

## DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EHC825/15/00004, made on 8 January 2016, did not involve the making of an error on a point of law.

The suspension of the effect of the tribunal's decision no longer applies.

### REASONS FOR DECISION

#### A. The capacity issue

1. Although my reasons deal with this individual case, they will be relevant to other cases for my analysis of how an appeal may be brought in respect of a young person who lacks capacity to do so. I deal with that issue in Section E.

#### B. Preliminary matters

2. The relevant legislation is set out in Appendix 1. I have used these abbreviations:

The 2005 Act – Mental Capacity Act 2005;

The 2014 Act – the Children and Families Act 2014;

The 2014 Regulations – the Special Educational Needs and Disability Regulations 2014 (SI No 1530).

The relevant parts of the **Special educational needs and disability code of practice: 0 to 25 years** of January 2015 are set out in Appendix 2 (cited by the parties to the First-tier Tribunal in closing) and Appendix 3 (relevant to the capacity issue).

3. I held an oral hearing of this appeal on 18 May 2016. Mr Small of Baker Small solicitors represented the local authority. David Wolfe QC represented the respondent. This was a joint hearing with *HS/0515/2016*, in which Mr Small also represented the local authority and Stephen Broach of counsel represented the respondent. I have used *respondent* at this stage, because it will take a long analysis to work out who the proper respondents were in these cases. I am grateful to all the advocates for their contributions.

#### C. Ryan

4. This case concerns Ryan. He was born on 22 February 1996 and has diagnoses of autistic spectrum disorder, hyperacusis, developmental co-ordination disorder and significant sensory processing difficulties. He functions at pre-school level. Ryan's parents applied under the 2005 Act to be welfare

deputies, but this was refused. The Court of Protection decided that the parents were concerned that they were not being consulted properly about where Ryan would live after he left school in July 2015. The Court noted that they were entitled to be consulted under section 4(7)(b) of the 2005 Act. The Court, rather than a deputy, should resolve any dispute about residence.

#### **D. The appeal to the First-tier Tribunal**

5. Ryan had a statement of special educational needs from July 1999 until the end of the school year 2014/2015. The local authority carried out an assessment of Ryan's needs in accordance with section 36 of the 2014 Act, but decided that it was not necessary to make special educational provision in accordance with a plan under section 37. The authority explained that this was 'because remaining in formal education for a further period will not enable Ryan to make any significant progress and/or better achieve the transition to adulthood outcomes of gaining employment, living independently, participating in his community or maintaining good health.' Ryan was placed in an adult care home.

6. There was an appeal to the First-tier Tribunal under section 51(2)(b) of the 2014 Act. The tribunal allowed the appeal and directed the local authority to issue a plan in respect of Ryan. I gave the local authority permission to appeal to the Upper Tribunal and suspended the effect of the First-tier Tribunal's decision pending this decision.

#### **E. Young persons and capacity issues**

7. I deal with this issue first as (i) it is logically preliminary to the substantive issues and (ii) Mr Small conceded at the hearing that the tribunal had not made an error of law.

8. A young person is someone who is over compulsory school age but under the age of 25: section 83(2) of the 2014 Act. Section 51 confers a right of appeal on the young person. The question is: how is that right made effective? There are three possibilities: the young person may have capacity, the young person may lack capacity, or the young person's capacity may be in doubt. Before coming to those, I need to say something about what lack of capacity entails.

##### *Lack of capacity*

9. This is governed by the 2005 Act. Capacity depends on the matter in respect of which a decision has to be made: section 2(1). So a person may have capacity at one time but not at another, and may have capacity in respect of one matter but not another. The matter I am concerned with is the bringing of an appeal; that is what I mean when I refer to (lack of) capacity. The young person may have capacity in respect of that, but not in respect of other decisions that have to be made in the course of the proceedings. Equally, a person may lack capacity to bring an appeal, but have capacity to make other decisions in the course of the proceedings.

10. A person is presumed to have capacity until shown otherwise and then only after all practical steps have been taken without success to help them make a decision: section 1(2) and (3).

11. Whether a person has capacity is a matter of fact for the tribunal to decide. Mr Small argued in *HS/0515/2016* that the tribunal had a particular responsibility to ensure that a young person had the necessary capacity. In a sense, that is correct. Any tribunal must be alert to the possibility that a person lacks capacity on a matter. However, the overriding objective for both the First-tier Tribunal and the Upper Tribunal requires parties to co-operate with the tribunal: rule 2(4) of both the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) and the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698). That may involve drawing an issue to the tribunal's attention and, perhaps, providing the tribunal with any evidence it needs to resolve the issue.

*If the young person has capacity*

12. Young persons who have capacity are in no different position from anyone else. They may appoint someone to help and act for them. That person may be a parent or someone with some form of professional position. Their role is as an assistant and an advocate. The appeal is brought under section 51 by the young person. The person who helps is merely assisting them. In tribunals, that person is usually called a representative. Unfortunately, that term is also used in a different sense when the young person lacks capacity.

*If the young person lacks capacity*

13. Section 80 deals with young persons who lack capacity. It adopts the meaning of lacking capacity that applies in the 2005 Act: section 80(5). The section is an enabling one, providing for regulations to be made. In particular, it provides for references to a young person to be read as referring to the young person's representative or parent: section 80(2)(b). Representative is not used here in the sense of an advocate in proceedings. Rather it refers to a person who acts for someone who lacks capacity. It is defined in section 80(6) and covers: a Court of Protection deputy; a donee of a lasting power of attorney; and an attorney of an enduring power of attorney.

14. Regulation 64 of the 2014 Regulations is made under the authority of section 80(2)(b). It introduces the concept of an alternative person. The starting point is that the young person's representative (in the section 80 sense) is the alternative person: regulation 64(2)(a). If the young person does not have a representative in that sense, it means the young person's parent: regulation 64(2)(b). The effect of this depends on which section of the 2014 Act is involved. In the case of section 19, the reference to young person is read as a reference to both the young person and the alternative person: regulation 64(1)(b) and Part 1 of Schedule 3. In the case of section 51, the reference to young person is read as a reference to the alternative person: regulation 64(1)(b) and Part 2 of Schedule 3. The result on an appeal is, in Mr Wolfe's helpful phrase, a statutory substitution of the alternative person for the young person. The appeal under section 51 is

brought by the alternative person in that capacity but in the best interests of the young person. For the purposes of appeals, in both the First-tier Tribunal and the Upper Tribunal, it is the alternative person who is the appellant or respondent. They are acting in respect of the young person, but not on behalf of the young person in the way an advocate would.

15. The alternative person may act on their own or use the services of a representative in the advocacy sense. An alternative person who is a representative in the section 80 sense may also rely on the services of a representative in the advocacy sense.

16. Mr Wolfe referred me to Annex 1 to the Code of Practice, which deals with young persons who lack capacity. He drew attention to one mistake or infelicity in the wording. The second paragraph says that 'in most cases where a young person lack capacity, decisions will be taken on their behalf by their parent.' Strictly, as he pointed out, the decision is not taken by the parent on the young person's behalf. Rather, it is taken by the parent in their capacity as the alternative person and in the young person's best interests.

17. There is an extra consideration for a young person who is aged 16 or 17. These persons are still children for the purposes of the Children Act 1989 and their parents retain parental responsibility. Section 27(1)(g) of the 2005 Act preserves that responsibility, except for property matters. Regulation 65 of the 2014 Regulations provides that regulation 64 applies despite section 27, but that does not deprive the parents of their responsibility generally.

18. Mr Small did not pursue any argument that the provisions of the 2014 Act or the 2014 Regulations involved a deprivation of liberty for the purposes of the 2005 Act or an infringement of the young person's Convention rights. Mr Wolfe drew my attention to authority that identifying a school in a plan would not involve a breach of the person's Article 8 right. In *CB v London Borough of Merton and the Special Educational Needs Tribunal* [2002] ELR 441, the tribunal accepted the local authority's argument that the child should be placed in a residential school. Sullivan J at [20] rejected the argument that this infringed the child's Article 8 rights. The tribunal had not ordered the child to attend the school. That was a matter for the local authority if it decided to serve a school attendance order. Any challenge would then relate to that order, not to the tribunal's decision to name the school. And in *X County Council v DW* [2005] EWHC 162 (Fam), Munby J said at [20] that the decision of a tribunal on placement did not oblige a parent to accept that decision and were free to make other arrangements. These authorities are consistent with section 42 of the 2014 Act, which requires the local authority to secure the specified special educational provision, unless the young person makes suitable alternative arrangements.

*If the young person's capacity is in doubt*

19. This analysis is concerned with the capacity to bring an appeal. If that issue arises, the most efficient way to resolve it may be as a preliminary issue that the tribunal will have to decide before it identifies the correct parties: rule 5(3)(e) of rules of procedure for both the First-tier Tribunal and the Upper Tribunal.

### *Changes in capacity*

20. If a young person's capacity changes during the course of proceedings, the tribunal may substitute another party as appellant or respondent: rule 9 of each set of rules of procedure. A young person who was the appellant before the First-tier Tribunal but lacks capacity before the Upper Tribunal will nevertheless be a party before the Upper Tribunal (see the definition of 'respondent' in rule 1(3) of the Upper Tribunal's rules) until a substitution is effected under rule 9.

### *Applying those principles*

21. Ryan was born on 22 February 1996. He is a young person. Mr Small accepted that he lacked capacity to bring an appeal. The First-tier Tribunal registered the appeal in the name of his parents. That was correct. Neither parent was a representative in the section 80 sense, but they were alternative persons under regulation 64(2)(b). They had a right of appeal under section 51(2)(b) in that capacity, which they exercised in Ryan's best interests. The same applies on the local authority's appeal in the Upper Tribunal.

22. Mr Small accepted that the First-tier Tribunal was not in error of law in respect of the capacity issue. I have set out this analysis, because (i) it explains why I accept Mr Small's concession, (ii) it will be relevant in other cases, (iii) it was the product of the efforts of all three advocates at the joint hearing.

## **F. The First-tier Tribunal's decision to require the local authority to secure a plan**

### *The tribunal's reasons*

23. This is the outline of the tribunal's reasons. They follow its summary of the evidence. The tribunal identified the issue as whether it was necessary for special educational provision to be made for Ryan in accordance with a plan. This led to a discussion of what amounted to education and educational provision. The tribunal then referred to paragraphs 9.14 and 9.55 of the Code of Practice on what is necessary. The tribunal's conclusions are set out in its final two paragraphs:

58. Mr and Mrs J... 's evidence was that Ryan was able to make progress at [his former] School, he engaged in activities and can use his iPad independently. In her report the Local Authority Educational Psychologist Rebekah Yerby noted as an outcome for Ryan that he should or that he will continue to access a variety of activities and that to help him achieve this outcome he should have access to a learning environment where he can live and learn on the same site; an environment which places demands on Ryan so that he continues to learn.

59. Having regard to that evidence, it was clear that it was not just Mr and Mrs J... identifying Ryan as capable of learning requiring support and stimulation to progress on the skills learnt at [his former] School. Rebekah Yerby and Dr Hawarany regarded Ryan as having the ability to learn and in our view the potential in Ryan was not being realised at his current

placement. We accept that the issue to be determined by us was not that of placement but whether an EHC Plan was necessary. We find that in the absence of an EHC Plan there would be no specific provision of OT, Speech and Language Therapy or other educational provision such as numeracy and literacy. We considered that the Local Authority failed to correctly follow the guidance of the Code of Practice and that there is evidence establishing a necessity for the Local Authority to issue an EHC Plan in respect of Ryan.

### **G. The argument for the local authority**

24. In his grounds of appeal, Mr Small argued that the tribunal had made three errors of law:

- First: it had failed to consider whether Ryan's needs could be met from the care budget available to the care home where he lived.
- Second: it had been wrong to find that he could only receive the specified therapies if he had a plan.
- Third: it had been wrong to find a plan was necessary when Ryan had made minimal progress and was not going to attain further qualifications.

25. At the hearing, Mr Small presented these points in a broader context. He argued that whether Ryan needed further education or training had to be considered in a wider context. He cited section 36(9) and (10) and the setting of the school or institution for the purposes of section 37. He criticised the tribunal for quoting passages from the Code of Practice that did not relate to the issue whether special educational provision was necessary, although he accepted that they dealt with the issue of necessity. The tribunal had failed to explain why it rejected evidence, and had failed to evaluate the need for further education or training and the further educational provision required.

### **H. The argument for Ryan**

26. Mr Wolfe dealt in his written argument with Mr Small's original grounds. As to the first and second grounds, there was provision available at the care home, but it was not being implemented. A plan was necessary in order to ensure that the therapies were provided. As to the third ground, qualifications were irrelevant and the tribunal had evidence that Ryan was capable of further achievements.

27. At the hearing, Mr Wolfe argued that there was no dispute about what Ryan required, the issue for the tribunal was whether a plan was needed to achieve it. He referred me to the report by the local authority's own educational psychologist, Rebekah Yerby, in which she set out the outcomes for Ryan and the facilities and resources required to achieve them. These included access to a learning environment where he could live and learn.

### **I. Why the tribunal was not in error of law**

28. Jurisdiction is an important constraint on a tribunal's powers. It has no authority to act outside its jurisdiction. In the case of appeals under the 2014 Act,

the First-tier Tribunal's jurisdiction is limited by the scope of section 51; in this case, by section 51(2)(b). This is relevant on an appeal to the Upper Tribunal, because the tribunal cannot be criticised for limiting its consideration to matters within its jurisdiction. I emphasised this in *Cambridgeshire County Council v FL-J* [2016] UKUT 0225 (AAC). In that case, the issue was whether to secure an assessment. I wrote:

11. ... The tribunal was hearing an appeal against a decision not to secure an assessment. It decided that an assessment should be secured. At the stage with which it was concerned, it had to make a provisional predictive judgment about the likely need for special educational provision. It did not have to make a definitive decision. The factual issues that have been argued out by the parties in their response and reply on this appeal may well be relevant to, if not determinative of, the final decision under section 37. But that was not within the tribunal's jurisdiction to decide under section 51(2)(a). It only had to decide whether the threshold questions for the making of an assessment were satisfied and that did not need to be done with so great a degree of certainty. Its findings and reasons are entitled at that initial stage to reflect the degree of uncertainty that is inherently likely before an assessment is actually made. Its findings were sufficiently precise to allow the appeal and require the local authority to secure an assessment.

This case concerns a later stage of the statutory process: a decision that a plan was not necessary. But the limitation of jurisdiction applies equally here. The tribunal correctly identified that issue and properly limited its consideration to it.

29. Within its jurisdiction, the tribunal is constrained by the issues. In a case like this, where the parties had experienced representatives (in the advocacy sense), the tribunal was entitled to limit its consideration to the issues they put. In this case, that meant the terms of the local authority's decision, the grounds of appeal, the local authority's response to the appeal and the closing submissions. The reason given by the local authority was set out in its letter to Ryan's parents explaining its decision. It took the same approach in its response to the appeal and in its closing submissions on that appeal. My decision is that the tribunal dealt properly with the issue before it. It may be that other issues will arise in the course of securing the plan, but that is a different and later stage of the statutory process, which gives rise to a separate right of appeal under section 51(2)(c). I now need to deal with the arguments put to me.

30. To begin with, I reject any suggestion that the attainment of qualifications is an essential element of education. For many of those to whom the 2014 Act and Regulations apply, attaining any qualifications at all is not an option. That does not mean that they do not require, or would not benefit from, special educational provision.

31. The tribunal was entitled to find that Ryan could still benefit from educational provision and that the therapies would help in that context. There was no dispute about the therapies that would benefit Ryan. The issue was whether they should be delivered in a care environment or an educational one. There may be cases in which a young person is not going to achieve anything if

education continues. Ryan's parents believed that he could learn more if appropriate provision were made. They based that on what they had seen when Ryan was at his last school; there was evidence that his teachers there had been of the same opinion. The local authority's own educational psychologist was of the same view. Why else would she say that Ryan needed a learning environment? It is true that Ryan was functioning only at a pre-school level. That meant, no doubt, that any further achievements would be small. That does not mean that they would not be valuable for Ryan in his adult life. The tribunal found as a fact that it would and there was evidence to support that conclusion.

32. The tribunal's reasons were adequate. Mr Small complained about the lack of reasons for assessing the evidence. Reasons fulfil a number of functions. One is to explain how the tribunal assessed the evidence. In this case, the tribunal accepted the evidence the most expert of which was that of the local authority's own educational psychologist. It can hardly complain that the tribunal did not explain why it accepted the authority's own expert evidence that supported the parents' case and the tribunal's decision.

33. The tribunal was entitled to find that a plan was necessary. The tribunal had to decide that issue as a practical matter. It may be that, theoretically, it might have been possible to achieve the outcomes through the care budget. In reality, that was not happening. Ryan was not taking advantage of the facilities and activities that were on offer at the care home and the staff had not succeeded in getting him involved. The evidence showed that Ryan spent his time in his room. As Mr Wolfe put it, the issue was not about what Ryan needed but about access to it. Necessity has to be judged practically and in light of the reality, not by reference to attainments that are more theoretical than real. He cited two decisions in support of the proposition that a plan may be necessary in order to ensure access to provision: *Manchester City Council v JW* [2014] ELR 304 at [30] and *MC v Somerset County Council* [2015] UKUT 0461 (AAC) at [19] and [21]. They support the tribunal's approach.

34. Finally, Mr Small mentioned that no member of the panel of the First-tier Tribunal asked any questions at the hearing. He put that forward, not as a separate ground of appeal, but as part of the context in which his grounds should be considered. Whether a panel asks questions or not depends on the evidence, the arguments and how they are presented. A well-presented case may require little or no intervention by a panel. It is certainly not required to ask questions for the sake of it. In this case, Mr Small had represented the local authority and Ms Joffe, a well-known representative from IPSEA (Independent Parental Special Education Advice), had represented Ryan's parents. It is entirely understandable that the panel might not need to intervene.

35. For those reasons, I find no error of law in the tribunal's reasoning.

**Signed on original  
on 25 May 2016**

**Edward Jacobs  
Upper Tribunal Judge**



## APPENDIX 1 THE LEGISLATION

### **Mental Capacity Act 2005 – the 2005 Act**

#### **1 The principles**

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

#### **2 People who lack capacity**

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
  - (a) a person's age or appearance, or
  - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person ("D") may exercise under this Act—
  - (a) in relation to a person who lacks capacity, or
  - (b) where D reasonably thinks that a person lacks capacity,is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

### **3 Inability to make decisions**

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
- (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or
  - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
- (a) deciding one way or another, or
  - (b) failing to make the decision.

### **16 Powers to make decisions and appoint deputies: general**

- (1) This section applies if a person (P) lacks capacity in relation to a matter or matters concerning-
- (a) P's personal welfare;
  - (b) P's property and affairs.
- (2) The court may-
- ...
- (b) appoint a person (a deputy) to make decisions on P's behalf in relation to the matter or matters.

### **27 Family Relationships etc**

- (1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person-
- ...
- (g) discharging parental responsibilities in matters not relating to a child's property; ...

Parental responsibilities are defined by section 3 of the Children Act 1989 and only apply to persons who are children, as defined in section 105 of that Act:

### **3 Meaning of 'parental responsibility'**

(1) In this Act 'parental responsibility' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property

### **105 Interpretation**

(1) In this Act-

...

'child' means, subject to paragraph 16 of Schedule 1, a person under the age of eighteen; ...

[Schedule 1 deals with financial provision for children.]

### **Children and Families Act 2014 – the 2014 Act**

#### **19 Local authority functions: supporting and involving children and young people**

In exercising a function under this Part in the case of a ... young person, a local authority in England must have regard to the following matters in particular—

- (a) the views, wishes and feelings of ... the young person;
- (b) the importance of ... the young person participating as fully as possible in decisions relating to the exercise of the function concerned;
- (c) the importance of ... the young person being provided with the information and support necessary to enable participation in those decisions;
- (d) the need to support ... the young person in order to facilitate the development of the ... young person and to help him or her achieve the best possible educational and other outcomes.

#### **20 When a child or young person has special educational needs**

(1) A ... young person has special educational needs if he or she has a learning difficulty or disability which calls for special educational provision to be made for him or her.

(2) ... a young person has a learning difficulty or disability if he or she-

- (a) has a significantly greater difficulty in learning than the majority of others of the same age, or
- (b) has a disability which prevents or hinders him or her from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions.

## **21 Special educational provision, health care provision and social care provision**

(1) 'Special educational provision', for ... a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—

...

(c) mainstream post-16 institutions in England ...

## **36 Assessment of education, health and care needs**

(1) A request for a local authority in England to secure an EHC needs assessment for a ... young person may be made to the authority by ... the young person ... .

(2) An 'EHC needs assessment' is an assessment of the educational, health care and social care needs of a ... young person.

(3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a ... young person, the authority must determine whether it may be necessary for special educational provision to be made for the ... young person in accordance with an EHC plan.

(4) In making a determination under subsection (3), the local authority must consult ... the young person.

(5) Where the local authority determines that it is not necessary for special educational provision to be made for the ... young person in accordance with an EHC plan it must notify ... the young person—

(a) of the reasons for that determination, and

(b) that accordingly it has decided not to secure an EHC needs assessment for the ... young person.

(6) Subsection (7) applies where—

(a) no EHC plan is maintained for the ... young person,

(b) the ... young person has not been assessed under this section or section 71 during the previous six months, and

(c) the local authority determines that it may be necessary for special educational provision to be made for the ... young person in accordance with an EHC plan.

(7) The authority must notify ... the young person—

(a) that it is considering securing an EHC needs assessment for the ... young person, and

(b) that the ... young person has the right to—

(i) express views to the authority (orally or in writing), and

(ii) submit evidence to the authority.

(8) The local authority must secure an EHC needs assessment for the ... young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

- (a) the ... young person has or may have special educational needs, and
- (b) it may be necessary for special educational provision to be made for the ... young person in accordance with an EHC plan.

(9) After an EHC needs assessment has been carried out, the local authority must notify ... the young person of—

- (a) the outcome of the assessment,
- (b) whether it proposes to secure that an EHC plan is prepared for the ... young person, and
- (c) the reasons for that decision.

(10) In making a determination or forming an opinion for the purposes of this section in relation to a young person aged over 18, a local authority must consider whether he or she requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete his or her education or training.

(11) Regulations may make provision about EHC needs assessments, in particular—

- (a) about requests under subsection (1);
- (b) imposing time limits in relation to consultation under subsection (4);
- (c) about giving notice;
- (d) about expressing views and submitting evidence under subsection (7);
- (e) about how assessments are to be conducted;
- (f) about advice to be obtained in connection with an assessment;
- (g) about combining an EHC needs assessment with other assessments;
- (h) about the use for the purposes of an EHC needs assessment of information obtained as a result of other assessments;
- (i) about the use of information obtained as a result of an EHC needs assessment, including the use of that information for the purposes of other assessments;
- (j) about the provision of information, advice and support in connection with an EHC needs assessment.

### **37 Education, health and care plans**

(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a ... young person in accordance with an EHC plan—

- (a) the local authority must secure that an EHC plan is prepared for the ... young person, and
- (b) once an EHC plan has been prepared, it must maintain the plan.
- (2) For the purposes of this Part, an EHC plan is a plan specifying—
  - (a) the ... young person's special educational needs;
  - (b) the outcomes sought for him or her;
  - (c) the special educational provision required by him or her;
  - (d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;
  - (e) in the case of ... a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (as it applies by virtue of section 28A of that Act);
  - (f) any social care provision reasonably required by the learning difficulties and disabilities which result in the ... young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).
- (3) An EHC plan may also specify other health care and social care provision reasonably required by the ... young person.
- (4) Regulations may make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans.
- (5) Regulations under subsection (4) about amendments of EHC plans must include provision applying section 33 (mainstream education for children and young people with EHC plans) to a case where an EHC plan is to be amended under those regulations.

#### **42 Duty to secure special educational provision and health care provision in accordance with EHC Plan**

- (1) This section applies where a local authority maintains an EHC plan for a ... young person.
- (2) The local authority must secure the specified special educational provision for the ... young person.
- (3) If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the ... young person.
- (4) 'The responsible commissioning body', in relation to any specified health care provision, means the body (or each body) that is under a duty to arrange health care provision of that kind in respect of the ... young person.
- (5) Subsections (2) and (3) do not apply if ... the young person has made suitable alternative arrangements.

(6) 'Specified', in relation to an EHC plan, means specified in the plan.

## **51 Appeals**

(1) A ... young person may appeal to the First-tier Tribunal against the matters set out in subsection (2), subject to section 55 (mediation).

(2) The matters are—

...

(b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the ... young person in accordance with an EHC plan;

(c) where an EHC plan is maintained for the child or young person—

(i) the ... young person's special educational needs as specified in the plan;

(ii) the special educational provision specified in the plan;

(iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;

(iv) if no school or other institution is named in the plan, that fact; ...

(3) A ... young person may appeal to the First-tier Tribunal under subsection (2)(c)—

(a) when an EHC plan is first finalised for the ... young person, and

(b) following an amendment or replacement of the plan.

(4) Regulations may make provision about appeals to the First-tier Tribunal in respect of EHC needs assessments and EHC plans, in particular about—

(a) other matters relating to EHC plans against which appeals may be brought;

(b) making and determining appeals;

(c) the powers of the First-tier Tribunal on determining an appeal;

(d) unopposed appeals.

(5) Regulations under subsection (4)(c) may include provision conferring power on the First-tier Tribunal, on determining an appeal against a matter, to make recommendations in respect of other matters (including matters against which no appeal may be brought).

(6) A person commits an offence if without reasonable excuse that person fails to comply with any requirement—

(a) in respect of the discovery or inspection of documents, or

(b) to attend to give evidence and produce documents,

where that requirement is imposed by Tribunal Procedure Rules in relation to an appeal under this section or regulations under subsection (4)(a).

(7) A person guilty of an offence under subsection (6) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

## **77 Code of practice**

(1) The Secretary of State must issue a code of practice giving guidance about the exercise of their functions under this Part to—

- (a) local authorities in England;
- (b) the governing bodies of schools;
- (c) the governing bodies of institutions within the further education sector;
- (d) the proprietors of Academies;
- (e) the management committees of pupil referral units;
- (f) the proprietors of institutions approved by the Secretary of State under section 41 (independent special schools and special post-16 institutions: approval);
- (g) providers of relevant early years education;
- (h) youth offending teams;
- (i) persons in charge of relevant youth accommodation;
- (j) the National Health Service Commissioning Board;
- (k) clinical commissioning groups;
- (l) NHS trusts;
- (m) NHS foundation trusts;
- (n) Local Health Boards.

(2) The Secretary of State may revise the code from time to time.

(3) The Secretary of State must publish the current version of the code.

(4) The persons listed in subsection (1) must have regard to the code in exercising their functions under this Part.

(5) Those who exercise functions for the purpose of the exercise by those persons of functions under this Part must also have regard to the code.

(6) The First-tier Tribunal must have regard to any provision of the code that appears to it to be relevant to a question arising on an appeal under this Part.

## **80 Parents and young people lacking capacity**

(1) Regulations may apply any statutory provision with modifications, for the purpose of giving effect to this Part in a case where the parent of ... a young person lacks capacity at the relevant time.

(2) Regulations under subsection (1) may in particular include provision for—



- (a) references to a child's parent to be read as references to, or as including references to, a representative of the parent;
  - (b) references to a young person to be read as references to, or as including references to, a representative of the young person, the young person's parent, or a representative of the young person's parent;
  - (c) modifications to have effect in spite of section 27(1)(g) of the Mental Capacity Act 2005 (Act does not permit decisions on discharging parental responsibilities in matters not relating to a child's property to be made on a person's behalf).
- (3) 'Statutory provision' means a provision made by or under this or any other Act, whenever passed or made.
- (4) 'The relevant time' means the time at which, under the statutory provision in question, something is required or permitted to be done by or in relation to the parent or young person.
- (5) The reference in subsection (1) to lacking capacity is to lacking capacity within the meaning of the Mental Capacity Act 2005.
- (6) 'Representative', in relation to a parent or young person, means—
- (a) a deputy appointed by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005 to make decisions on the parent's or young person's behalf in relation to matters within this Part;
  - (b) the donee of a lasting power of attorney (within the meaning of section 9 of that Act) appointed by the parent or young person to make decisions on his or her behalf in relation to matters within this Part;
  - (c) an attorney in whom an enduring power of attorney (within the meaning of Schedule 4 to that Act) created by the parent or young person is vested, where the power of attorney is registered in accordance with paragraphs 4 and 13 of that Schedule or an application for registration of the power of attorney has been made.

Section 83(2) provides that *young person* 'means a person over compulsory school age but under 25.'

### **Special Educational Needs and Disability Regulations 2014 (SI No 1530) – the 2014 Regulations**

#### **63 Where a child's parent lacks capacity**

In a case where a child's parent lacks capacity at the relevant time references in—

- (a) Part 3 of the Act, and
- (b) these regulations, except the references in regulation 6(1)(b)(iv) and paragraph 15(b) of Schedule 2,

to a child's parent or the parent of a detained person who is a child are to be read as references to a representative of the parent.

#### **64 Where a young person lacks capacity**

- (1) In a case where a young person lacks capacity at the relevant time—
- (a) references to a young person in the provisions of Part 3 of the Act listed in Part 1 of Schedule 3 are to be read as references to both the young person and the alternative person;
  - (b) references to a young person or a detained person who is a young person in the provisions of Part 3 of the Act listed in Part 2 of Schedule 3 are to be read as references to the alternative person instead of the young person; and
  - (c) references to a young person in these regulations listed in Part 3 of Schedule 3 are to be read as references to both the young person and the alternative person; and
  - (d) references to a young person in these regulations listed in Part 4 of Schedule 3 are to be read as references to the alternative person instead of the young person.
- (2) For the purposes of this regulation, 'the alternative person' means—
- (a) a representative of the young person;
  - (b) the young person's parent, where the young person does not have a representative;
  - (c) a representative of the young person's parent, where the young person's parent also lacks capacity at the relevant time and the young person does not have a representative.

#### **65 Mental Capacity Act 2005**

Regulations 63 and 64 have effect in spite of section 27(1)(g) of the Mental Capacity Act 2005.

### **SCHEDULE 3**

#### **PART 1**

##### **References to a young person in the Act that are to be read as references to both a young person and an alternative person**

The provisions referred to in regulation 64(1)(a) are—

section 19(a), (b), (c) and (d) (first reference); ...

#### **PART 2**

##### **References to a young person in the Act that are to be read as references to an alternative person**

The provisions referred to in regulation 64(1)(b) are—

...

section 51(1) and (3) (opening words); ...

#### **PART 3**

**References to a young person in the Act that are to be read as  
references to both a young person and an alternative person**

The provisions referred to in regulation 64(1)(c) are—

...

regulation 19(a); ...

## APPENDIX 2 THE CODE OF PRACTICE

### Paragraphs cited by the parties in their closing submissions to the tribunal

7.6 All students aged 16-19 (and students up to the age of 25 where they have an EHC plan) should follow a coherent study programme which provides stretch and progression and enables them to achieve the best possible outcomes in adult life. Further detail on study programmes and pathways to employment is given in Chapter 8, Preparing for adulthood from the earliest years, paragraphs 8.32 to 8.40. More detailed information on what constitutes good outcome setting is given in Chapter 9, Education, Health and Care needs assessments and plans, paragraphs 9.64 to 9.69). These principles should be applied to planning for all young people.

8.76 For young people with EHC plans, where it is known that a young person will soon be completing their time in education and training, the local authority should use the annual review prior to ceasing the EHC plan to agree the support and specific steps needed to help the young person to engage with the services and provision they will be accessing once they have left education.

8.77 Some young people will be moving into employment or going on to higher education. Others will primarily require ongoing health and/or care support and/or access to adult learning opportunities. They may be best supported by universal health services and adult social care and support, alongside learning opportunities in the adult skills sector. For those who have just completed an apprenticeship, traineeship or supported internship the best option may be for them to leave formal education or training and either begin some sort of paid employment resulting from their work placement, or to access further support and training available to help them secure a job through Jobcentre Plus.

9.5 EHC plans should be forward-looking documents that help raise aspirations and outline the provision required to meet assessed needs to support the child or young person in achieving their ambitions. EHC plans should specify how services will be delivered as part of a whole package and explain how best to achieve the outcomes sought across education, health and social care for the child or young person.

9.14 In considering whether an EHC needs assessment is necessary, the local authority should consider whether there is evidence that despite the early years provider, school or post-16 institution having taken relevant and purposeful action to identify, assess and meet the special educational needs of the child or young person, the child or young person has not made expected progress. To inform their decision the local authority will need to take into account a wide range of evidence, and should pay particular attention to:

- evidence of the child or young person's academic attainment (or developmental milestones in younger children) and rate of progress

information about the nature, extent and context of the child or young person's SEN

- evidence of the action already being taken by the early years provider, school or post-16 institution to meet the child or young person's SEN
- evidence that where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided
- evidence of the child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies, and
- where a young person is aged over 18, the local authority **must** consider whether the young person requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete their education or training. Remaining in formal education or training should help young people to achieve education and training outcomes, building on what they have learned before and preparing them for adult life.

9.54 In deciding whether to make special educational provision in accordance with an EHC plan, the local authority should consider all the information gathered during the EHC needs assessment and set it alongside that available to the local authority prior to the assessment. Local authorities should consider both the child or young person's SEN and the special educational provision made for the child or young person and whether:

- the information from the EHC needs assessment confirms the information available on the nature and extent of the child or young person's SEN prior to the EHC needs assessment, and whether
- the special educational provision made prior to the EHC needs assessment was well matched to the SEN of the child or young person

9.55 Where, despite appropriate assessment and provision, the child or young person is not progressing, or not progressing sufficiently well, the local authority should consider what further provision may be needed. The local authority should take into account:

- whether the special educational provision required to meet the child or young person's needs can reasonably be provided from within the resources normally available to mainstream early years providers, schools and post-16 institutions, or
- whether it may be necessary for the local authority to make special educational provision in accordance with an EHC plan

## **Young people aged 19 to 25**

9.150 It is important to ensure young people are prepared effectively for adulthood and the decision to provide or continue an EHC plan should take this into account, including the need to be ambitious for young people (see paragraph

8.51). The outcomes specified in the EHC plan should reflect the need to be ambitious, showing how they will enable the young person to make progress towards their aspirations. The local authority, in collaboration with the young person, his or her parent where appropriate, and relevant professionals should use the annual review process to consider whether special educational provision provided through an EHC plan will continue to enable young people to progress towards agreed outcomes that will prepare them for adulthood and help them meet their aspirations.

### **Young people turning 19 who have EHC plans**

9.151 In line with preparing young people for adulthood, a local authority **must** not cease an EHC plan simply because a young person is aged 19 or over. Young people with EHC plans may need longer in education or training in order to achieve their outcomes and make an effective transition into adulthood. However, this position does not mean that there is an automatic entitlement to continued support at age 19 or an expectation that those with an EHC plan should all remain in education until age 25. A local authority may cease a plan for a 19- to 25-year-old if it decides that it is no longer necessary for the EHC plan to be maintained. Such circumstances include where the young person no longer requires the special educational provision specified in their EHC plan. In deciding that the special educational provision is no longer required, the local authority **must** have regard to whether the educational or training outcomes specified in the plan have been achieved (see the section on Outcomes, paragraphs 9.64 to 9.69).

9.152 The local authority should also consider whether remaining in education or training would enable the young person to progress and achieve those outcomes, and whether the young person wants to remain in education or training so they can complete or consolidate their learning. In both cases, this should include consideration of access to provision that will help them prepare for adulthood. Young people who no longer need to remain in formal education or training will not require special educational provision to be made for them through an EHC plan.

9.200 The circumstances where a local authority may determine that it is no longer necessary for the EHC plan to be maintained include where the child or young person no longer requires the special educational provision specified in the EHC plan. When deciding whether a young person aged 19 or over no longer needs the special educational provision specified in the EHC plan, a local authority **must** take account of whether the education or training outcomes specified in the EHC plan have been achieved. Local authorities **must not** cease to maintain the EHC plan simply because the young person is aged 19 or over.

## **APPENDIX 3 THE CODE OF PRACTICE**

### **Paragraphs and Annex 1 that are relevant to the capacity issue**

#### **Young people preparing to make their own decisions**

8.13 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.

8.14 The specific decision-making rights about EHC plans (see Chapter 9) which apply to young people directly from the end of compulsory school age are:

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

8.15 Local authorities, schools, colleges, health services and other agencies should continue to involve parents in discussions about the young person's future. In focusing discussions around the individual young person, they should support that young person to communicate their needs and aspirations and to make decisions which are most likely to lead to good outcomes for them, involving the family in most cases. A decision by a young person in respect of an EHC plan will typically involve discussion with their family and others, but the final decision rests with the young person.

8.16 A young person can ask a family member or friend to support them in any way they wish, including, for example, receiving correspondence on their behalf, filling in forms, attending meetings, making telephone calls and helping them to make decisions. Local authorities and other agencies working with young people should work flexibly to accommodate these arrangements. They should also be flexible about accommodating any changes in those arrangements over time, since the nature of the family's involvement may alter as the young person becomes older and more independent.

#### **16- to 17-year-olds**

8.17 Where a young person is under 18, the involvement of parents is particularly important and local authorities should continue to involve them in

the vast majority of decisions. Schools and colleges normally involve the parents or family members of students under 18 where they have concerns about a young person's attendance, behaviour or welfare and they should continue to do so. They should also continue to involve parents or family members in discussions about the young person's studies where that is their usual policy. Child safeguarding law applies to children and young people up to the age of 18. The fact that the Children and Families Act 2014 gives rights directly to young people from the end of compulsory school age does not necessitate any change to a local authority's, school's or college's safeguarding or welfare policy.

### **Support for young people**

8.18 Some young people will need support from an independent skilled supporter to ensure that their views are acknowledged and valued. They may need support in expressing views about their education, the future they want in adult life, and how they prepare for it, including their health, where they live, their relationships, control of their finances, how they will participate in the community and how they will achieve greater autonomy and independence. Local authorities should ensure young people who need it have access to this support.

### **The Mental Capacity Act**

8.19 The right of young people to make a decision is subject to their capacity to do so as set out in the Mental Capacity Act 2005. The underlying principle of the Act is to ensure that those who lack capacity are empowered to make as many decisions for themselves as possible and that any decision made or action taken on their behalf is done so in their best interests. Decisions about mental capacity are made on an individual basis, and may vary according to the nature of the decision. Someone who may lack capacity to make a decision in one area of their life may be able to do so in another. There is further guidance on the Mental Capacity Act and how it applies both to parents and to young people in relation to the Act in Annex 1, Mental Capacity.

### **Who can appeal to the Tribunal about EHC needs assessments and plans**

11.44 Parents (in relation to children from 0 to the end of compulsory schooling) and young people (over compulsory school age until they reach age 25) can appeal to the Tribunal about EHC needs assessments and EHC plans, following contact with a mediation adviser in most cases (see paragraph 11.18). Young people can register an appeal in their name but can also have their parents' help and support if needed. Chapter 8, paragraphs 8.15 to 8.18, gives further guidance on the rights of young people under the Children and Families Act 2014 and the involvement and support of parents.

## **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.