



Disabled Children's Social Care – Briefing #6

Eligibility criteria and disabled children's social care

About this briefing

This is one of a series of briefings written by the Council for Disabled Children and Research in Practice. These have been developed to help practice leaders and service managers promote greater understanding across the children's workforce of the complex and often confusing legal and policy landscape around disabled children's social care.

They accompany the resource [Using a needs-led eligibility framework to provide services to disabled children and families](#) (June 2024).

Introduction

Under section 17 of the *Children Act 1989*, every disabled child is automatically a child 'in need'. But while a local authority is under a statutory duty to assess the needs of each child 'in need', the law does not require services to be provided in every case.

Local authorities have limited resources, and no local authority can reasonably be expected to provide every potentially helpful service to every disabled child and their family. A local authority therefore has to determine whose needs to prioritise. To do this, the local authority is entitled to develop and apply eligibility criteria.

Duty to develop and publish eligibility criteria

Local authorities have a duty to develop and publish local criteria that explain how it will decide whether a child in need, including a disabled child, is eligible for support from statutory services once that child's needs have been assessed.

- > That duty is set out in [section 30\(8\)](#) of the *Children and Families Act 2014* and [schedule 2](#) of the *Special Educational Needs and Disability Regulations 2014*. Schedule 2 lists information to be published in the local offer; this includes 'information about any criteria that must be satisfied before any provision or service set out in the local offer can be provided'.
- > Statutory guidance sets out how local authorities should meet the duty (SEND code of practice – Department for Education & Department of Health, 2015, p. 59 et seq.); this requires that the local offer should be 'accessible', 'easy to understand', 'jargon free', 'comprehensive', 'collaborative' and 'up to date' (p. 61).

Despite this requirement, research suggests eligibility criteria are often inaccessible, sometimes misapplied and confusing for both families and practitioners (see following page).

Setting and applying eligibility criteria

While it is permissible for local authorities to use eligibility criteria to limit disabled children's access to services, a local authority must follow the 'principles of public law' when devising and applying those criteria (Broach & Clements, 2020, p. 107). What this means in practice is that the process a local authority uses to decide which children are or are not eligible for a service must be fair, transparent and rational.

Broach and Clements have set out what these public law principles mean in the context of access to disabled children's social care services. Eligibility criteria must:

- > Be transparent – with clear information on any eligibility criteria applied to social care services for disabled children set out in the local offer.
- > Use clear everyday language to explain how services are allocated on the basis of need.
- > Take into account the impact of disability on children and their families.
- > Reflect the 'object and purpose' of the legislation – which is to provide support to children in need and their families (see briefing #5 's.17 *Children Act 1989* and s.2 *Chronically Sick and Disabled Persons Act 1970*').
- > Have been subject to a consultation process with disabled children and their families that has taken into account equality duties, in particular the public sector equality duty¹ (section 149 of the *Equality Act 2010*). (Broach & Clements, 2020, p. 108)

Crucially, this means that eligibility criteria should only support decision-making about what services might be appropriate **after** the child or young person's needs have been assessed. To apply criteria before needs have been assessed would not be fair or rational (Broach & Clements, 2020, p. 96).

Families' experiences

Research by Bahri et al. (2020) found that despite the requirement for local authorities to publish eligibility criteria as part of their local offer, in more than one in three of the 149 local authorities studied, the criteria were either:

- > 'inaccessible' (23 local authorities)
- > 'so unfit for purpose as to be incapable of constituting "lawful" eligibility criteria' (33 local authorities). (Bahri et al., 2020, p. 5)

Research with families has found that parents often do not understand the assessment process or experience difficulty when trying to access accurate information about eligibility criteria and available support (Bennett et al., 2016, p. 13, p. 16). Parents highlight:

- > The difficulties they experience in getting their disabled child's needs and their own needs assessed.
- > A lack of clear information about what support is available locally or how to get it.
- > A lack of transparency about the eligibility criteria for that support. (Bahri et al., 2020; Bennett et al., 2016)

Misapplication of eligibility criteria and the ‘pressing need’ for government guidance

In a landmark ruling in 2009 (R (JL) v Islington [2009] EWHC 458 (Admin)), the judge ruled that new eligibility criteria developed by the local authority were unlawful – in large part because the authority had sought to apply restrictive criteria **before** the child’s needs had been fully assessed.

The local authority had introduced eligibility criteria that imposed a maximum of 12 hours’ support per week for any disabled child, no matter the extent of that child’s needs. The local authority argued that this would enable it to support more disabled children.

In the case of JL, the change had the effect of reducing JL and his family’s support from 25 hours per week to 12 hours. The judge ruled this was unlawful because it did not relate to an assessment of JL’s **actual** needs; the local authority had imposed the change without first assessing what those individual needs were.

In her ruling, the judge also highlighted a ‘pressing need’ for government guidance on the use of eligibility criteria in relation to children’s services. Yet to date, no comprehensive guidance has been issued in relation to eligibility criteria and disabled children’s social care.²

More recently, research in relation to children with autism found that misapplication of eligibility criteria was common, with criteria often discriminating against children with autism (Bahri et al., 2020). For example:

- > Many local authorities were operating what the researchers call ‘autism plus’ policies. Such policies restricted autistic children’s access to an assessment or support from the children and disabilities team to those who had another impairment also, such as a learning disability or challenging behaviour.
- > A survey of parents found that of those who had been denied an assessment by the children and disabilities team, the vast majority had not been offered an alternative assessment (e.g. by a generic child in need team). (Bahri et al., 2020)

¹ The public sector equality duty requires local authorities (and other public bodies, including schools) to be proactive in eliminating discrimination and to take positive steps to promote equality for people who share a protected characteristic. This includes removing or minimising disadvantage associated with a protected characteristic, and encouraging participation in public life.

² In 2011, the Department for Education did issue non-statutory ‘advice’ for local authorities on how to apply eligibility criteria for access to short breaks for carers of disabled children. That advice says local authorities should take care not to apply criteria ‘mechanistically without consideration of a particular family’s needs’ (p. 4). They should also avoid relying on a potentially discriminatory single criterion, such as a child’s attendance at a special school (p. 26).

Key points

- > As a child ‘in need’, every disabled child is entitled to an assessment of their social care needs. This entitlement is not dependent on having a medical diagnosis of a disability.
- > Limited resources mean that local authorities cannot meet every assessed need. Local authorities are therefore required to develop eligibility criteria that set out how it will decide whose needs to prioritise. In developing its eligibility criteria, a local authority is entitled to take its available resources into account.
- > Local authorities cannot lawfully gatekeep the assessment process itself. In other words, they cannot apply restrictive criteria that constrain a family’s right to an assessment. To do so would be to create an extra-statutory hurdle and so would be unlawful.
- > Eligibility criteria should follow the principles of public law, which means they must be fair, transparent and rational. Local authorities have a duty to publish their eligibility criteria on their website as part of their local offer in terms that are clear, easy to understand and jargon free.
- > A local authority cannot apply eligibility criteria that screen out certain groups of children. In other words, it cannot deny services or support to predefined groups – for example, children with autism. A decision on eligibility for support and services must always relate to and follow an assessment of a child’s individual needs.

References

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