



# **MENTAL CAPACITY AND CONSENT POLICY (ORCHARD HILL COLLEGE)**

**The OHC&AT Board of Trustees has agreed this Policy and as such, it applies across all College centres and settings – 24<sup>th</sup> March 2023.**

Peter Lauener  
Chair of OHC Board

A handwritten signature in black ink, appearing to read "Peter Lauener", is positioned below the printed name and title.

# Mental Capacity and Consent Policy (Orchard Hill College)

## INTRODUCTION

Orchard Hill College and Academy Trust (OHC&AT) is a family of providers, comprising Orchard Hill College (OHC) and Orchard Hill College Academy Trust (OHCAT), which works together for mutual benefit. OHC&AT is committed to providing outstanding educational opportunities for all our pupils and students. We aim to put the individual at the heart of all our provision, supporting each pupil and student to identify and achieve the aims that are important to them.

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 students attending Orchard Hill College; there is a separate policy for students attending OHCAT Academies. Both policies are drawn from the principles laid out in the Mental Capacity Act 2005, and reflect OHC&AT's commitment to respecting the rights of the individual. As an organisation we will strive to support every pupil/student to express their needs and wishes, regardless of age or legal status.

This policy sets out Orchard Hill College's understanding of and approach to supporting mental capacity and consent within the context of our provision. The College aims to provide teaching and learning which is responsive to the individual needs of our students. On this basis, we will strive to maximise the independence and self-advocacy of all students, operating from a starting assumption that each student has capacity to make decisions related to their learning unless evidenced to the contrary within the parameters of the Mental Capacity Act (2005) (please see Appendix A for a summarised version), and ensuring that 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 OHC students.
- To clarify OHC's responsibilities to facilitate students in maximising their self-advocacy, and ensuring all appropriate support to achieve this.
- To ensure that a student's consent is paramount in all situations.
- To ensure that a Best Interests Decision is taken, in the student's best interests, in the absence of capacity (and staff do not defer to "parental consent")

## **POLICY STATEMENT**

### **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. you need to do a separate assessment 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 to make a decision**

The Code of Practice states that:

*“The starting point must always be to assume that a person has the capacity to make a specific decision. Some people may need help to be able to make or communicate a decision. But this does not necessarily mean that they lack capacity to do so. What*

*matters is their ability to carry out the processes involved in making the decision – and not the outcome.”*

### **Assessing capacity**

Anyone assessing someone’s capacity to make a decision for themselves should use the two-stage and then the 4 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 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:

<b>1.Retain the information</b> (for long enough to make the decision)
<b>2.Understand the information</b>
<b>3.Weigh the decision</b> (such as why that choice is being made; what is good / bad about that choice)
<b>4.Express his / her answer</b> (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 be embedded in 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.
- Have they had the chance to experience different options (eg. Visiting different colleges before choosing which one?) Has there been sufficient repetition to allow the student to feel comfortable with the options if necessary?
- 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)? This should be done with reference to the student’s PSP or their Speech & Language Therapist if needed.
- 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?
- Are they potentially subject to influence or coercion from significant others that would impact on their ability to make a true choice?

Staff may need to refer to the College centre’s Speech & Language Therapist for support in understanding the student’s understanding and best methods for communication in order to prepare adequately for a MCA.

**Appendix A** includes a summary proforma to record the process and outcome of a MCA conducted at OHC by any member of staff.

## BEST INTERESTS DECISIONS

If the student is found to lack capacity, then a Best Interests meeting or discussion should be conducted with the decision maker and those people in the network who

are relevant to the decision and know the person well. We would expect that this would or could involve (dependent on the nature of the decision):

- the student's family, carers and/or advocate;
- lecturer and other members of the curriculum team (e.g. an LSA they work with frequently who knows them very well);
- relevant members of the Integrated Services team;
- Social worker
- GP and other members of the external Community LD team, if involved
- Members of external services, such as respite, clubs, PA services, etc.

In conducting the Best Interests Decision, the **STUDENT'S VOICE MUST BE CENTRAL** and OHC will need to present clear evidence of how they have assessed this through observations, discussions and video / photo recording of the student's reactions to situations – especially if the student is non-verbal or has limited formal communication skills.

The following principles are central to the process of a Best Interests decision:

1. Have all relevant circumstances been taken into account?
2. Will the person regain capacity or do they need a period of education around this issue before we assess capacity? If so can the decision wait?
3. What we understand to be the person's beliefs and values
4. What we believe to be the person's wishes and feelings about this issue
5. Is there a less restrictive option?
6. The views of others who know the person
7. Encourage the person to participate in the decision making process as far as possible
8. Any other factors the person would consider if they could
9. The decision should not be based solely on the person's age, appearance, condition or behaviour

**Appendix B** is a recording form on which to record Best Interests Decisions made at OHC on behalf of any student.

In the light of the above information, Orchard Hill College will:

- Assume a student has capacity with regard to the decisions and choices presented to them within College provision.
- Take a decision-specific approach to capacity and consent.
- Ensure that the circumstances for making a decision are right for the individual student.
- Acknowledge that, in the judgement of staff, a student may make an 'unwise decision' but staff will still respect and support it, provided it does not place the student or others at risk of harm.

- Not lead a student, through emphasis or intonation, when presenting them with a choice.
- Only have an involvement in assessing a student's capacity within the remit of decisions relating to their learning and being at College, unless invited to contribute otherwise e.g. at external best interest meetings.
- Ensure that staff involved in assessing capacity have received training on the Mental Capacity Act and suitable assessment strategies.
- Strive to maximise opportunities for all students to advocate for themselves.
- Reflect a student's goals and aspirations as identified through Person Centred Planning, tutorials and reviews.
- Work in the best interests of the student, and in partnership with all appropriate agencies, in the event that a 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 student, it is someone who the student has chosen and who knows them well.
- Always gain a 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 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 student's best interest in mind and in accordance with professional advice and/or the student's best-placed advocate.
- Work in collaboration with a 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 students (or, where the 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 College provision.
- Ensure the student (or, where the student does not have capacity, their best-placed advocate) has consented to attending and applying to attend Orchard Hill College.
- Respect a student's decision if they express a wish to leave College premises at any time if they have the capacity to make this decision, providing the appropriate level of community support as detailed in their support plan and risk assessment. Any safeguarding concerns should be reported to the Designated Safeguarding Lead before a student leaves College premises.

- Respect a student's decision if they do not wish to attend college on a given day or permanently if they have capacity to make this decision. Any best interest's decision will take into account their reasons for not wanting to attend and, after trying to resolve the issue, if the student still wishes not to attend, this will be advocated to their family and network.
- Always gain a 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. Orchard Hill College will provide a safe environment for the diverse needs of all its students, ensuring the safety and due liberty of them all as individuals. Orchard Hill College will ensure that student choice and best interest is considered at all times and that decisions being made suit the needs of the student to which they pertain.

## **SUPPORT TO CONDUCT MENTAL CAPACITY ASSESSMENTS AND BEST INTERESTS DECISIONS**

The College recognises that conducting MCAs can be a complex process involving some specialist communication skills.

Staff should consult with the Speech & Language Therapy team if:

- The student needing an MCA has a complex communication system, e.g. high tech AAC
- Staff need support to differentiate the information to the correct level for students with more significant difficulties with understanding

## **POLICY REVIEW DETAILS**

<i>Version:</i>	1.2
<i>Reviewer:</i>	Jane Johnson, Kirsty Cottrell
<i>Approval body:</i>	Family Board
<i>Date this version approved:</i>	24 <sup>th</sup> March 2023
<i>Due for review:</i>	Spring 2026

## **RELATED POLICIES AND PROCEDURES**

Child Protection Adult Protection & Safeguarding Policy and Procedure  
Mental Capacity and Consent Policy (Academies)  
Manual Handling Policy



Personal and Intimate Care Policy (OHC/Academies)  
Staff Code of Conduct

**APPENDIX A: Mental Capacity Act – Decision Making template**

Name of student:

Date:

MCA assessor:

<p>The choice about which X's mental capacity is being assessed is:</p>
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What resources will be needed to do this (easy read / white board and pen / symbols, etc.) in order to:

- Present the necessary information clearly?
- Ask the necessary questions in order to assess the student's mental capacity?

Write which questions you will ask, and the student's response, to check whether the student can:

	Question to ask:	Record student's response.
<i>Express a choice</i>		
<b>1.Retain the information</b>		
<b>2.Understand the information</b>		
<b>3.Weigh the decision</b>		
<b>4.Express his answer</b>		

**Conclusion:**

X was able / not able to demonstrate the capacity to consent / make this choice.

## APPENDIX B: Best Interests Decision Making template

Name of student:

Date:

Best Interests meeting co-ordinator:

<p>Decision about which Best Interests Decision is being made:</p>
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Attendees present:

Might the student be able to give consent in the future with some education? How long might this take?	
What do we feel student's opinion, view and feeling are on this decision?	
What evidence do we have to support this?	
How has student had a range of experiences to support an informed decision?	
What do family, friends / advocate feel is in this student's best interests?	
What do college lecturer / LSA feel is in this student's best interests?	
What do any health team / social care team feel is in this student's best interests? (internal or external teams)	
Have all relevant circumstances been taken into account?	
Is there any less restrictive option?	

Is this option closest to what my mainstream peers might do in this situation?	
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Best Interests decision decided by majority:
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