



PRESIDENT OF THE  
COURT OF PROTECTION



## Deprivation of liberty - guidance for providers of children's homes and residential special schools

1. This is guidance, issued jointly by the President of the Court of Protection and Ofsted, on the deprivation of liberty under the Mental Capacity Act 2005.
2. There are two ways in which a deprivation of liberty can be authorised and so in which a person can be deprived of their liberty under the Mental Capacity Act 2005:
  - An urgent or standard authorisation which can only be given by a supervisory body on the request of a managing authority of a hospital or care home<sup>1</sup> in respect to a person who has reached 18. This specifically excludes an establishment which is a children's home. An urgent or standard authorisation cannot be given in respect of a children's home. Nor can an urgent or standard authorisation be made in relation to a person under the age of 18 years old.
  - By order of the Court of Protection<sup>2</sup>: orders and declarations of the Court of Protection are made in relation to a person who is over the age of 16 and lacks capacity. The order may authorise (not require) the detention of that person. Any such order is a decision on behalf of the person who lacks capacity - it is not like an injunction aimed at requiring third parties to take steps to facilitate the detention of that young person.
3. The Court of Protection should be reminded by the parties of the Regulations that apply to children's homes and residential special schools. The Court of

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<sup>1</sup> Such authorisations are granted under Schedule A1 of the Mental Capacity Act 2005. The meaning of a care home is provided by section 3 of the Care Standards Act 2000 (Para. 178 of Schedule A1 to 2005 Act)

<sup>2</sup> Sections 4A(3) and (4) and section 16(2)(a) of the 2005 Act.

Protection does not have the jurisdiction to require any home or school to act in breach of such Regulations or to authorise any such breach. Accordingly, the Court of Protection should not make an order authorising a plan for the care and supervision involving the detention of a person, where to do so would involve the children's home or a residential special school breaching the regulations that apply to it. If compliance with an Order of the Court of Protection would involve such a breach of the relevant Regulations it cannot be relied on to justify breach of the Regulations or enforced in a manner that would involve such a breach.<sup>3</sup> The most relevant Regulations are referred to below.

### **Children's Homes and residential special schools registered as children's homes**

4. All children's homes must meet the Children's Home Regulations (2001). In this instance, the relevant regulations are: regulation 11 (Promotion of welfare), regulation 17 (Behaviour management and discipline) and regulation 17A (Restraint). As restraint can only be used to prevent a child from leaving a secure children's home, there is no purpose to be served in seeking an order of the Court of Protection authorising such restraint by a non-secure children's home because the Court of Protection has no jurisdiction to order or authorise a breach of these Regulations.

### **Non-maintained residential special schools<sup>4</sup>**

5. These schools must comply with the Education (Non-Maintained Special Schools) (England) Regulations 2011 which require the school to comply with the National Minimum Standards in relation to safeguarding the welfare of children<sup>5</sup>. NMS 12.7 states that:

*'No school restricts the liberty of any child as a matter of routine or provides any form of secure accommodation.'*

6. As this type of school is unable to deprive a young person of their liberty the Court of Protection has no jurisdiction to make an order that requires or authorises it to do so in breach of that regulation.

### **Independent residential special schools**

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<sup>3</sup> The effect of these orders does not **require** the deprivation of the person's liberty, but rather **permits** the deprivation of their liberty in certain circumstances and mitigates liability in terms of potential breaches of Article 5 of the European Convention of Human Rights (right to liberty of person).

<sup>4</sup> As defined in section 337 of Education Act 1996

<sup>5</sup> Regulation 3 and paragraph 13(2) of the Schedule to the 2011 Regulations

7. These schools must comply with the Education (Independent School Standards) (England) Regulations 2010, which provide that the schools must have regard to the National Minimum Standards for residential special schools<sup>6</sup> and so NMS 12.7 is relevant. If the school does not meet NMS 12.7 it must have good reason for not doing so. It is not the spirit of the NMS that there are different applicable standards for independent and non-maintained residential special schools.
8. Accordingly, such schools are not entitled to deprive children of their liberty and the Court of Protection should not authorise a deprivation of liberty by this type of school.

### **The Mental Health Act Code of Practice 1983**

9. In *R (on the application of C) v A Local Authority* [2011] EWHC 1539 (admin) and [2011] 14 CCLR 471 and [2100] Med LR 415 "the blue room case" the Court considered the need to have regard to the Mental Health Code of Practice 1983 in a case involving seclusion. This approach is one which should be followed. However, the need to have regard to the Mental Health Code of Practice 1983 in cases involving seclusion does not mean that Regulations and Guidance expressly directed towards children's homes should not be followed. The primary focus of all children's homes should be on the Regulations and Guidance which relates to such homes, and in the case of residential special schools the Regulations which apply, albeit in the exceptional case, such as the blue room case, assistance can also be derived from the Mental Health Code of Practice. The position is similar in relation to the Mental Capacity Act 2005 and the Code of Practice and Guidance relating to it.

### **Good practice in the event providers are aware of an application to the Court of Protection**

10. Should the providers of children's homes or residential special schools become aware of an application to the Court of Protection and be aware of a reason why it is not possible or appropriate for the incapacitated person to be detained at the home or school (whether because it is in breach of regulations or for other reason) it is good practice to advise the Court of Protection and parties to the application that this is the position and to give reasons why this is the case as soon as possible.

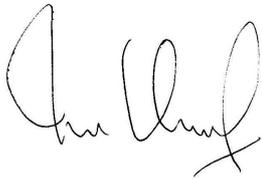
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<sup>6</sup> Regulation 3(1) and paragraph 8 of Schedule 1 to the 2010 Regulations.

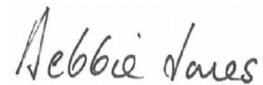
**In Summary:**

11. No application should be made to the Court of Protection in relation to any child under the age of 16 years old.
12. Standard and urgent authorisations under Schedule A1 Mental Capacity Act have no application to children's homes as they only apply to hospitals and care homes and only apply to those over the age of 18 years old.
13. Orders of the Court of Protection authorising a deprivation of liberty by non-secure children's homes or residential special schools should not be sought or made and they should not be advanced or relied on to permit such homes and schools to act in breach of the Regulations that apply to them.
14. The Mental Health Act Guidance and other Guidance may be relevant but do not override the Regulations and Guidance directed towards children's homes and schools.

Dated the 12<sup>th</sup> February 2014



President of the Court of Protection



National Director Social Care Ofsted