



Criteria for Decision Making for EHCPs (2022 Edition)

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1. Introduction

The purpose of this document is to explain how Norfolk County Council (NCC) makes decisions when considering a request for an Education, Health and Care (EHC) needs assessment and to issue an Education Health Care Plan (EHCP).

It replaces all previous guidance issued by Norfolk County Council and is underpinned by:

- The Children and Families Act 2014
- The Equalities Act 2010
- Special Educational Needs and Disability Regulations 2014
- SEND Code of Practice: 0 to 25 years 2015

2. Definitions of Special Educational Needs and Special Educational provision

EHCPs are for children and young people with special educational needs (SEN) and who require special educational provision. Sections 20 and 21 of the Children and Families Act provide the legal definition of special educational needs and special educational provision, summarised as:

Section 20:

A child or young person has SEN if they need special educational provision due to a learning difficulty or disability.

A learning difficulty or disability is where the child or young person has significantly greater difficulty in learning compared to the majority of others of the same age and/or has a disability which prevents them from making use of the facilities that are made for others of the same age.

Section 21:

Special educational provision is educational or training provision that is additional to, or different from, that made generally for others of the same age in mainstream education settings.

EHCPs should look at the whole of the child or young person and bring together provision the child or young person needs across education, health and social care. Section 21 also provides the legal definition of health and social care provision.

Health care provision is the provision of health care services to secure the improvement in the physical and mental health of the population and in the prevention, diagnosis and treatment of illness.

Social care provision means provision made by a Local Authority (LA) in the exercise of its social services functions. This broadly relates to the LA's duties to secure the safety, welfare and wellbeing of children and vulnerable adults in its area set out in a range of legislation such as the Children's Act 1989, the Chronically Sick and Disabled Person's Act 1970 and the Care Act 2014.

Health or social care provision which **educates or trains a child or young person** is deemed to be special educational provision in law.

3. High needs pupils and high needs funding

The funding for special educational provision required by children and young people with SEN in England is arranged through the national high needs funding system. This has two main parts which is set out in the High Needs Funding operational guide, released annually by the Education and Skills Funding Agency (ESFA).

Schools and settings core funding

This is given directly to educational institutions in several ways, including:

- Mainstream schools, academies and further education college's notional SEN budget is an identified amount of money within a setting's overall budget to meet additional support costs for individual pupils of **up to** the first £6,000. In schools, this is in addition to the basic per pupil entitlement which ranges from approximately £3,000-£4,000 per child/young person to meet the school's core running costs.
- Place funding of £10,000 per place for children who attend a state-funded special school, Alternative Provision academy, or special unit within mainstream schools. The core funding is paid either by local authorities for maintained schools and pupil referral units or by the Education Funding Skills Agency for academies.
- Independent Schools / colleges sit outside of this funding formula and charge fees for places that the Local Authority must meet when it names the school in an EHCP.

High Needs Block "Element 3" or top-up Funding

This is provided to local authorities by the ESFA. If the cost of making provision for a pupil with high needs is more than the school / setting receives from their core funding, the LA will allocate the school / setting this additional funding to enable a pupil or student with high needs to participate in education and learning.

How funding for pupils with SEND works has importance in decision making for EHCPs as it is a key factor in considering whether the child's special educational needs can be provided by the resources normally available to mainstream settings.

High needs funding in mainstream schools and academies is managed by the Inclusion and SEND team in Norfolk. The team is responsible for deciding when additional funds are needed to support a child or young person above the school / setting's own resources. [Read about the details of the support given by the Inclusion and SEND team.](#) In Norfolk, mainstream schools' and colleges access to top up funding is **not dependent** on a child having an EHCP (unless the young person is over age 19 in Further Education).

4. Criteria for EHC needs assessments

4.1 Duty to assess – legal test

Summarising Section 36 Children and Families Act, the **legal test** where a LA must secure an EHC needs assessment for a child or young person is when the LA is of the opinion that:

- The child or young person **may** have SEN, and
- It **may** be necessary for special educational provision to be made in accordance with an EHC plan

The SEND Code of Practice also gives guidance on a range of evidence that the LA should use to help to decide whether to carry out an EHC needs assessment. It says:

In considering whether an EHC needs assessment is necessary, the LA should consider whether there is evidence that despite the early years provider, school or post-16 institution having taken purposeful action to identify, assess and meet the special educational needs of the child or young person, the child or young person has not made expected progress. To inform their decision the LA will need to consider a wide range of evidence, and should pay particular attention to:

- evidence of the child or young person's academic attainment (or developmental milestones in younger children) and rate of progress
- information about the nature, extent and context of the child or young person's SEN
- evidence of the action already being taken by the early years' provider, school or post-16 institution to meet the child or young person's SEN
- evidence that where progress has been made, it has only been as the result of much additional intervention and support over and above that which is usually provided
- evidence of the child or young person's physical, emotional and social development and health needs, drawing on relevant evidence from clinicians and other health professionals and what has been done to meet these by other agencies, and
- where a young person is aged over 18, the LA **must** consider whether the young person requires additional time, in comparison to the majority of others of the same age who do not have special educational needs, to complete their education or training. Remaining in formal education or training should help young people to achieve education and training outcomes, building on what they have learned before and preparing them for adult life.

The LA also encourages schools and settings to also provide evidence of the following things to support the decision-making process:

- The school/setting has worked with the parent / carer or young person to map the child / young person's needs on the Identification of Needs Descriptors (INDES) toolkit. This toolkit provides a common understanding of need and helps schools and families to agree together which description of needs best fits the child. [Access the INDES toolkit here.](#)
- The school/setting uses the guidance which describes what provision a school/setting should be making for the child without an EHCP and shares this with parents/carers and young people. [Read the "Provision Expected at SEN Support guidance."](#)
- The school/setting have already made a SEN Support plan for the child or young person with evidence that it has been put into place and has been reviewed.

4.2 Decision making

The LA will consider the following questions based on the information available in deciding whether to do an EHC needs assessment:

1. What is already known about the child or young person?
 - a. Has their progress stalled?
 - b. Is the educational gap widening between the child or young person and their peers?
 - c. Is the child at risk of exclusion?
 - d. If over 18, do they require more time to complete their education or training?
2. Are these issues due to a learning difficulty or disability or could they be?
3. Does the child require educational provision that is additional or different to the majority of others of the same age?
4. Do we need to know or understand more about the child or young person?
5. Is the CYP already in an identified vulnerable group?

It should not be assumed that all children / young people who have low attainment, are working below average levels or displaying challenging behaviour have special educational needs. It may be that the child or young person has other needs not related to a learning difficulty or disability which affect their progress in learning. Some children / young people may struggle with the learning for other reasons, for example:

- They are disengaged from learning, the school and curriculum and require good levels of pastoral support, including planning around the child and family through early support planning. They may benefit also from a suitable package of alternative provision which can be arranged by school.
- They have experienced loss or separation such as bereavement, parental separation or divorce, hospitalisation, loss of friendships, family conflict or breakdown that results in the child having to live elsewhere, being homeless or in temporary accommodation or taken into care or adopted.
- They have experienced life changes such as the birth of a sibling, moving to a new house or changing schools or during transition from primary to secondary, or secondary to sixth form/college.

These questions and considerations help the LA to understand how far *the child has, or may have, special educational needs*. If the LA judges that the child does not require special educational provision or, if they do, this is not due to a learning difficulty or disability, then the LA will usually decide that an EHC needs assessment is not required.

The LA will also consider whether *it may be necessary for special educational provision to be made in accordance with an EHC plan*. This is very technical with a range of legal precedent case law that applies. The word “necessary” has no legal definition although SEND Tribunal case law has determined that,

“Necessary sets the standard as somewhere between indispensable and useful or reasonable” (Paragraph 16, Buckinghamshire County Council v HW 2013 UKUR 0470).

To judge whether an EHCP is “necessary” the LA will need to consider the situation and circumstances of each individual child and each individual educational setting by asking:

1. Does the setting have the resources to support the child or young person? (i.e., such as funding, staff skill and expertise, facilities, equipment and availability of external professional intervention and support.
2. How far are these resources available to the child without an EHC plan? i.e.
 - Will the setting provide this support without an EHC plan?
 - Are they able to?

These considerations will likely vary from setting to setting or, in the case of children or young people not educated in an educational establishment, with the individual arrangements being made for them. If there is any doubt, then the LA must assess the child / young person.

On all elements described in Sections 4.1 and 4.2 above, the LA will always consult with and take into consideration any views expressed and evidence provided by the child, young person and their parent / carer.

4.3 The information needed to help the LA make its decision

To make good and lawful decisions in a timely way, the LA needs good quality information provided as early as possible. There is no requirement for any person requesting an EHC needs assessment to provide information when making the request. This means that the LA often receives little or no information about the child when the request for an EHC needs assessment is made. Officers must then spend time gathering this information from various sources. Good quality information at the point of initial request will result in better and speedier decision making by the LA. The LA asks for the support of parents, young people, educational settings to provide as much information as possible at the point of the request for an assessment to help us with this. The LA provides templates for requesting an EHC needs assessment on the Local Offer which details the information that is needed for decision making. The LA requests these templates are used wherever possible. [Access the EHC needs assessment templates.](#)

5. Criteria for deciding whether to issue an EHC Plan

5.1 Duty to issue an EHCP – legal test

Summarising Section 37 Children and Families Act 2014, the legal test whereby the LA should make an EHC plan for a child or young person is:

The LA must prepare an EHC plan for a child or young person and, once it is prepared, must maintain the plan when the EHC needs assessment has shown that it **is necessary** for special educational provision to be made for the child or young person in accordance with an EHC plan.

Again, there is no legal definition of the word necessary and so the LA will need to consider every child's assessment on its own merits to decide whether an EHCP is necessary. However, SEND Tribunal case law has established that it is not necessary for provision to be made in accordance with an EHCP where it can be provided from within the resources **normally available** to schools and post-16 institutions in England (i.e., nationally rather than what provision is made available in a local area).

5.2 Decision making

If done well, the EHC needs assessment will have confirmed whether the child has special educational needs and, if so, the special educational provision required to meet the child or young person's needs.

The Local Authority will then consider how the needs of the child or young person can be met, factoring in the resources normally available to educational settings.

The LA will consider the following questions in deciding whether it is necessary for SEN provision to be made in accordance with an EHC plan:

1. What new information has the EHC needs assessment revealed regarding the child's special educational needs and the provision to meet those needs that was not known before the assessment? Have new needs been identified?
2. Considering the EHC needs assessment, what special educational provision do we now know is required by the child or young person to meet their special educational needs?
3. Considering the EHC needs assessment, does the setting have the resources to support the child or young person? This is in terms of: funding; in house staff skill and expertise; facilities; equipment; availability of external professional intervention and support.
4. How far are these resources available to the child without an EHC plan? i.e.
 - a. Will the setting provide this support without an EHC plan?
 - b. Are they able to do so?

If the provision that is needed is available under the arrangements listed below, the LA will generally judge that it can reasonably be provided from the resources normally available to mainstream schools and that an EHCP is not necessary:

- Any provision that is described within the Norfolk document "SEN Support Guidance: Provision expected at SEN Support".
- Any special educational provision that is free at the point of access for educational settings as part of Norfolk's Local Offer.
- Special educational provision which, if not free at point of access from centrally arranged provision of the local offer, can be arranged, funded and delivered by mainstream educational settings using its core funding and notional SEND funding.

Where the LA decides that an EHCP is not necessary to make the provision needed by the child, schools and settings should actively use the information and advice obtained through the EHC needs assessment. Schools and settings should then meet their own legal duties to use their best endeavours to make the provision available to child to meet their special educational needs.

6. Summary: Case law

Substantial case law from the SEND Tribunal underpins the legal test to both undertake an EHC needs assessment and to issue an EHC plan.

What is “necessary” is not defined by CFA2014 and allows for flexibility, which is not overridden by the SEN Code of Practice 2015. Whether it is “necessary” is to be deduced rather than defined. Its determination will vary according to the circumstances of a particular case and may well involve a considerable degree of judgment”: Hertfordshire CC v MC and KC [2016] UKUT 0385 (AAC)

The LA and Tribunal should generally consider whether, without an EHC Plan, “can the child’s special educational needs be met through provision from the resources normally available to a mainstream school and will they actually be met?”: JP v Sefton MBC [2017] UKUT 0364 (AAC), DH & GH v Staffordshire CC [2018] UKUT 49 (AAC).

The criteria set out in this document is designed to provide a methodology for the LA when considering questions which, on the surface, appear simple but are very complex. Whilst it is appreciated that LA policies do not trump the law, to achieve fairness and transparency an agreed methodology is in place to frame good quality decision making. The LA will continue to learn from our experience of rightful challenge and apply that learning to future decision making and practice.