

This note is therefore intended to help IASS understand their legal

- b. A young person lacks capacity to decide to access IAS (in which case the IASS should make a best interests decision and consult with the parents before doing so unless this is judged not appropriate, for example because the young person objects).
- 4. Parents will not generally have a right to access records relating to support provided to a child or young person by an IASS.

and young people. The IASSN considers that the Code of Practice is simply recognising that it is more likely that older children will want to access IAS separately from their parents – but this will not always be the case.

There is no lower age limit on the exercise of this right of access. IASS will, however, have to consider issues of capacity when dealing with requests for IAS from children and ensure that they act in the best interests of the child in all cases. This may involve modifying the way in which advice is provided. If a child lacks capacity to decide to access IAS, that decision can be taken for the child by their parent(s). However, there must be no presumption that just because a child is disabled it will be necessary to involve their parents. Indeed if a child objects to parental involvement there will need to be a good reason for this to be overridden, particularly where they have capacity to decide to access IAS on their own.

Questions of capacity in relation to children under 16 are determined under the princi

whether the child or young person has the relevant capacity. This will generally only be necessary if there is a dispute as to whether the child or young person has capacity and specific legal advice should be sought in any such cases.

Furthermore, even if a young person lacks capacity to make decisions on her own behalf, it is hard to see why in most cases the provision of some form of IAS would be what they want.

Although in difficult cases it may be necessary to make an application to the court⁵ to decide what is in the best interests of the young person, in the great majority of cases this decision can properly be taken by the IASS. For young people aged 16 or over the approach set out in section 4 of the Mental Capacity Act (MCA) 2005 must be followed; similar principles should inform best interests decisions in cases involving children under 16. Important principles found in section 4 of the MCA 2005 include:

- a. Interest based solely on their age, appearance, condition or behaviour (sub-section 1);
- b. All relevant circumstances must be considered (sub-section 2);
- c. The person must be permitted and encouraged as far as possible to participate in the decision (sub-section 4);
- d. The wishes and feelings of the person must be considered if they can be ascertained (sub-section 6(a));
- e. The views of anyone engaged in caring for the person or interested in his welfare should be taken into account, if it is practicable and appropriate to consult them (sub-section 7(b))

IASSN considers that questions of capacity and best interests are generally more likely to be relevant to the manner in which IAS is provided (e.g. whether services should be tailored to help the young person understand advice) than to the question of whether any IAS should be provided at all. IASS will of course need to give effect to their reasonable adjustments duties under the Equality Act 2010 when considering tailoring the provision of IAS to the needs of young people with special educational needs.

Where a child or young person lacks capacity to decide to access IAS, it is important to note that parents (and any representative a young person has under the MCA 2005⁶) also have a right to access IAS under section 32 of the SEN and Disability Regulations 2014.

⁵ See above in relation to capacity for the relevant courts.

⁶ Such as a court-appointed Deputy or a person with Lasting Power of Attorney. This is the effect of section 80 of the Act and Part 6 of the SEN and Disability Regulations 2014.

IASSN considers that the only exceptions to this would be if:

1. A child aged under 16 lacks capacity to decide to access IAS. In such cases the IASS should obtain express consent from a person with parental responsibility. If the child objects

presumption is that records of a child or young person should remain confidential to them.

3. Where a child or young person lacks capacity to decide whether to consent to disclosure and a decision is then taken that disclosure will be in their best interests. See the summary above of some of the important principles in best interests decision-making. Again, IASS should keep in mind the presumption that IAS is provided to children and young people in confidence. There will need to be good reasons to override this presumption of confidence. The fact that a child or young person does or does not object to information being disclosed is relevant to the best interests decision but is not in itself determinative. Again these may be cases where specific legal advice needs to be sought.

In addition, where a child is too young or otherwise unable to make (or is otherwise unable to exercise) the Data Protection 1998, a parent will likely be permitted to exercise the right of subject access unless this would not be in the best interests of the child.¹¹ If a subject access request is made by a parent of a child where the IASS considers that the child would be unable to make such a request herself, the records should be disclosed unless it can be shown that disclosure would be in the child's best interests.

An important exception to this is where an IASS holds personal data about a child or young person which is subject to a duty of confidentiality. IASS will not be permitted to disclose that information to a parent making a subject access request unless the IASS has been expressly authorised the disclosure.¹² However, disclosure under FOIA may still be possible, subject to the considerations above. In practice, again, disclosure in the absence of consent is only likely to be permissible on the basis of compelling safeguarding or welfare considerations.

¹¹ The Information Commissioner's Office (ICO) states that where a child or young person is unable to exercise their right of subject access, a parent or guardian may be able to exercise that right on their behalf. However, where the child or young person is able to understand (in broad terms) what it means to make a SAR and how to do so, the IASS should consider whether it is appropriate to disclose the information to the parent or guardian. In such cases, the IASS should consider the child's best interests, the nature of the personal data, any duty of confidence owed to the child, any consequences of allowing those with parental responsibility to access the information, any detriment to the child if persons with parental responsibility cannot access the information, and any views the child has on whether their parents should have access to the information about them.

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