MENTAL CAPACITY AND CONSENT POLICY (ACADEMIES)

Version:	1.3
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Approval body:	ESLT
Date this version approved:	27th March 2026
Due for review:	Spring 2029

Mental Capacity and Consent Policy (Academies)

INTRODUCTION

Under the Children and Families Act 2014, a child becomes a young person and is deemed to have capacity once they reach the age of 16; this is the point at which parental rights under the law in relation to the young person's education pass to the young person. This policy applies to all pupils/students aged 16 or over who attend an OHCAT Academy.

This policy sets out OHCAT's understanding of and approach to supporting mental capacity and consent within the context of our academy provision. OHCAT aims to provide teaching and learning which is responsive to the individual needs of pupils/students. On this basis, OHCAT will strive to maximise the independence and self-advocacy of all pupils/students, operating from a starting assumption that each pupil/student has capacity to make decisions related to their learning unless evidenced to the contrary within the parameters of the Mental Capacity Act (2005), and ensuring that pupil/student consent is sought and given with respect to all aspects of their learning.

AIMS

- To identify the key aspects of the Mental Capacity Act (2005) in relation to OHCAT pupils/students.
- To clarify OHCAT's responsibilities to facilitate pupils/students in maximising their self-advocacy, ensuring all appropriate support to achieve this.
- To ensure that a pupil's/student's consent is paramount in all situations.

POLICY STATEMENT

'Mental capacity' means being able to make your own decisions. Someone lacking capacity – because of an illness or disability such as a mental health problem, dementia or a learning disability – cannot do one or more of the following four things:

- Understand information given to them about a particular decision
- Retain that information long enough to be able to make the decision
- Weigh up the information available to make the decision
- Communicate their decision.

OHCAT will:

- Assume a pupil/student has capacity with regard to the decisions and choices presented to them within OHCAT provision.

- Take a decision-specific approach to capacity and consent.

- Ensure that the circumstances for making a decision are right for the individual pupil/student.

- Acknowledge that, in the judgment of staff, a pupil/student may make an 'unwise decision' but staff will still respect and support it, provided it does not place the pupil/student or others at risk of harm.

- Not lead a pupil/student, through emphasis or intonation, when presenting them with a choice.

- Only have an involvement in assessing a pupil or student's capacity within the remit of decisions relating to their learning and being at OHCAT provision, unless invited to contribute otherwise e.g. at external best interest meetings.

- Ensure that key staff involved in assessing pupil/student capacity have received training on the Mental Capacity Act and suitable assessment strategies.

- Strive to maximise the opportunities for all pupils/students to advocate for themselves.

- Reflect a pupil or student's goals and aspirations as identified through Person Centred Planning, tutorials and reviews.

- Work in the best interests of the pupil/student, and in partnership with all appropriate agencies, in the event that a pupil or student's capacity is in question with regard to a specific decision affecting them or their circumstances.

- Ensure that when 'appropriate help' with decision making is given to a pupil/student, it is someone who the pupil/student has chosen and who knows them well.

- Always gain a pupil or student's consent before undertaking any personal care or medical/ therapeutic interventions – consent will be gained for each separate intervention. Where it has been specifically identified that a pupil/student lacks capacity with regard to granting permission for the administration of personal or medical care, or has a level of language development which is not consistent with their being able to give informed consent, care will be administered with the pupil/student's best interest in mind and in accordance with professional advice and/or the pupil/student's best-placed advocate.

- Work in collaboration with a pupil/student where they are unhappy about essential interventions (e.g. personal care or emergency medical care) to achieve a level and mode of support that they are comfortable with.

- Ensure consent is gained from prospective pupils/students (or, where the pupil/student does not have capacity, their best-placed advocate) with regard

to medical, therapeutic and other forms of assessment during any assessment days and/or initial assessment processes for OHCAT provision.

- For students over 18, respect a student's decision if they express a wish to leave OHCAT provision at any time, ensuring that they can do so safely and providing their concerns have been discussed and attempts made to resolve these. If there are safeguarding concerns these must be reported to the Designated Safeguarding Lead before a student leaves OHCAT provision.

- Always gain a pupil or student's consent for the taking and use of images and video material in different forms and media. Consent will only be overruled where it has been evidenced that an individual does not have capacity and/or it is deemed by their parent/carer or best-placed advocate that the use of any images will create a safeguarding risk or pose another form of significant threat to their wellbeing.

- Have due regard to Deprivation of Liberty Safeguards. This is a safeguard for people who lack capacity to make decisions regarding their own safety. OHCAT will provide a safe environment for the diverse needs of all its pupils/students, ensuring the safety and due liberty of them all as individuals. OHCAT will ensure that pupil/student choice and best interest is considered at all times and that decisions being made suit the needs of the pupil/student to which they pertain.

THE MENTAL CAPACITY ACT 2005

What is mental capacity?

The Mental Capacity Act (2005) provides the legal framework for acting and making decisions on behalf of an adult (aged 16 or over) who lacks the mental capacity to make particular decisions for themselves.

The Mental Capacity Act (2005) Code of Practice makes the following definition:

"Mental capacity is the ability to make a decision.

- *This includes the ability to make a decision that affects daily life – such as when to get up, what to wear or whether to go to the doctor when feeling ill – as well as more serious or significant decisions.*
- *It also refers to a person's ability to make a decision that may have legal consequences – for them or others. Examples include agreeing to have medical treatment, buying goods or making a will."*

Capacity is "decision specific" – i.e. a separate assessment must be made for each decision and someone cannot be referred to generically as "having capacity" or not.

The five statutory principles of the Mental Capacity Act

1. A person must be assumed to have capacity unless it is established that they lack capacity.

2. A person is not to be treated as unable to make a decision unless all practicable steps to help her/him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.
4. 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 her/his best interests.
5. Before the act is done, or the decision is made, regard must be given 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.

The statutory principles aim to:

- protect people who lack capacity, **and**
- help them take part, as much as possible, in decisions that affect them.

They aim to assist and support people who may lack capacity to make particular decisions, not to restrict or control their lives (in line with the Human Rights Act 1995).

Assessing capacity

Anyone assessing someone's capacity to make a decision for themselves should use the two-stage and then the four-stage test of capacity.

The **two-stage test of capacity**:

- Does the person have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It doesn't matter whether the impairment or disturbance is temporary or permanent.)
- If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

The Mental Capacity Act (2005) Code of Practice lists people with learning disabilities as having the potential to fall into the above criteria. However, it also acknowledges that these people may regain or develop capacity in the future:

"a person with learning difficulties may learn new skills or be subject to new experiences which increase their understanding and ability to make certain decisions."

The **four-stage test of capacity**:
Is the person able to:

1.Retain the information (for long enough to make the decision)
2.Understand the information
3.Weigh the decision (such as why that choice is being made; what is good / bad about that choice)
4.Express his / her answer (using any means possible, including pointing, eye pointing; signing; using AAC; writing or circling your preferred option)

Safeguards provided by the Act in assessing someone's capacity

An assessment that a person lacks capacity to make a decision must never be based simply on:

- their age
- their appearance (including physical characteristics of certain conditions e.g. features linked to Down's syndrome or muscle spasms caused by cerebral palsy)
- assumptions about their condition (including physical disabilities, learning difficulties and disabilities), **or**
- any aspect of their behaviour (including shouting or gesticulating and withdrawn behaviour e.g. talking to oneself/avoiding eye contact).

Support with decision making

The Code of Practice recognises that providing appropriate help with decision-making should form part of care planning processes for people receiving health or social care services and, by virtue, learning providers and a key example of this is Person Centred Planning for people with learning disabilities.

Key factors to establish are:

- Does the person have all the relevant information they need to make a particular decision? However, they must not be expected to know more than the average person making this decision.
- If they have a choice, have they been given information on all the alternatives? This must not be influenced by what the assessor feels is the "right decision".
- Could information be explained or presented in a way that is easier for the person to understand (for example, by using simple language or visual aids)?
- Have different methods of communication been explored if required, including non-verbal communication?
- Could anyone else help with communication (for example, a family member, support worker, interpreter, speech and language therapist or advocate)?
- Does the time of day suit the person?
- Is there a location where they feel most at ease?
- Could the decision be deferred to a time that best suits the person?

RELATED POLICIES AND PROCEDURES

Child Protection Adult Protection & Safeguarding Policy
Manual Handling Policy
Personal and Intimate Care Policy
Staff Code of Conduct
Supporting Students with Medical Conditions in Education Policy