

My child will soon be turning 18:

What do I need to know?

Turning 18 is a fundamental milestone for all young people. For children and young people with a disability and/or special educational needs, it can be a particularly challenging time. In practice, planning for post-18 support for a disabled child tends to start when the child/young person reaches 16 or 17 or, in some cases, even earlier.

We consider here some of the key issues to be aware of when your child/young person is approaching adulthood. This factsheet is addressed to parents of children and young people but is intended as guidance for anyone involved, including the young person themselves.

Mental capacity and decision making

When your child reaches 18 they will become a legal adult. Amongst other matters, this means that they will be deemed able to make their own decisions about all aspects of their life, unless it is established that they lack the mental capacity to do so.

The Mental Capacity Act 2005 ("MCA 2005") provides the legal framework for decision-making for people who lack mental capacity to make certain decisions. Much of the MCA 2005 applies to those aged 16 and above. However, parents can still provide consent to certain care and treatment matters until their child reaches 18 if their child does not have capacity to provide or refuse consent themselves.

Mental capacity is "decision-specific", which means that your child could have capacity to make certain decisions, but not others. If your child is assessed to lack the mental capacity to make a particular decision, decisions must be made in his or her best interests. A parent does not automatically have the right to make decisions for their child once they have turned 18.

In some situations it may be appropriate to consider the need for a deputy. A deputy is a person (or persons) who is (are) given authority by the Court of Protection to make certain decisions for a person who lacks capacity to make those decisions. Our separate factsheet "*My child is turning 18: Do they need a deputy?*" explains how decisions are made under the MCA 2005 and the circumstances in which a deputy may be appointed and how to apply.

Deprivation of liberty

If your child is 16 or older and requires constant care and supervision and it would not be safe for them to leave their home unsupervised, they may be legally "deprived of their liberty". We all have a right to liberty under the European Convention on Human Rights, and any deprivation of liberty must be appropriately authorised.

A person is deprived of their liberty if:

1. They are "subject to continuous supervision and control" and "not free to leave";
2. They have not validly consented (usually because they lack capacity to do so); and
3. The State is aware, or ought to be aware of the care arrangements.

Perhaps the most straightforward example is a person who lives in a residential placement where the doors are locked to keep residents safe, and where they are monitored throughout the day and night to ensure their needs met and to keep them safe from harm. However, a deprivation of liberty can occur in a variety of different settings, including in a person's own home.

For those aged 18 or over, there are two possible methods of authorisation, depending on the type of setting the person lives in. Where an adult lives in a residential care home or hospital, their local authority can authorise their deprivation of liberty. In other settings, the Court of Protection must authorise the deprivation of liberty. For young people aged 16 or 17, a deprivation of liberty can only be authorised by the court. The young person's local authority should take the lead in considering whether the young person is deprived of their liberty, and should take steps to apply to court if so.

This legal procedure is set to change in April 2022¹, so that deprivations of liberty for all adults and young people over the age of 16 can be authorised by the appropriate public body (which may be the local authority or healthcare body), without a court order being required.

For children under 16, parents may be able to provide the necessary consent to prevent confinement being a deprivation of liberty.

Transitioning from children's social care to adult social care

For young people with disabilities, transitioning to adulthood means changes to both the legal framework and service provision applicable to them. This has the potential to create uncertainty, but the legal framework and government guidance requires the different organisations involved in your child's care to work together to ensure effective transition planning.

Local authorities have a duty to consider completing a transition assessment for a disabled child, a young carer, and/or an adult caring for a disabled child. The Care Act 2014 ("the Care Act") states that the local authority must assess (or give reasons for a decision not to) where:

1. It is likely that a disabled child, a young carer or an adult caring for a child ("a child's carer") will have care and support needs when they, or the child they care for, turns 18; and
2. The assessment will be of "significant benefit" to the individual.

When completing the assessment for a disabled child, the local authority must consider:

- a) Whether the child currently has needs for care and support and, if so, what those needs are;
- b) Whether the child is likely to have needs for care and support when they turn 18 and, if so, what those needs are;
- c) The outcomes that the child wants to achieve in their life; and
- d) Whether, and to what extent, providing care and support could contribute to achieving those outcomes

¹ It will be known as the "Liberty Protection Safeguards"

If the assessment process is not prompted by the local authority, you can ask the local authority to complete an assessment. If the local authority decides not to complete an assessment, it must confirm its reasons in writing, together with information and advice about how to prevent or delay the development of needs for care and support in future.

When a transition assessment is undertaken, the local authority must indicate which needs are likely to be eligible for support when the person (or the child they care for) turns 18.

Where a child is already receiving support from children's services, that support must remain in place until adult care and support is able to take over, or until it is clear that adult care and support is not required.

Adult social care assessments

If your child has already turned 18 the local authority may decide to treat the assessment as a full needs assessment under the Care Act. If your child is 18 and an assessment has not been completed, you can ask the local authority to complete one.

You should be involved in your child's adult needs assessment and both you and your child (subject to your child's cognitive ability and mental capacity) should have an opportunity to consider the assessment and to address any factual inaccuracies.

Following an assessment, the local authority should produce a care and support plan, which specifies which needs have been identified by the assessment; which of those needs are "eligible needs"; which needs the local authority is going to meet; and how it is going to meet them.

Once the needs assessment has been completed, the local authority will usually complete a financial assessment to determine whether your child is required to pay for or to contribute towards any support to be provided by the local authority.

Children with special educational needs and/or disabilities (SEND)

An Education, Health and Care Plan ("EHCP") can continue to be maintained until your child reaches the age of 25, depending on the support that your child requires, whether they have reached their educational outcomes, and whether they continue to derive benefit from the EHCP.

An EHCP is intended to improve cooperation between all services that support children with special educational needs and their families. Planning for the transition process should begin when your child is in Year 9 at school (13 or 14 years old) and may be aligned with discussions about potential post-16 and post-19 placements. The transition process is an ongoing process, rather than a single event.

When your child reaches 16, it will also be necessary to consider whether they have mental capacity to make their own decisions about the educational input they would like to receive.

NHS healthcare funding

If your child receives a package of care that is funded by NHS Continuing Care, the Clinical Commissioning Group ("CCG") should undertake a formal screening process when your child is 16, with a view to confirming whether they will be eligible for NHS Continuing Healthcare upon turning 18. This should allow sufficient time to arrange the necessary package of care ahead of your child's 18th birthday. Your child's existing funding and care arrangements should remain in place until the outcome of the assessment has been communicated to you.

Not all children and young people who receive NHS Continuing Care will be eligible for NHS Continuing Healthcare. If the outcome of the assessment is that your child is ineligible for NHS Continuing Healthcare, you can request an independent review of this decision, and the CCG should inform you of the steps to do so. The CCG should also consider whether it should be commissioning, funding or providing services towards a joint package of care with social services.

If you have any questions or require advice, please contact Rosie Banks on 0118 959 7711 or email rbanks@boyesturner.com.

This factsheet is provided free of charge for information purposes only, it does not constitute legal advice and should not be relied on as such. No responsibility for the accuracy and/or correctness of the information and commentary set out in the factsheet, or for any consequences of relying on it, is assumed or accepted by Boyes Turner LLP or any subsidiary, member, officer, employee, consultant or other agent of Boyes Turner LLP.