

Information, Advice and Support Services – duties to children and young people seeking information, advice and support

Briefing note from the Information, Advice and Support Services Network

Introduction

This briefing note has been prepared by the Information, Advice and Support Services Network (IASSN) to help Information, Advice and Support Services (IASS) understand their duties towards children and young people¹ who approach them for advice.

The extended remit of IASS to cover children and young people is vital to the successful implementation of the SEN and disability reforms in Part 3 of the Children and Families Act 2014 (the Act). The reforms require transparency and co-production with children, young people and families, and the provision of effective information, advice and support to children and young people is central to this.

The IASSN is aware that there are some key legal issues for IASS in their work with children and young people. These issues arise particularly where there is actual or potential conflict between the wishes and views of the child or young person and their parent(s)² in terms of access to information, advice and support (IAS).

¹ See the definition of a “young person” in section 83(2) of the Act), i.e. as someone over compulsory school age (very roughly speaking, 16) but under 25.

² The term ‘parent’ is used throughout this briefing note to refer to a person with parental responsibility. IASS should be aware that will usually, though not always, be the birth parents and may include a special guardian or a local authority.

This note is therefore intended to help IASS understand their legal obligations to children and young people looking to access their services. It follows detailed legal advice obtained from Alex Rook at Irwin Mitchell solicitors and Steve Broach and Michael Armitage, barristers at Monckton Chambers. IASS should note, however, that this briefing contains general guidance only and cannot be relied on to give a legal answer to any particular case. IASS should seek legal advice on the specific facts of any given case which is causing concern.

The Questions

Key legal questions which have arisen for IASS in their work with children and young people since the Act came into force in 2014 are as follows:

1. Is a child entitled to access confidential information, advice and support (IAS) separately from her parents?
2. Do parents have a right to be informed that IAS has been provided to a child or young person?
3. Is parental consent required before IAS is provided to a child or young person?
4. Do parents of children or young people have a right to access records relating to IAS provided to a child / young person?

The IASSN considers that the answers to these questions are as follows:

1. Children and young people have a separate right of access to confidential IASS. Such access should only be denied in cases where the child or young person lacks the mental capacity to decide to access IAS, the parents refuse consent (in the case of a child) for them to access IAS and the provision of some form of IAS would not be in the child or young person's best interests.
2. Parents will not generally have a right to be informed about a child's or young person's access to IAS – nor indeed do other organisations such as local authorities or schools. The exceptions will be where the child or young person validly consents or where serious safeguarding concerns justify disclosure of this information.
3. Parental consent is not required before an IASS provides any support to a child or young person. Indeed it may well breach the child or young person's privacy rights for an IASS to seek such consent. The only exceptions are:
 - a. Where a child lacks capacity to decide to access IAS, in which case the IASS should obtain express consent from the parents unless it is not in the child's best interests to do so, when a best interest decision should be made by the IASS

- 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. If a child or young person agrees that a parent may access their records then they can be disclosed, assuming the child or young person has the relevant mental capacity to consent. Records may also be disclosed if there are significant safeguarding reasons which justify disclosure where a child or young person does not consent. If a child or young person lacks capacity to consent, disclosure may be made only if it is in the child or young person's best interests. Finally, parents may make a "subject access request" under the Data Protection Act 1998 on behalf a child, where the child is unable to make the request themselves and disclosure is in the child's best interests. This does not apply however to information relating to a child's physical or mental health, which under the Data Protection Act should generally only be disclosed with a child's express agreement.

The reasons for these answers are as follows:

1. Children's Right of Access to IASS

The Act and the new SEN and Disability Code of Practice both make clear that children and young people have a right of access to IASS which is not dependent on their parent's right of access.

Paragraph 2.10 of the Code of Practice³ (headed "*Children*") states as follows:

"The Children and Families Act 2014 requires local authorities to provide children with information, advice and support relating to their SEN or disability. Many children will access information, advice and support via their parents. However, some children, especially older children, may want to access information, advice and support separately from their parents, and local authorities **must** ensure this is possible."

(emphasis in original)

This paragraph should not be read as limiting the duty to provide information, advice and support only to specific groups of children, i.e. older children. It is clear from the Act that IASS must be available to all children

³ Section 77(4) of the Act provides that local authorities and a number of other bodies "must" have regard to the Code of Practice when exercising their functions under Part 3 of the Act.

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 include involving the child's parent(s) or 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 principles set down by the House of Lords in the well-known *Gillick* case⁴. The key principle is that children with sufficient understanding and intelligence to enable them to understand fully what is involved in a proposed medical intervention will also have the capacity to consent to that intervention. In the context of the provision of IAS, the very fact that a child has sought to access IASS services independently strongly suggests that they have the necessary competence to do so, although IASS should not merely assume that this is the case. It should be borne in mind that access to IAS will generally be a relatively 'low level' decision and the bar for capacity to make this decision will not be as high as other more serious decisions, for example to consent to certain medical treatment.

For people aged 16 and over (i.e. young people) capacity is determined in accordance with the Mental Capacity Act (MCA) 2005, which involves a consideration of a number of factors including the young person's understanding of the nature of a given decision and their ability to weigh up the benefits and disbenefits of each option (for example, whether to access IAS). Again, the fact that a young person is positively seeking to make use of IASS is strong, but not decisive, evidence of capacity. In cases of doubt these issues will need to be assessed and a case-specific decision taken by the relevant IAS. Importantly under the MCA 2005, any young person seeking to access IASS should be presumed to have capacity to do so unless it can be shown that the test in the MCA is not met, and "all practicable steps" should be taken to help young people to do make such decisions.

In principle, if a child or young person does not (or may not) have the mental capacity to give consent to a relevant decision then an application could be made to the Family Division of the High Court (for those under 16) or the Court of Protection (for those aged 16 or other) for a decision as to

⁴ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112

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 contrary to that person's best interests if this is what they want.

Although in difficult cases it may be necessary to make an application to the court⁵ to decide what is in the child or young person's best interests, 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. There should be no assumption of what is in a person's best 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 a particular young person's 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 Act in relation to their children's disabilities/special educational needs.

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.

2. Informing parents about children and young people accessing IAS

The basic principle is that IASS support is confidential; see the Code of Practice at para 2.5. The situations in which this duty of confidence may be overridden where children and young people have capacity to decide not to disclose the fact that they are accessing IAS to parents are limited to cases where children and young people give valid consent to the information being shared, or where there are serious safeguarding or welfare concerns that would justify notifying parents.⁷ If the child or young person lacks capacity to decide whether their parents should be informed then the decision must be taken in their best interests. These issues are discussed in more detail in relation to question 4 below.

The same principle, that a child or young person's confidence must be respected unless they consent to information being shared, there are overriding safeguarding or welfare concerns or it is in their best interests to share the information if they lack capacity to make the decision, applies to requests to share information with other parties, for example local authorities or schools. Disclosure of information about children and young people to any other person or organisation other than in these circumstances is highly likely to be unlawful. IASS should also consider whether parental consent should be sought to disclose information to third parties in cases involving a child who lacks capacity to make this decision. IASSN considers that parental consent should be sought in such cases unless it is in the child's best interests not to do so. This briefing note focuses on sharing information with parents and IASS should seek separate advice, including case-specific advice, before sharing information with third parties.

3. Parental consent for children and young people to access IAS

There is no basis in the Children and Families Act for imposing any prior obligation to obtain parental consent before children or young people access IASS. As set out above there is a separate duty to provide IAS to children and young people which is not dependent on the views or wishes of their parents.

The Code of Practice specifies that local authorities should take into account a number of "principles", including the fact that the provision of IAS should help to promote "*independence and self-advocacy*" for children/young people, as well as their parents. This underlines the fact that there should be no parental veto on the right of access to IAS for children and young people.

⁷ Local authorities must discharge their functions having regard to the need to safeguard and promote the welfare of children; see section 11 of the Children Act 2004 and section 175 of the Education Act 2002.

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 to parental consent being sought or the IASS is concerned that involving the parents may not be in the child's best interests the IASS will need to consider whether this objection precedes over the parent's rights to consent on the child's behalf, applying a best interests approach. Specific legal advice may need to be taken in such cases.
2. A young person aged 16 or over lacks capacity to decide to access IAS. In that case a best interests decision should be taken by the IASS as to whether IAS should be provided and a person with parental responsibility should be consulted before that decision is made if it is practicable and appropriate to consult them.⁸ An IASS may judge that it is not appropriate to consult a parent or carer if the young person objects to them being involved in the decision.

4. Parents' Right of Access to Records

Neither the Act nor the Code of Practice make any reference to a right of access for parents to records held by IASS about children or young people. Although parents (like everyone else) have a right of access to information held by public authorities under the Freedom of Information Act 2000 (FOIA), information about the provision of IAS to a child or young person will inevitably engage the exemptions which concern personal information and confidential information.⁹ A common theme of these exemptions is that public authorities may not disclose information which would infringe privacy rights. As is noted above, the Code of Practice at para 2.5 states that IASS should be confidential.

There are three situations where IASSN considers that disclosure of information to parents by an IASS will not breach the child or young person's privacy rights:

1. Where the child or young person consents to disclosure. It will of course be necessary for the child or young person to have capacity to make this decision for the consent to be valid.
2. Situations where, even though the child or young person validly refuses consent, there are compelling reasons where disclosure is required in the interests of that child or young person's welfare.¹⁰ An example might be where disclosure is made to an IASS staff member that the child had been abused at school. However it is important that IASS assess carefully whether disclosure is strictly required as the

⁸ See section 4(7)(b) of the Mental Capacity Act 2005, discussed below.

⁹ Sections 40 and 41 of FOIA

¹⁰ In the language of the Data Protection Act 1998, where disclosure is necessary in the child or young person's 'vital interests'.

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 the child or young person's 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 in the child's best interests. 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 understand the implications of making) a "subject access request" under the Data Protection 1998, a parent will likely be permitted to exercise the right of subject access on the child's behalf unless this would not be in the child's best interests.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 properly be said that this would be contrary to the child's best interests.

An important exception to this is where an IASS holds personal data relating to a child's physical or mental health. The IASS will not be permitted to disclose that information to a parent making a subject access request on the child's behalf, unless the child has 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 Subject Access Code of Practice issued by the Information Commissioner's Office states that "in the case of young children these rights are likely to be exercised by those with parental responsibility for them". The IASSN considers that the relevant question is not just the child's age but their capacity to make a subject access request themselves – therefore parents may well be able to exercise subject access rights for older disabled children. As the Subject Access Code of Practice notes, "[w]hat matters is that the child is able to understand (in broad terms) what it means to make a SAR and how to interpret the information they receive as a result of doing so". The Code of Practice lists a number of relevant considerations, including the child's level of maturity and ability to make decisions, 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 child's information (which is particularly important where there have been allegations of abuse or ill treatment), 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.

¹² See the Data Protection (Subject Access Modification) (Health) Order 2000