happen if they do or do not make a choice.

To help Rosie make her choice between school and college, she needs to know what is on offer at her school and at the college. She has been to the college so she knows the environment and some staff. School staff have been using her iPad to take photos and videos of what happens in college. When it comes to making the decision Rosie can be helped to look at these to remind her.

2. Can the young person retain the information long enough to make the decision?

It is not a test or exam, so the young person can have as many visual, audio or tactile aids as they need; this can include objects of reference. They can have written or braille information.

School staff have been using Rosie's iPad to take photos of key places in college and school and staff and to make some video recordings of Rosie in school and at college doing various activities. Rosie would be able to look at all of these to help her make the decision.

3. Can the young person use and weigh the information to arrive at a choice?

This is likely to be the aspect that presents challenges for young people with special educational needs. There are ways of talking with young people to find out what they think about the choices. 'Talking' here means communicating with the young person in the way they prefer and by allowing them to respond in their favoured way, which may be verbal or non-verbal. Using smiley and sad faces or thumbs up/thumbs down can help a young person show likes and dislikes. So does asking what is good about the choice, what they find helps them, and what they like about the choice. A young person's behaviour may have been observed which indicates what they think about the particular choice.

Rosie communicates mainly by signing but she does sometimes use single words. She has an iPad which she enjoys using. Using single words, signs and the photos and videos on her iPad, Rosie can be asked to show what she thinks is good about college and school. If she shows more good things about one or other establishment it could be taken as an indicator that she prefers this. She can be asked what she does not like about school and college. She can be asked about the choice between school and a bit of college or college all the time.

The Mental Capacity Act 2005 states that a young person should have all the help and support possible to make and communicate their own decision before anyone concludes that they lack capacity. It is important that all those working with the young person take time and try everything to help the young person make their own decision.

4. Can the young person communicate their decision in any way?

Communicate means by any means, verbal or non-verbal, including the use of augmented communication aids.

Does the young person have capacity?

The assessor's decision is based on the balance of probabilities that there is a reasonable belief that the young person either does or does not have the capacity to make the specific decision. This depends on - whether the young person has been able to show they understand the necessary information; the main points.

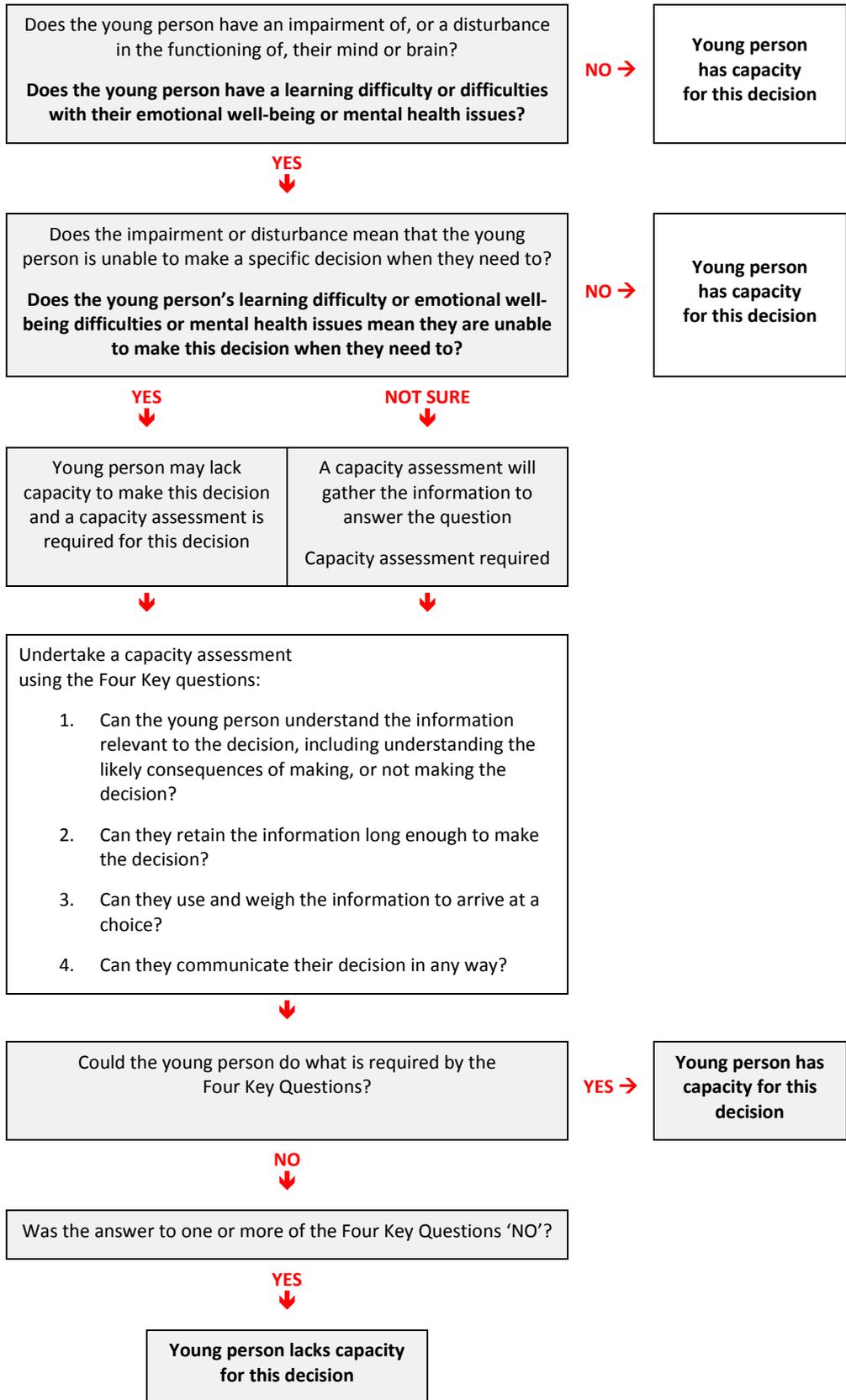
If they have been able to clearly show a preference and communicate their choice, then the young person has capacity to make this decision. The assessor's view will be that, on the balance of probabilities, there is a reasonable belief that the young person has the capacity to make this decision.

If the young person is unable to satisfy one or more of the Four Key Questions then they are considered to lack capacity.

There is no such thing as *partial* capacity, it is either Yes or No. If the assessor believes that the young person lacks capacity for this decision, any information about the views, wishes and feelings of the young person in relation to the decision should be passed to whoever will make the decision on the young person's behalf. For educational decisions this will generally be the young person's parent/carer.

If the assessor is uncertain about the reliability of the outcome of the capacity assessment, good practice would suggest that the assessment should be repeated a week or so later to check the outcome is the same and confirm the reliability of the assessment.

IS A CAPACITY ASSESSMENT REQUIRED?



Section 8: How the Mental Capacity Act 2005 guides you to make the decision in your young person's 'best interests' if they lack the capacity to make the decision

If the young person has had a capacity assessment, and the assessor has concluded that the young person **lacks** capacity for this decision about their education, then the SEND COP states that as the parent/carer it is most likely you will be asked to make the decision for the young person.

If your young person receives Disability Living Allowance/Personal Independent Payments and you are the Appointee you will have already come across the phrase about acting in the young person's 'best interests'. To act in the young person's best interests, you should follow the Best Interests Checklist in the Mental Capacity Act 2005 which is set out in the MCA COP. The person making the decision is known as the Decision Maker in the MCA COP.

'Best Interests' does not have an actual definition; it is the guidance set out in the Best Interests Checklist. Sometimes, working out what is in your young person's best interests may be difficult, but it is important that you follow the Best Interests Checklist to help you. It does not cover everything and all points may not be relevant to the particular decision, but they need to be considered. It is important that you think about what the young person would want and not your own choice.

The Best Interests Checklist in the MCA COP covers matters relating to healthcare which are not relevant to education and so these have been left out of the discussion below.

Best Interests Checklist

This checklist gives the key factors that the Decision Maker must consider when working out what is in the best interests of the young person who lacks capacity. This list is the starting point; there may be other things that as the Decision Maker you believe the young person would consider important to think about when making this particular decision.

As the young person's parent making a decision about their education on their behalf, you must follow this checklist to be sure you have legally acted in your young person's best interests. Like the outcome of a capacity assessment, the conclusion is that on balance, the decision you make, having followed the Best Interests checklist, is in their best interests.

1. Like a decision about capacity, a decision in the young person's best interests should not be based on the young person's condition, diagnosis, label or age or the way they look or the way they behave. It should be based on carefully considering the Best Interests Checklist. You will need to think about how the young person functions and what they are able and not able to do.
2. It should be considered whether the young person may, at a later date, be able to make the particular decision. For example, this would be a consideration if the young person is experiencing a serious deterioration in their mental health which may improve with treatment, or if the young person is receiving specific support to develop their communication skills or learn something relevant to making this decision. If the young person may be able to make the decision at a later date this may be too late; if this is so, you will need to make the decision. Some decisions are needed by a specific date so it may be that the young person will not be in a position to make the decision within the time frame.
3. Encourage the young person to participate in making the decision. See Section 7 Using the Four Key Questions for guidance about how to do this.
4. It is important to consider all the information relevant to the specific decision, such as the things that the person who lacks capacity may take into account.

Rosie likes looking after animals; she has a cat and a rabbit at home. She does not like to see animals being hurt and becomes upset if she sees animals on television being killed or having an operation. If Rosie was attending college full-time she would have a choice of an animal care or horticulture option and work experience related to her chosen option. She would probably choose the animal care option on the life skills course.

If Rosie's parent was making a decision on her behalf then it would be likely that the animal care option would be chosen for her as this is probably the choice Rosie herself would have made. Choosing animal care takes account of Rosie's interest and experience. Depending on the type of accommodation Rosie lives in and the interest of her family, she may have no experience of seeing someone garden or grow indoor plants. So it would be unusual for the horticulture option to be chosen on her behalf.

5. The Decision Maker must in particular consider the young person's views, wishes and feelings:
 - The young person may have shown through their behaviour or verbal or non-verbal communication their views, wishes and feelings about the particular choice to be made. This may have happened recently or in the past. The young person may have been in a similar situation in the past and behaved in a particular way which will help you understand the choice they may have made. They may have communicated verbally or non-verbally to you or school/college staff things which show their views, wishes or feelings about the choice to be made. The young person's views, wishes and feelings may have been shown during the capacity assessment. Whoever carried out the capacity assessment should have passed this information to you as the Decision Maker.
 - The young person may have beliefs and values (e.g. religious, cultural, moral or political) that they would consider when making the particular decision.

Rosie does not like to see animals hurt, even an animal having an operation upsets her. So Rosie's love of animals means the animal care option would be her choice, but her dislike of seeing animals hurt would mean that a work placement at a vet's surgery would be inappropriate. The Decision Maker would need to explain to the FE College that Rosie's animal care work experience would need to be at a kennels or animal sanctuary where she will not see animals undergoing surgical procedures.

- There may be other factors the young person themselves would be likely to consider if they were making the decision or acting for themselves.
6. The Best Interests checklist requires the decision maker to consult other people, if it is appropriate, to take account of their views as to what would be in the best interests of the young person who lacks capacity to make the decision. This booklet focuses on decisions about the young person's education so it may be appropriate to consult with school or college staff or specialist teachers. It may be appropriate to talk with the young person's speech and language therapist, physiotherapist, occupational therapist or educational psychologist. If the young person is being treated by mental health services it may also be appropriate to talk with the treating healthcare professional. If the young person has an allocated social worker, their views may also be helpful. Through the SEND COP you will be able to access support from the local Impartial Advice and Support Service to assist you.
 7. As Decision Maker, if you are making a decision about a residential educational placement you will need to look at how the provision keeps the young person safe but does not deprive them of their liberty. See Section 8 for further information.
 8. When you have worked through the checklist and gathered the information, you will need to weigh up all the factors to work out what is in your young person's best interests.

What if the school or college do not agree with the decision I have made on behalf of my young person?

If the decision relates to matters within the school or college such as the choice of options or courses or participation in a school or college event, then the best thing is for you to discuss the reasons for your decision with the school or college staff.

If the school or college staff or other education professional still feels that the decision is not in the young person's best interests then a formal best interests case conference can be held. This is a meeting where everyone present will work through the Best Interests Checklist. As the decision maker, you will need to show how you followed the Best Interests Checklist to arrive at the decision.

Following the Best Interests case conference, if the school or college staff or other education professional still remain concerned that the decision is not in the young person's best interests and the matter cannot be resolved, then the Court of Protection may need to decide what is in the young person's best interests.

What if the Local Authority does not agree with my decision?

If the disagreement relates to wishing to request a statutory assessment or to make changes to the parts of the EHC Plan that can be looked at by the First-Tier Tribunal (SEN and Disability) then the process to be followed is set out in the SEND Chapter 11.

Section 9: What to do if you do not agree with the outcome of a capacity assessment of your young person's ability to make their own decision?

If you or your young person disagrees with the outcome of a capacity assessment, then this should be first raised with the person who undertook the assessment. You or your young person may wish to have support from the Independent Advice and Support Service or other agency e.g. NDCS or other voluntary body.

The assessor should be able to give reasons and provide evidence to support their conclusion that they believe the young person lacks capacity. They should be able to show they have applied the principles of the Mental Capacity Act 2005. The assessor should be able to show that:

- they communicated with the young person in their preferred way
- they could understand the young person's communication
- they gave the young person time to respond
- the young person was comfortable in the situation
- information was presented to the young person in their preferred format e.g. photos, videos, pictures, sign language, braille, moon easy read text etc.
- memory aids were used to help the young person
- the young person was able or unable to understand the information
- the young person was able or unable to make a choice using the information
- the young person did or did not communicate their choice
- they repeated the process again at a later date to confirm the young person could or could not make the decision

If a meeting with the Assessor is unable to resolve the matter there are a number of other options:

- requesting a second opinion; this may be from another member of the school or college staff, a specialist teacher or possibly an educational psychologist
- a more formal mediation meeting with the assessor using the services of the Impartial Advice and Support Service or other body such as NDCS or other voluntary body
- obtaining an independent expert opinion

If the decision is subject to an appeal to the First-tier Tribunal (SEN and Disability) then the Tribunal panel makes the decision. The Court of Protection can also be asked to determine the matter.

Section 10: Special considerations for Residential Special Schools and Residential Colleges

Residential Special Schools

Ofsted and the Court of Protection have issued guidance to Residential Special Schools stating clearly that staff are not permitted to deprive a young person of their liberty. Deprivation of liberty has been defined by the Supreme Court in March 2014 as:

*The young person is under continuous supervision and control **and** is not free to leave **and** the young person lacks capacity to consent to these arrangements.*

As parents/carers you will want to know that your young person is being kept safe at a residential special school. Residential special schools are allowed to use keypads and locks to limit access to areas of buildings and outside. Staff can closely supervise young people inside and outside the building or when they leave the school premises. Staff can physically stop a young person from doing something which could cause them harm and remove items which could cause them harm. Bedrails, wheelchair straps and splints can also be used to ensure a young person's safety.

Residential Colleges from 18+ years

A young person should be cared for in the least restrictive way possible. If the college wishes to deprive a young person aged 18+ of their liberty they should look at alternatives to try to care for the young person in a way that places minimal restrictions on their rights and freedoms. If a college does feel it is necessary to deprive a young person of their liberty it must make an application to the Court of Protection to have the arrangements authorised.

Residential colleges are allowed to use keypads and locks to limit access to areas of buildings and outside. Staff can closely supervise young people inside and outside the building or when they leave the college premises. Staff can physically stop a young person from doing something which could cause them harm and remove items which could cause them harm. Bedrails, wheelchair straps and splints can also be used to ensure a young person's safety.

Section 11: Glossary

<p>Assessor</p>	<p>The person who does the capacity assessment with a young person who is thought to lack capacity to make the particular decision.</p> <p>For educational decisions this may be a member of school or college staff, or a local authority officer.</p> <p>Any decisions made, or anything done for a person who lacks capacity to make specific decisions, must be in the person’s best interests.</p> <p>There are standard minimum steps to follow when working out someone’s best interests.</p> <p>These are set out in section 4 of the Act, and in the non-exhaustive checklist in the Code of Practice, in 5.13 Best interests.</p>
<p>Best Interests Best Interests Checklist</p>	<p>Any decisions made, or anything done for a young person who lacks capacity to make specific decisions, must be in the young person’s best interests.</p> <p>The checklist of things that whoever is making a particular decision on behalf of a young person who lacks capacity to make the decision must follow. It is set out in Chapter 5 of the Mental Capacity Act Code of Practice.</p>
<p>Capacity assessment</p>	<p>The two stage assessment set out in Chapter 4 of the Mental Capacity Act Code of Practice that is used when it is thought the young person lacks capacity to make a particular decision.</p>
<p>Children and Families Act 2014</p>	<p>This is the law that covers educational provision for children and young people in England with special educational needs and disabilities.</p>
<p>Code of Practice</p>	<p>A Code of Practice is the guidance the government or other organisation publishes about how a particular law should work on a day to day basis. The Code of Practice explains in more detail what the law means and gives practical steps. People in certain roles or jobs have to follow the Code of Practice. These roles or jobs are set out in the Code of Practice.</p>
<p>Court of Protection</p>	<p>This is a specialist court for all issues relating to people who lack capacity to make a specific decision.</p> <p>www.justice.gov.uk/courts/rcj-rolls-building/court-of-protection</p>
<p>Decision Maker</p>	<p>The person making a particular decision on behalf of a young person who has been assessed as lacking capacity to make the particular decision. For decisions relating to the young person’s education the Decision Maker will generally be the young person’s parent.</p>
<p>Deprivation of liberty</p>	<p>The young person is under continuous supervision and control and is not free to leave and the young person lacks capacity to consent to these arrangements.</p>

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 young person who has SEN or a disability. It is drawn up by the local authority after an EHC needs assessment of the young person has determined that an EHC Plan is necessary, and after consultation with partner agencies.
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 FE colleges, 6 th form colleges, specialist colleges and adult education institutes.
Lack capacity	A person is considered to lack capacity if they are unable to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken.
Mental capacity	The ability to make a decision about a particular matter at the time the decision needs to be made. This is any decision.
Mental Capacity Act 2005	This is the law about people making decisions for themselves. The law assumes everyone can make their own decisions until it is proved they are not able to do so. It provides a statutory framework for people who lack capacity to make decisions for themselves. It sets out how decisions should be taken on behalf of someone who lacks capacity to make the decision.
Ofsted	Office for Standards in Education. A part of the government which is responsible for inspecting all schools and FE colleges.
Parent	Any person who is the young person's parent or has parental responsibility or cares for the young person.
Personal Budget	A Personal Budget is an amount of money identified by the local authority to deliver the provision.
Young person	Someone aged 16 - 25 years old. However, the definition in the SEND COP is someone who has reached the end of Y11 and is 16 years old.

Section 12: References

References

<p>Mental Capacity Act 2005 Code of Practice.</p> <p>Chapters 1-6 & Chapter 12</p>	<p>www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act</p>
<p>Special educational needs and disability code of practice: 0 - 25 years. (July 2014).</p> <p>Appendix 1: Mental Capacity.</p>	<p>www.gov.uk/government/publications/send-code-of-practice-0-to-25</p>
<p>Court of Protection and Ofsted</p> <p>Deprivation of liberty - guidance for providers of children’s homes and Residential Special Schools.</p>	<p>www.ofsted.gov.uk/resources/deprivation-of-liberty-guidance-for-providers-of-childrens-homes-and-residential-special-schools</p>
<p>DfE</p> <p>Mental Health and Behaviour in Schools: departmental advice.</p> <p>Annex A</p> <p><i>It has a website MindEd which provides free mental health e-learning and advice for all adults with a duty of care for children and young people.</i></p> <p><i>MindEd also has a twitter account:</i></p>	<p>www.gov.uk/publications/mental-health-and-behaviour-in-schools--2</p> <p>www.minded.org.uk</p> <p>https://twitter.com/MindEdUK</p>
<p>DfE Youtube videos for young people about the SEND reforms</p>	<p>www.youtube.com/user/educationgovuk</p>
<p>DfE</p> <p>Statutory Guidance on supporting pupils at school with medical conditions 2014</p>	<p>www.gov.uk/government/uploads/system/uploads/attachment_data/file/306952/Statutory-guidance-on-supporting-pupils-at-school-with-medical-conditions.pdf</p>

Section 13: Helpful Organisations

<p>Action on Hearing Loss provides free confidential impartial advice to people who are deaf, their families, friends and professionals</p>	<p>www.actiononhearingloss.org.uk</p>	<p>Helpline 0808 808 0123 informationline@hearingloss.org.uk</p>
<p>Contact a Family provides information, advice and support. Brings families together so they can support each other. Campaigns to improve their circumstances, and for their right to be included and equal in society.</p>	<p>www.cafamily.org.uk</p>	<p>Free helpline: 0808 808 3555</p>
<p>Down's Syndrome Association offers advice and information to people with Down's syndrome and their families</p>	<p>www.downs-syndrome.org.uk</p>	<p>Helpline: 0333 121 2300 10am-4pm Mon-Fri</p>
<p>MENCAP works in partnership with people with a learning disability, and provides services to support people to live life as they choose. Provides information and advice for people with learning disabilities, families and carers.</p>	<p>www.mencap.org.uk</p>	<p>Helpline 0808 808 1111 9.00am – 5pm Mon-Fri help@mencap.org.uk</p>
<p>Impartial Advice and Support</p>	<p>Information about the services available in your area can be found through your local authority's Local Offer website.</p>	
<p>Local Offer</p>	<p>This will have information about local support groups and voluntary organisations</p>	

<p>Mind provides advice and support to help people experiencing a mental health problem. There are local groups in many places.</p> <p>The legal advice line offers legal information and general advice on mental health related law including mental capacity.</p>	<p>www.mind.org.uk</p>	<p>Mind Infoline: 0300 123 3393 9am – 6pm Mon–Fri</p> <p>info@mind.org.uk</p> <p>Legal advice 0300 466 6463 legal@mind.org.uk</p>
<p>National Autistic Society provides information and support for people with autism and their families.</p>	<p>www.autism.org.uk</p>	<p>Helpline: 0808 800 4104 10am – 4pm Mon–Fri</p>
<p>National Deaf Children’s Society</p> <p>An organisation with a wealth of online information, as well as factsheets, booklets and DVDs to download or order. There’s information on audiology, financial support, education, technology, communication, and much more.</p> <p>NDCS can give personalised information through a Freephone to staff.</p>	<p>www.ndcs.org.uk</p>	<p>Helpline (free from landlines) 0808 800 8880 Mon – Thurs 9.30am – 9.30pm Fri 9.30am – 5pm</p>

<p>Rethink Mental Illness provides expert accredited advice and information to everyone affected by mental illness. Provides a range of services nationally including advocacy, carer support, crisis services and more.</p>	<p>www.rethink.org</p>	<p>Helpline: advice: 0300 500 0927 10am – 2pm Mon–Fri</p> <p>Supporter care (general enquiries) 0121 522 7007 9am – 5pm Mon–Fri</p>
<p>RNIB offers emotional and practical support to everyone affected by sight loss.</p>	<p>www.rnib.org.uk</p>	<p>Helpline: 0303 123 9999</p>
<p>Sane provides care and emotional support for people with mental health problems, their families and carers.</p>	<p>www.sane.org.uk</p>	<p>Helpline: 0845 767 8000</p> <p>info@sane.org.uk</p>
<p>SENSE works to support people of all ages who are deaf blind.</p>	<p>www.sense.org.uk</p>	<p>Information and advice helpline: 0300 330 9256 0207 520 0972 info@sense.org.uk</p>
<p>SCOPE provides support and information to disabled people and their families. Gives free independent impartial emotional support and disability advice.</p>	<p>www.scope.org.uk</p>	<p>Helpline 0808 800 333</p> <p>helpline@scope.org.uk</p>
<p>Young Minds is committed to improving the emotional well-being and mental health of children and young people. Provides expert knowledge to parents and young people through the parent helpline as well as online resources, publications, and outreach work.</p>	<p>www.youngminds.org.uk</p>	<p>Parent helpline (for parents and young people) (free from landlines) 0808 802 5544 9.30am - 4pm Mon - Fri.</p>

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