

Developing eligibility criteria- areas to consider

Introduction

The following document is practice advice issued by the Council for Disabled Children . The document is intended to support local authorities in delivering their services for disabled children and their families and fulfilling their obligations under the AHDC agenda. This document is a follow on to earlier advice issued by CDC following the Islington ruling. This can be accessed at <http://www.ncb.org.uk/default.aspx?page=2647> Early in 2010 DCSF will be issuing draft guidance about the duty to provide short breaks (section 25, Children and Young Persons Act 2008) which is expected to address eligibility.

The legal framework.

1. The three key pieces of legislation are the Disability Discrimination Act, the Children Act 1989 and the Chronically Sick and Disabled Persons Act 1970.

Disability Discrimination Act (DDA).

2. Public authorities now have duties under Part 3 of the Disability Discrimination Act (DDA) 1995 not to discriminate against disabled people by treating them less favourably or failing to make reasonable adjustments. These duties add to the duties on schools and other service providers found in other parts of the DDA. For more information on these duties, see the revised Code of Practice, *'Rights of Access: Services to the public, public authority functions, private clubs and premises'* issued by the Disability Rights Commission and in force from December 2006. This can be found at http://www.opsi.gov.uk/SI/si2006/uksi_20061967_en.pdf
3. Public authorities also have a duty to have due regard to the need to promote disability equality under s49A DDA (inserted into the DDA in 2005). This duty in particular involves producing a disability equality scheme but also applies when policies are set and when decisions are made about individual cases. The 'needs' which public authorities must have regard to include:
 - Eliminating discrimination;
 - Promoting equality of opportunity; and
 - Encouraging participation by disabled people in public life.

The DDA duties provide a baseline on which local eligibility criteria should be built.

4. In practice this means at the outset all children (disabled and non-disabled) should have access to universal services. Local areas should work towards eliminating discrimination and promoting equality of opportunity by building capacity in local services so that they are accessible by all children. Every endeavour and support to settings and children should be made to enable children and young people to use universal services if they wish to do so. Where this may not be practical, for example for children on the autistic spectrum or children with multiple impairments who may require a high level of support and activities tailored to their needs, then setting up specific services, such as youth activities or sports opportunities, for a specified group of children is one way of meeting the duties under the DDA. Given the need under the DDA to ensure the most disabled children are not disadvantaged, a mixture of universal and specific services will be required in every area.

Children Act 1989.

5. Disabled children can and should access services through Part III of the Children Act 1989 ('Local Authority Support for Children and Families'). All disabled children are children 'in need' for the purposes of section 17 of the Children Act 1989. The duty on local authorities under s17 of the 1989 Act is to provide a range and level of support services for children in need in their area, where possible to support them in the context of their families. Local authorities are required to assess and prioritise the way they meet the needs of children in their area. Local authorities are permitted to use eligibility criteria and to take into account available resources when deciding whether to provide services following assessment. However, they should have due regard to their duties under the Disability Discrimination Act 1995 in reaching this decision.
6. Where the local authority assess a child's needs they should do so in accordance with the statutory guidance, *Framework for the Assessment of Children in Need and their Families* (Department of Health, 2000).
http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4014430.pdf
The needs of most children in society can and should be met by universal and mainstream services without the need for such an assessment. However, families should be aware that they can ask for an assessment if they are not satisfied by what can be provided by universal and mainstream services. If the local authority accept that more information about the child is needed then they should complete an 'initial assessment' within 7 working days. It is not acceptable for only those who can shout loudest to be able to access assessments.
7. Under carers legislation individuals providing substantial and regular care to a disabled person have a right to request an assessment. While parents should be told that they have a right to an assessment, it is hoped that their needs as well as

the needs of most children can be met without the need for such an assessment. (See section 4 Short Break Practice Guidance Draft)

8. Services provided under Section 17 of the Children Act 1989 should safeguard and promote the welfare of children 'in need'. Services should be designed to:
 - Minimise the effect on disabled children of their disabilities, and
 - Give disabled children and their families the opportunity to lead lives which are as 'normal' as possible.¹
9. Such services include services to a child at home, social or recreational activities, help with holidays and where necessary the provision of accommodation.
10. While local authorities must be aware of other legislation which creates duties to provide support to disabled people (including disabled children – see for example the section on the Chronically Sick and Disabled Persons Act 1970 below), local authorities should generally meet their obligations to disabled children through the exercise of powers conferred on them by Section 17 of the Children Act 1989. The 1989 Act provides the appropriate framework of measures to safeguard and promote the welfare of all children in need.

The Chronically Sick and Disabled Persons Act 1970 (CSDPA).

11. The interface between the CSDPA 1970 and the Children Act 1989 is not straightforward. CSDPA 1970 is one of the central pieces of legislation about the provision of social care services to disabled people. The Act covers both adults and children.
12. A recent High Court case (*R (JL) v Islington LBC*) re-stated that services under s2 of the CSDPA 1970 are available to disabled children.² Once an authority has assessed the needs of a disabled child and decided that the provision of services under CSDPA 1970 s2 is necessary in order to meet that child's needs, there is then a specific duty on that authority to provide those services; *R v Gloucestershire CC ex p Mahfood*.³
13. To make sense of the duty under section 2 CSDPA 1970, local authorities will need to have a process to decide which children will be eligible for CSDPA services. This process needs to be fair and rational, and local authorities can take resource constraints into account when making this decision.

¹ The term 'normal' is found in Schedule 2 to the 1989 Act, but in keeping with Aiming High for Disabled Children this should be read as meaning a right to lead 'ordinary lives'.

² As specifically stated in CSPDA 1970 s28A

³ (1995) 1 CCLR 7

14. The CSDPA 1970 only becomes important if a local authority has assessed a child's needs under Section 17 of the 1989 Act and has identified needs, but is considering not providing services to meet those needs. If the needs can be met through the provision of one or more of the services listed in Section 2 of the CSDPA, then the local authority is under a duty to provide them. Local authorities must be careful that their eligibility criteria allow for consideration of the CSDPA 1970 before a final decision is made on whether to provide services.

15. Local authorities need to also take into account the following two pieces of legislation:
 - a. **Childcare Act 2006.** Section 12 of the Children Act 2006 requires local authorities to provide information about child care and other services which help to support parents with their children. There is a specific requirement to provide information which is helpful and accessible to disabled children, young people and their families. The local authority needs to be clear that all disabled children are entitled to universal services and information, advice and assistance and need to be aware of the reasonable adjustments being made to ensure that all children can access these services wherever possible. For further information on this duty see the statutory guidance, <http://www.dcsf.gov.uk/everychildmatters/earlyyears/childcare/childcareact2006/newduties/newduties/> follow the link: *Childcare Act duty to provide information: LA's guide*. February 2008.

 - b. **Children Act 2004.** The Children Act 2004 creates important new duties on local authorities to safeguard and promote the welfare of all children in their area (section 11) and to co-operate with other agencies, including Primary Care Trusts, to achieve the 'Every Child Matters' outcomes (section 10). These duties must be considered whenever a local authority is carrying its functions towards children. For more information see, <http://www.dcsf.gov.uk/everychildmatters/>

Working with the principles outlined in Aiming High for Disabled Children.

16. We would suggest the following principles to inform the development of local eligibility criteria:

- a. Short breaks should be provided in line with the Full Service Offer and Eligibility Criteria should reflect this.
- b. The needs of children and their families change and the process of assessment and providing appropriate levels of support should reflect this.
- c. Some children and families will always need direct access to targeted and specialist services
- d. Children should not have unnecessary assessments. Some disabled children will be able to access a local offer and be entitled to a minimum level of support without additional assessments. The information from assessments previously carried out should be used when doing further more in-depth assessments.
- e. Decisions on eligibility criteria (above minimum entitlements/ local offer) cannot be made without an assessment being undertaken. Where the support needs of the child and family cannot, or may not be met by the local offer or the minimum entitlements, there needs to be a clear process by which the child's needs are assessed.
- f. As much resource as possible should be dedicated to providing short breaks for children and their families with only as much as is necessary allocated for administration and assessment.
- g. Families are entitled to an initial assessment. Pre-assessment services can and should be provided and services can also be provided after other types of assessment, for instance a CAF. However, this does not undermine the right to an initial assessment on request.
- h. Local authorities may use self - assessments, however the completion of a self-assessment does not negate the duty of the local authority to carry out its own assessment, which may differ from the self-assessment. Self-assessments can be a useful way of placing the child at the centre of the process.
- i. All children need to have equal access to services , eligibility criteria should not discriminate against children who services find hard to reach ,or hard to place.

Avoiding common pitfalls in developing criteria.

17. We would also suggest the following common pitfalls to be avoided:

- a) It is important that children are not seen as being in fixed bands. The banding of children undermines the principle of identifying and meeting individual assessed need.
- b) Maximum caps on service provision or on sums of money are unlawful, because again they undermine a response based on individual need. Minimum service entitlements are fine and indicative levels of service can be used with caution!
- c) Be careful using pathways, particularly ensuring clear access points and in making it clear that children and families can move easily between pathways if needs change.
- d) Be careful about using proxy measures for disability. The use of DLA as a passport to services is fine **IF** it is clearly accompanied with information about how families who do not receive DLA but could be eligible can also access services. Remember that the definition of 'disabled' children in the Children Act 1989 is broad and that all 'disabled children' are children 'in need' and are entitled to an initial assessment.
- e) Be careful about language. You should be operating within the assessment framework and so eligibility cannot just be based on the severity of the child's impairment but should take into account the other 2 sides of the assessment triangle (parenting capacity and family and environmental factors). The term 'disabled' child exists in law, but severe disability or complex needs does not. If you are targeting particular resources on children with severe disabilities, it is more helpful to state that 'this resource, such as one-to-one support will be provided to children whose needs cannot be met by mainstream or universal services.
- f) More on language, be clear when an assessment is an assessment, referring to an assessment as a meeting is not helpful. Terms such as 'Aiming High for Disabled Children eligibility criteria' should not be used as they have no basis in law. Families may complete a 'form' giving information on their child – this is not 'an assessment', which involves analysis of need, judgement and decision-making.

- g) While increasingly, assessments are completed using the Common Assessment Framework it is important that local procedures recognise that an assessment for services under section 17 of the Children Act 1989 has to follow the statutory guidance in the Assessment Framework. Initial assessments addressing the 3 dimensions of the AF 'can be very brief depending on the child's circumstances.' (AF para 3.9) It will often be sufficient to decide the nature of any services required. The initial assessment may determine that a core assessment is needed in more complex cases. The aim should be that the level of assessment is proportionate to the apparent level of needs of the family and to ensure that the welfare of the child is safeguarded
- h) Decisions on eligibility criteria above minimum requirements cannot be delegated to service providers as the level of support to be provided is dependent on the level determined by the authority assessing the needs of the child and family. Where service provision has been contracted out for a specified group of children (for example, children with ASD, young disabled people in transition etc.), contracts must include information on the specific group of children to be provided for and arrangements between the contractor and provider as to how unmet needs will be dealt with – either for an individual child or young person or where the service has reached capacity. In every case the legal duties remain with the local authority, not the service provider.
- i) All short break services and other social care services can be provided through direct payments or individual budgets. However there is no basis in law for forcing families to have a direct payment or individual budget; if eligible families choose to receive a direct service they should be provided with one. Once need has been assessed and it is agreed the level of support that should be provided, families should be offered the option of direct payments or individual budgets as an alternative to direct services. The support offered to families to manage the budget should create a level playing field so that families do not feel disadvantaged by choosing this option.

Issues to consider when developing/revising your own criteria

- Have you remembered the assessment framework ? –Are you clear that eligibility must be developed to include all aspects of a child and families needs, not just the level of a child's impairment?
- Have you consulted with families/linked in with your parents forum?
- Do parents understand how they can access assessments , find routes into services, come back if their needs change or appeal against decisions ?
- Is this linked to your work implementing the core offer and NI54?

- Have you talked to universal services about Section 49a of the DDA –is there a process in place that ensures disabled children can access leisure and cultural services ? (remember its not your role to sort it out but to ensure the issue is raised.)
- Have you consulted with your legal services on any concerns e.g. children eligible under Section 2 of the CSDPA?
- Are you clear in passporting children that DLA is only one route and does not undermine the principle that under S17 CA1989, all disabled children are children in need and therefore entitled to an assessment.

Council for Disabled Children
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