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THE MENTAL CAPACITY ACT 2005 AND ITS CODE OF PRACTICE

1. INTRODUCTION

This briefing note discusses the impact of The Mental Capacity Act 2005 and the Children and Families Act 2014 on professionals dealing with young people with sensory impairment and special educational needs.

NatSIP has published a suite of documents on the Mental Capacity Act 2005. These give more detail and can be found at: https://www.natsip.org.uk/index.php/doc-library-login/cat_view/54/208

An important change takes place at the age of sixteen, when a young person has the right to make decisions about their education and the young person's view normally prevails over that of the parents:

As young people develop, and increasingly form their own views, they should be involved more and more closely in decisions about their own future. After compulsory school age (the end of the academic year in which they turn 16) the right to make requests and decisions under the Children and Families Act 2014 applies to them directly, rather than to their parents. Parents, or other family members, can continue to support young people in making decisions, or act on their behalf, provided that the young person is happy for them to do so, and it is likely that parents will remain closely involved in the great majority of cases.

SEND Code of Practice

2. SCOPE OF THE LEGISLATION

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

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. It is expected that all young people over the age of sixteen, 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.

Young people over the age of eighteen are legally adults and all adult legislation applies to them.

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

The CFA (which has its own Code of Practice, the SEND COP) specifically includes the MCA 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.

3. APPLICATION

The law assumes that all young people over the age of sixteen, 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.

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 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.

Young people may be able to make some decisions and not others. 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.

4. YOUNG PEOPLE MAKING THEIR OWN DECISIONS – AGE AND KEY DATES

The CFA has introduced a change to the age at which young people can make their own decisions about their special education provision. Young people have the legal right to make such decisions from the last Friday in June of the young person's Y11, provided they are 16 years old.

The CFA 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 onwards.

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 about matters that are part of their EHC Plan.

If the young person has care and treatment from healthcare professionals then 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.

5. MENTAL CAPACITY – DEFINITION UNDER THE MCA

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

6. TO LACK CAPACITY – DEFINITION

A young person can 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. The young person will not be 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

7. WHY A PARTICULAR DECISION?

A young person's ability to make a decision will be looked at for each 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.

8. LACK OF CAPACITY CANNOT BE ASSUMED

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. 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.

9. MENTAL CAPACITY IN SUMMARY

In summary:

- Mental capacity means the ability to make a decision.
- It should be assumed young people 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.

10. FIVE KEY PRINCIPLES OF THE MCA

The Mental Capacity Act 2005 has five key principles which must be followed. The principles 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.

PRINCIPLE 1 – ASSUMPTION OF CAPACITY

It is assumed that a young person can make their own decisions unless it is proved they cannot do so.

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.

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.

PRINCIPLE 2 – ALL POSSIBLE HELP AND SUPPORT MUST BE PROVIDED

It is assumed that a young person will be given all the help and support possible to make and communicate their own decision before anyone decides that they lack capacity.

'All the help and support possible' 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.

PRINCIPLE 3 – AN UNWISE DECISION DOES NOT IMPLY LACK OF CAPACITY

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

Parents and carers may wish to protect a young person from making what they 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 if they 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 poor decision contributes to their learning and development.

PRINCIPLE 4 – DECISIONS MADE ON BEHALF OF A YOUNG PERSON MUST BE IN THEIR BEST INTERESTS

If a young person is considered to lack capacity to make a decision that is needed, then someone, usually the parent or carer (the 'decision maker') will need to make that decision for them.

A decision maker will need to follow the 'Best Interests Checklist'.

PRINCIPLE 5 – DECISIONS MADE ON BEHALF OF A YOUNG PERSON SHOULD LIMIT THEIR RIGHTS AND FREEDOMS AS LITTLE AS POSSIBLE

Everyone has some level of restrictions on what they can do. Young people lacking capacity to make a particular decision should be allowed and helped to make 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 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.

At the extreme end of restricting freedom is depriving someone of their liberty. The MCA covers this in the form the Deprivation of Liberty Safeguards (known as DoLS).

The only time that professionals 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.

11. MAKING A DECISION ABOUT CAPACITY

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. E.g. 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.

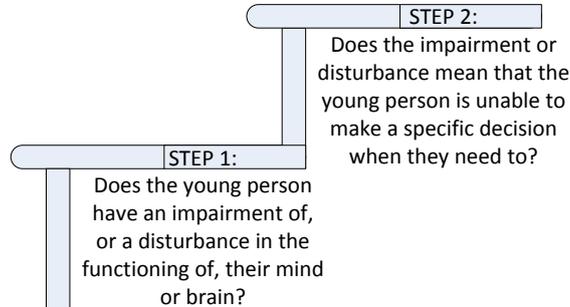
If the person who needs the decision to be made thinks that the young person **may** not have the capacity to make the decision, they will need to carry out a **capacity assessment**, the process for which is set out in the MCA and Chapter 4 of the MCA COP

12. WHAT IS INCLUDED IN 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.

Stage 1 has 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.

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.

13. THE FOUR KEY QUESTIONS

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.

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.

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.

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.

14. DOES A 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.

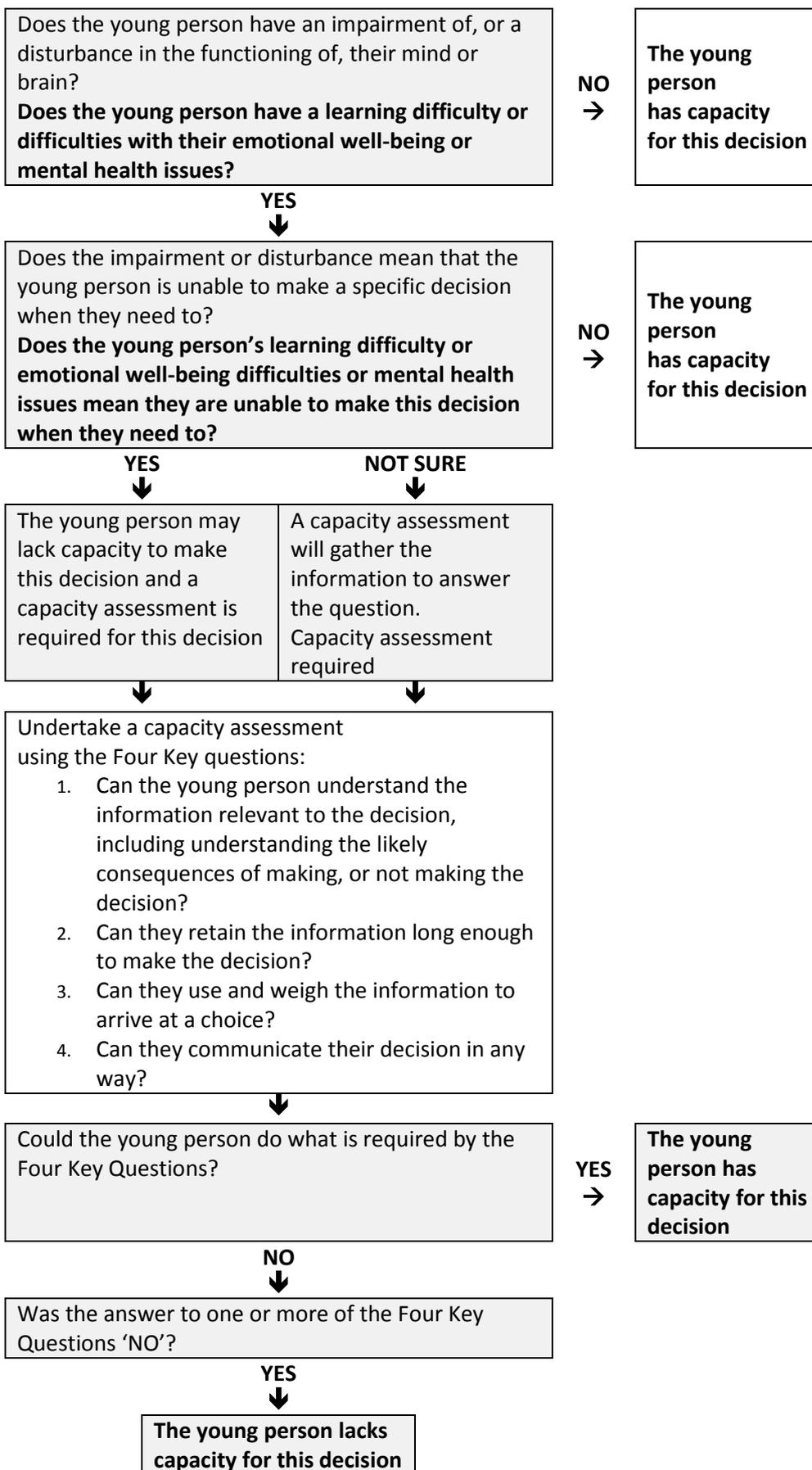
If the young person has been able to clearly show a preference and communicate their choice, then the young person has capacity to make this decision. On the balance of probabilities, there is a reasonable belief that the young person has the capacity to make this decision.

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.

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.

15. IS A CAPACITY ASSESSMENT REQUIRED?



16. FURTHER RESOURCES

NatSIP has published a suite of documents on the Mental Capacity Act 2005. These can be found at:

https://www.natsip.org.uk/index.php/doc-library-login/cat_view/54-natsip-documents/208-mental-capacity-act-2005

These include:

A guidance booklet for parents:

https://www.natsip.org.uk/index.php/doc-library-login/doc_details/861-01-no-decision-about-my-education-without-me

A capacity assessment recording form for professionals to use:

https://www.natsip.org.uk/index.php/doc-library-login/doc_details/863-03-mental-capacity-act-2005-natsip-capacity-assessment-form

Guidance notes for completing the form:

https://www.natsip.org.uk/index.php/doc-library-login/doc_details/864-02-mental-capacity-act-2005-capacity-assessment-form-guidance-notes

17. SOURCE LEGISLATION

The full text of the Mental Capacity Act can be accessed via the NatSIP Website:

https://www.natsip.org.uk/index.php/doc-library-login/doc_details/860-04-mental-capacity-act-2005-the-legislation

The Mental Capacity Act Code of Practice (MCA COP), containing guidance for professionals working with young people who may not be able to make their own decision, can be accessed via the NatSIP Website:

https://www.natsip.org.uk/index.php/doc-library-login/doc_details/880-05-mental-capacity-act-2005-code-of-practice

18. A NOTE ON NATSIP RESOURCES

NatSIP Resources are free, but you will need to be registered on the NatSIP Website and logged in in order to access the links above.

A walkthrough guide on how to register on the NatSIP Website can be downloaded from:

https://www.natsip.org.uk/index.php/doc-library-login/doc_download/139

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