

Important Sections of the NDIS Act and Operational Guidelines

This document gathers together excerpts from the [NDIS Act](#) and [Operational Guidelines](#); the information was current as at March 20th 2020

1. Sections regarding the definition of Disability:

NATIONAL DISABILITY INSURANCE SCHEME ACT 2013 - SECT 24

Disability requirements

(1) A person ***meets the disability requirements*** if:

(a) the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition; and

(b) the impairment or impairments are, or are likely to be, permanent; and

(c) the impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities:

(i) communication;

(ii) social interaction;

(iii) learning;

(iv) mobility;

(v) self-care;

(vi) self-management; and

(d) the impairment or impairments affect the person's capacity for social or economic participation; and

(e) the person is likely to require support under the [National Disability Insurance Scheme](#) for the person's lifetime.

(2) For the purposes of [subsection](#) (1), an impairment or impairments that vary in intensity may be permanent, and the person is likely to require support under the [National Disability Insurance Scheme](#) for the person's lifetime, despite the variation.

The following excerpt is from the [NDIS Operational Guidelines](#):

8. The disability requirements

A prospective participant will meet the disability requirement if they meet each of the following requirements:

- the prospective participant has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments *or* to one or more impairments attributable to a psychiatric condition (section 24(1)(a));
- the prospective participant's impairment/s are, or are likely to be, permanent (section 24(1)(b));
- the prospective participant's impairment/s result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following relevant activities :

a. communication;

b. social interaction;

c. learning;

d. mobility;

e. self-care; or

f. self-management (section 24(1)(c));

- the prospective participant's impairment/s affect their capacity for social or economic participation; (section 24(1)(d)); and
- the prospective participant is likely to require support under the NDIS for their lifetime (section 24(1)(e)).

For the above purposes, impairments that vary in intensity may be permanent and a prospective participant may still require support under the NDIS for their lifetime despite the variation (section 24(2)).

If a prospective participant does not meet one or more of the above disability requirements, the NDIA will consider whether the prospective participant can become a participant in the NDIS under the early intervention requirements instead.

For all children under 7 years of age (except children diagnosed with a condition on List A of this Operational Guideline) the NDIA will first consider whether the child meets the early intervention requirements, before considering the disability requirements.

1. communication;
2. social interaction;
3. learning;mobility;
4. self-care; or
5. self-management (section 24(1)(c));

8.1 What is a disability attributable to impairment?

The NDIA *must* be satisfied that a prospective participant has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition (section 24(1)(a)).

The term "impairment" commonly refers to a loss of, or damage to, a physical, sensory or mental function (Mulligan and NDIA [2014] AATA 374 at [19]).

The term 'disability' is described in Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) as follows:

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

For the purposes of becoming a participant in the NDIS the focus of 'disability' is on the *reduction or loss of an ability to perform an activity* which results from an impairment. The term 'impairment' commonly refers to a loss of, or damage to, a physical, sensory or mental function.

The narrower definition of 'disability' employed by the NDIS seeks to target those people with disability who have a significant impairment to their functional capacity.

This functional definition of disability focuses on outcomes for people with disability that are in the most need (Explanatory Statement to the Becoming a Participant Rules.).

The NDIA *must* be satisfied that a person has a disability that is attributable to one or more impairments which results in a reduction or loss of an ability to perform certain activities.

It is important to note that a person may have a disability without meeting all, or even any, of the disability requirements. For example, a person may have a temporary disability, or a permanent disability that has a minimal effect on functioning.

For the purpose of determining access, the NDIS Act is not concerned with what caused a person's disability. All people with disabilities who meet the access criteria can be participants, whether the disability came about through birth, disease, injury or accident (see [Mulligan and NDIA \[2015\] FCA 44 at \[16\]](#)).

Whether a prospective participant has a disability attributable to an impairment is a question of fact to be determined on the balance of available evidence, including their diagnosis.

If a prospective participant has multiple impairments, the NDIA will consider all impairments together when considering whether the person satisfies this disability requirement.

8.2 When is an impairment permanent or likely to be permanent?

The NDIA *must* be satisfied that a prospective participant's impairment/s are, or are **likely** to be, permanent (i.e. likely to be lifelong) (section 24(1)(b)).

The following principles provide guidance:

- an impairment is, or is likely to be, permanent only if there are no known, available and appropriate evidence based treatments that would be likely to remedy (i.e. cure or substantially relieve) the impairment (rule 5.4 of the Becoming a Participant Rules);
- an impairment that varies in intensity (for example, because the impairment is of a chronic episodic nature) may be permanent despite the variation (section 24(2));
- an impairment may be permanent notwithstanding that the severity of its impact on the functional impact of the person may fluctuate or potentially improve (rule 5.5 of the Becoming a Participant Rules);
- an impairment is, or is likely to be, permanent only if the impairment does not require further medical treatment or review in order for its likely permanency to be demonstrated (rule 5.6 of the Becoming a Participant Rules).

- In this context, an impairment may be permanent notwithstanding that it may continue to be treated and reviewed after its permanency, or likely permanency, has been medically demonstrated; and
- if an impairment is of a degenerative nature, the impairment is, or is likely to be permanent if medical or other treatment would not, or would be unlikely to, improve the condition (rule 5.7 of the Becoming a Participant Rules).

If a prospective participant has multiple impairments, the NDIA will consider each impairment separately and determine whether each impairment is, or is likely to be, permanent. However, the NDIA only needs to be satisfied that at least one of a prospective participant's impairments are, or are likely to be, permanent.

Where there is a possibility of medical treatment (such as surgery) to treat the prospective participant's condition, and the treatment has some prospect of success, the NDIA should not conclude that the impairment is permanent but should wait until the outcome of the treatment is known (Mulligan and NDIA [2015] AATA 974 at [71]).

8.3 Substantially reduced functional capacity to undertake relevant activities

The NDIA *must* be satisfied that an impairment results in substantially reduced functional capacity of a prospective participant to undertake one or more relevant activities (section 24(1)(c)).

The NDIA is required to consider whether any permanent impairment, or permanent impairments when considered together, result in substantially reduced functional capacity to undertake one or more of the following activities:

- **Communication:** includes being understood in spoken, written or sign language, understanding others and expressing needs and wants by gesture, speech or context appropriate to age;
- **Social interaction:** includes making and keeping friends (or playing with other children), interacting with the community, behaving within limits accepted by others, coping with feelings and emotions in a social context;
- **Learning:** includes understanding and remembering information, learning new things, practicing and using new skills;
- **Mobility:** this means the ability of a person to move around the home (crawling/walking) to undertake ordinary activities of daily living, getting in and out of bed or a chair, leaving the home, moving about in the community and performing other tasks requiring the use of limbs;
- **Self-care:** means activities related to personal care, hygiene, grooming and feeding oneself, including showering, bathing, dressing, eating, toileting, grooming, caring for own health care needs; or
- **Self-management:** means the cognitive capacity to organise one's life, to plan and make decisions, and to take responsibility for oneself, including completing daily tasks, making decisions, problem solving and managing finances.

The NDIA does *not* need to be satisfied that a person's impairment is 'serious', or more serious than another person's. Rather, access to the NDIS is based on a functional, practical assessment of what a person can and cannot do (see [Mulligan and NDIA \[2015\] FCA 44 at \[56\]](#)).

The NDIA will not need to consider whether a prospective participant's impairment results in substantially reduced functional capacity in relation to all of the relevant activities for every access request.

It is sufficient for a prospective participant to have **substantially reduced functional capacity in relation to one activity** (see [Mulligan and NDIA \[2015\] FCA 44 at 67](#)).

Which activity the NDIA will need to consider will depend on the circumstances and the evidence presented by the prospective participant. For example, if a prospective participant has an impairment which results in substantially reduced functional capacity to undertake mobility, but otherwise has full cognitive capacity, it may not be necessary for the NDIA to consider whether the impairment results in substantially reduced functional capacity to undertake activities related to cognition.

8.3.1 When does an impairment result in substantially reduced functional capacity to undertake activities?

An impairment results in substantially reduced functional capacity to perform one or more activities when:

- the person is unable to participate effectively or completely in the activity or perform tasks or actions required to undertake or participate effectively or completely in the activity, without assistive technology, equipment (other than commonly used items) or home modifications (rule 5.8(a) of the Becoming a Participant Rules); or
- the person usually requires assistance (including physical assistance, guidance, supervision or prompting) from other people to participate in the activity or to perform tasks or actions required to undertake or participate in the activity (rule 5.8(b) of the Becoming a Participant Rules); or
- the person is unable to participate in the activity or to perform tasks or actions required to undertake or participate in the activity, even with assistive technology, equipment, home modifications or assistance from another person (rule 5.8(c) of the Becoming a Participant Rules).

The following information provides further guidance in relation to determining when an impairment results in **substantially reduced functional capacity**:

By itself, reliance on commonly used items will not result in a substantially reduced functional capacity to participate effectively or completely in an activity. Commonly used items include glasses, walking sticks, non-slip bath mats, bathroom grab rails, stair rails, age appropriate child safety locks, simple adapted kitchen utensils and dressing aids.

In considering the role played by assistive technology, home modifications and equipment, the NDIA will consider specific needs arising from the prospective participant's impairment, and whether those needs are met (or need to be met) through the use of specialist disability aids and/or equipment.

Such items would generally be specifically designed to assist in increasing the functional capacity and participation of people with disability and be formally prescribed by a medical practitioner, specialist clinician or allied health professional such as an occupational therapist, physiotherapist or speech therapist.

When considering whether a person requires assistance from others to participate or perform tasks associated with an activity, the NDIA will have regard to whether a person's need for assistance is consistent with normal expectations of a person of a similar age. For example, children under the age of 2 will not necessarily have a substantially reduced functional capacity because they need assistance to provide for self-care needs.

A person will be considered to be unable to participate effectively or completely in an activity if they cannot safely complete one or more of the tasks required to participate in an acceptable period of time. Undertaking a task more slowly or differently to others will not necessarily mean a person cannot participate effectively or completely in an activity.

When considering whether a fluctuating or episodic impairment results in substantially reduced functional capacity to undertake relevant activities, the NDIA will consider the impact on the person's ability to function in the periods between acute episodes.

8.3.2 Additional considerations for children

When considering whether a child's impairment results in substantially reduced functional capacity to perform one or more activities, the NDIA will consider the functional impact on the child relative to other children of the same age. For example:

- the child requires more assistive technology, equipment (other than commonly used items such as glasses) or home modifications to participate in one or more of the activities than most other children of the same age; or
- the child usually requires more assistance than most other children of the same age to participate in one or more of the activities; or
- the child is unable to participate in activities that would usually be expected of most other children of the same age.

If a child's impairment does not currently result in substantially reduced functional capacity but could in the future, the NDIA should consider whether the child meets the early intervention requirements.

8.3.3 Additional guidance for hearing impairments

Hearing impairments may result in reduced functional capacity to undertake communication, social interaction, learning and self-management activities.

Generally, the NDIA will be satisfied that hearing impairments of ≥ 65 decibels in the better ear (pure tone average of 500Hz, 1000Hz, 2000Hz and 4000Hz) may result in substantially reduced functional capacity to perform one or more activities. This audiometric criteria reflects the lower limit of what is likely to constitute a substantially reduced functional capacity to undertake relevant activities.

Hearing impairments < 65 dB decibels in the better ear (pure tone average of 500Hz, 1000Hz, 2000Hz and 4000Hz) in conjunction with other permanent impairments (for example vision or cognitive impairments), or where there is evidence of significantly poorer than expected speech detection and discrimination outcomes, may also be considered to result in substantially reduced functional capacity to undertake relevant activities.

8.4 When does an impairment affect a person's capacity for social or economic participation?

The NDIA *must* be satisfied that a prospective participant's impairment/s affect their capacity for social and economic participation (section 24(1)(d)).

The NDIA is required to *only* consider whether any permanent impairment, or permanent impairments when considered together, affect a person's social or economic participation.

For example, the NDIA *must* be satisfied that a prospective participant's permanent impairment/s affect their capacity to find or maintain work, play sport, go to the movies, perform voluntary work or travel.

This disability requirement does *not* require a person's impairment to reduce, substantially reduce or affect to any particular degree their social or economic participation. Rather, the impairment merely needs to *affect* the person's social or economic participation. Therefore, people who retain substantial capacity for social or economic participation may still satisfy this disability requirement (see [Mulligan and NDIA \[2015\] AATA 974 at \[140\]](#)).

8.5 When is a person likely to require support under the NDIS for their lifetime?

The NDIA *must* also be satisfied that the prospective participant is likely to require support under the NDIS for the rest of their lifetime (section 24(1)(e)).

If an impairment varies in intensity (for example, because the impairment is of a chronic episodic nature) the person may still be assessed as likely to require support under the NDIS for the person's lifetime, despite the variation (section 24(2)).

The NDIA is required to consider a prospective participant's overall circumstances and conclude that the person will require support under the NDIS for their lifetime. The purpose of this requirement seems to be to distinguish that subset of people with serious and permanent disabilities who are intended to be the beneficiaries of funded supports (Mulligan and NDIA [2015] AATA 974 at [153]).

For example, if a person's support needs arise from a health condition and are most appropriately provided through another service system (i.e. the health system) then the person will *not* require support under the NDIS for their lifetime. Rather, the person will require support under the health system.

When considering this criterion, the NDIA does not need to be satisfied that the support/s required for the person's lifetime meet the reasonable and necessary criteria. The reasonable and necessary criteria are relevant to whether funding is provided, *not* whether a person meets the disability requirements (see Mulligan and NDIA [2014] AATA 374 at [53] and Mulligan and NDIA [2015] AATA 974 at [146]–[150]).

8.6 Streamlined process for determining the disability access requirement

The NDIA has developed a list of conditions and state or territory disability programs which are designed to streamline the access process in certain cases.

Where a prospective participant has a condition included in List A or List B, or is an existing client of a disability program included in List C (attached to this guideline), the NDIA will be satisfied that the person meets one or more of the disability requirements.

8.6.1 'List A' Conditions

Where a prospective participant has been diagnosed with a condition/s on List A the NDIA will be satisfied that the person meets the disability requirements without further assessment. A person does not need to have a condition on List A to become a participant in the NDIS.

8.6.2 'List B' Conditions

Where a prospective participant has been diagnosed with a condition/s on List B the NDIA will be satisfied that the person has a disability attributable to one or more impairments that is, or is likely to be, permanent without further assessment. For prospective participants diagnosed with a condition/s on List B, the NDIA will *only* need to assess whether the prospective participant:

- has an impairment/s that result in substantially reduced functional capacity to perform one or more activities;
- has impairment/s which affect the person's capacity for social or economic participation; and

- is likely to require support under the NDIS for the person's lifetime.

A person does not need to have a condition on List B to become a participant in the NDIS.

8.6.3 Existing clients of defined state or territory disability programs on 'List C'

Defined programs are disability programs that have disability requirements equivalent to the NDIS. Where a prospective participant is an existing client of a defined Commonwealth, state or territory disability program on List C, the NDIA will be satisfied that the person meets the disability requirements without further assessment.

A person does not need to be a client of a defined program on List C to become a participant in the NDIS.

2. Sections Regarding Early Intervention

NATIONAL DISABILITY INSURANCE SCHEME ACT 2013 - SECT 25

Early intervention requirements

(1) A person [meets the early intervention requirements](#) if:

(a) the person:

(i) has one or more identified intellectual, cognitive, neurological, sensory or physical impairments that are, or are likely to be, permanent; or

(ii) has one or more identified impairments that are attributable to a psychiatric condition and are, or are likely to be, permanent; or

(iii) is a [child](#) who has [developmental delay](#); and

(b) the CEO is satisfied that provision of early intervention [supports](#) for the person is likely to benefit the person by reducing the person's future needs for [supports](#) in relation to disability; and

(c) the CEO is satisfied that provision of early intervention [supports](#) for the person is likely to benefit the person by:

(i) mitigating or alleviating the impact of the person's impairment upon the functional capacity of the person to undertake communication, social interaction, learning, mobility, self-care or self-management; or

(ii) preventing the deterioration of such functional capacity; or

(iii) improving such functional capacity; or

(iv) strengthening the sustainability of informal [supports](#) available to the person, including through building the capacity of the person's [carer](#).

Note: In certain circumstances, a person with a degenerative condition could meet the early intervention requirements and therefore become a [participant](#).

(2) The CEO is taken to be satisfied as mentioned in [paragraphs](#) (1)(b) and (c) if one or more of the person's impairments are prescribed by the [National Disability Insurance Scheme rules](#) for the purposes of this [subsection](#).

(3) Despite [subsections](#) (1) and (2), the person does not **meet the early intervention requirements** if the CEO is satisfied that early intervention support for the person is not most appropriately funded or provided through the [National Disability Insurance Scheme](#), and is more appropriately funded or provided through other general systems of service delivery or support services offered by a person, [agency](#) or body, or through systems of service delivery or support services offered:

(a) as part of a universal service obligation; or

(b) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.

NATIONAL DISABILITY INSURANCE SCHEME ACT 2013 - SECT 27

National Disability Insurance Scheme rules relating to disability requirements and early intervention requirements

The [National Disability Insurance Scheme rules](#) may prescribe circumstances in which, or criteria to be applied in assessing whether:

(a) one or more impairments are, or are likely to be, permanent for the purposes of [paragraph 24\(1\)\(b\)](#) or subparagraph 25(a)(i) or (ii); or

(b) one or more impairments result in substantially reduced functional capacity of a person to undertake, or psychosocial functioning of a person in undertaking, one or more activities for the purposes of [paragraph 24\(1\)\(c\)](#); or

(c) one or more impairments affect a person's capacity for social and economic participation for the purposes of [paragraph 24\(1\)\(d\)](#); or

(d) the provision of early intervention [supports](#) is likely to benefit a person by reducing the person's future needs for [supports](#) in relation to disability for the purposes of [paragraph 25\(1\)\(b\)](#); or

(e) the provision of early intervention [supports](#) is likely to benefit a person by mitigating, alleviating or preventing the deterioration of the person's functional capacity to undertake one or more of the activities for the purposes of subparagraph 25(1)(c)(i) or (ii), or improving such functional capacity for the purposes of subparagraph 25(1)(c)(iii); or

(f) the provision of early intervention [supports](#) is likely to benefit a person by strengthening the sustainability of the informal [supports](#) available to the person, including through building the capacity of the person's [carer](#) for the purposes of subparagraph 25(1)(c)(iv).

The following excerpt is from the [NDIS Operational Guidelines](#):

9. Early intervention requirements

Early intervention support is available to both children and adults who meet the early intervention requirements. The intention of early intervention is to alleviate the impact of a person's impairment upon their functional capacity by providing support at the earliest possible stage. Early intervention support is also intended to benefit a person by reducing their future needs for supports.

A prospective participant will meet the early intervention requirements if they meet each of the following requirements:

- the person:
 - i. has one or more identified intellectual, cognitive, neurological, sensory or physical impairments that are, or are likely to be, permanent (section 25(1)(a)(i)); or
 - ii. has one or more identified impairments that are attributable to a psychiatric condition that are, or are likely to be, permanent (section 25(1)(a)(ii)); or
 - iii. is a child who has developmental delay (section 25(1)(a)(iii)); and
 - the NDIA is satisfied that provision of early intervention supports is likely to benefit the person by reducing their future needs for disability related supports (section 25(1)(b)); and
 - the NDIA is satisfied that provision of early intervention supports is likely to benefit the person by:
 - i. mitigating or alleviating the impact of the person's impairment upon their functional capacity to undertake communication, social interaction, learning, mobility, self-care or self-management (section 25(1)(c)(i)); or
 - ii. preventing the deterioration of such functional capacity (section 25(1)(c)(ii)); or
 - iii. improving such functional capacity (section 25(1)(c)(iii)); or
 - iv. strengthening the sustainability of informal supports available to the person, including through building the capacity of the person's carer (section 25(1)(c)(iv)); and
- the NDIA is satisfied early intervention support for the person is most appropriately funded or provided through the NDIS (section 25(3)).

Note, in certain circumstances, a person with a degenerative condition could meet the early intervention requirements and become a participant in the NDIS.

For all children under 7 years of age (except children diagnosed with a condition on List A of this Operational Guideline) the NDIA will first consider whether the child meets the early intervention requirements before considering the disability requirements.

9.1 When is an impairment permanent or likely to be permanent for the early intervention requirements?

The NDIA *must* be satisfied a prospective participant has one or more identified impairments that are, or are likely to be, permanent (i.e. lifelong or likely to be lifelong) (section 25(1)(a)(i) and (ii)).

The following principles provide guidance:

- an impairment is, or is likely to be, permanent only if there are no known, available and appropriate evidence based treatments that would be likely to remedy (i.e. cure or substantially relieve) the impairment (rule 6.4 of the Becoming a Participant Rules);
- an impairment may be permanent notwithstanding that the severity of its impact on the functional impact of the person may fluctuate or potentially improve (rule 6.5 of the Becoming a Participant Rules);
- an impairment is, or is likely to be, permanent only if the impairment does not require further medical treatment or review in order for its likely permanency to be demonstrated (rule 6.6 of the Becoming a Participant Rules). In this context, an impairment may be permanent notwithstanding that it may continue to be treated and reviewed after its permanency, or likely permanency, has been medically demonstrated; and
- if an impairment is of a degenerative nature, the impairment is, or is likely to be permanent if medical or other treatment would not, or would be unlikely to, improve the condition (rule 6.7 of the Becoming a Participant Rules). Accordingly, in certain circumstances, a person with a degenerative condition could meet the early intervention requirements and therefore become a participant in the NDIS.

If a prospective participant has multiple impairments, the NDIA will consider each impairment separately and determine whether each impairment is, or is likely to be, permanent. However, the NDIA only needs to be satisfied that at least one of a prospective participant's impairments are, or are likely to be, permanent.

Where there is a possibility of medical treatment (such as surgery) to treat the prospective participant's condition, and the treatment has some prospect of success, the NDIA should not conclude that the impairment is permanent but should wait until the outcome of the treatment is known (Mulligan and NDIA [2015] AATA 974 at [71]).

9.2 Developmental delay (early intervention in early childhood)

9.2.1 Requirements for children with developmental delay

Access to the NDIS under the early intervention requirements is also open to children **under 6 years of age** with a developmental delay (section 25(1)(a)(iii)).

Generally, developmental delay is a term used when a child is slower to reach, or has not reached, age-appropriate developmental milestones.

For the purposes of the NDIS Act, developmental delay means a delay in the development of a *child under six years of age* that meets all of the following criteria:

- is attributable to a mental or physical impairment or a combination of mental and physical impairments; and
- results in substantial reduction in functional capacity in one or more of the following areas of major life activity:
 - i. self care;
 - ii. receptive and expressive language;
 - iii. cognitive development;
 - iv. motor development; and
 - results in the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services that are of extended duration and are individually planned and coordinated (section 9).

Note, 'receptive and expressive language' is considered to be a singular area of major life activity. Therefore, a prospective participant will *not* need to specifically demonstrate a substantial reduction in functional capacity for *both* receptive and expressive language. A substantial reduction in functional capacity for either receptive or expressive language will suffice.

'Expressive language' is taken to include articulation and speech pronunciation.

9.2.2 Determining whether a child has a developmental delay

Access to the NDIS for a child with a developmental delay must be demonstrated by reference to evidence of a substantial reduction in functional capacity relating to the child's daily routines and daily activities in one or more of the relevant areas of major life activity (i.e. self-care, receptive and expressive language, cognitive development or motor development).

In addition, the NDIA must be satisfied that any impairment which results in a substantial reduction in functional capacity in one or more area of life activity also

results in the 'need for a combination and sequence of special interdisciplinary or generic care, treatment or other services that are of extended duration and are individually planned and coordinated' (section 9).

Current best practice in early childhood intervention has moved towards functional based assessments using developmental screening tools to evidence the degree of delay in a child's development. Developmental screening identifies areas in which a child's development differs from same age norms and identifies children presenting with developmental delay. For example, the Pediatric Evaluation of Disability Inventory Computer Adaptive Test (PEDI-CAT) is one of the functional assessment tools used for children in this context.

The NDIA may specify, in operational guidelines, assessment tools that may be used for the purposes of deciding whether a person meets the early intervention requirements (rule 7.2 of the Becoming a Participant Rules).

Without limitation, the NDIA may specify:

- different tools to be used for adults and children; and
- tools that are specifically tailored to particular impairments (rule 7.4 of the Becoming a Participant Rules).

A tool must be designed to ensure the fair and transparent assessment of whether a person meets the early intervention requirements and have reference to areas of activity and social and economic participation identified in the World Health Organisation International Classification of Functions, Disability and Health as in force from time to time (rule 7.5 of the Becoming a Participant Rules).

Generally, the NDIA will use a validated and reliable functional assessment tool which indicates a child is statistically below a normal range (i.e. that their needs are substantially different to the norm) to determine access to the NDIS under the developmental delay criteria for children aged under 6 years.

Qualitative information provided by parents to the NDIA regarding developmental skills and milestones may also assist in understanding the level of functional impact for a child. Where possible, the NDIA will assist parents to provide appropriate evidence of substantially reduced functional capacity relating to developmental milestones.

The NDIA will also consider the when determining whether a child's impairment results in a substantial reduction in functional capacity in one or more of the areas of major life activity.

In some circumstances, the NDIA may request further information or request that a prospective participant undergo an assessment or examination (see requesting further information or reports to inform the access decision).

In summary, having regard to results from a validated and reliable functional assessment tool and any other relevant information, a child under the age of 6 who has a developmental delay as a result of an impairment that results in substantial functional limitations requiring a coordinated, long term, multidisciplinary service response will meet the early intervention requirements under the NDIS Act, provided the early intervention support is most appropriately funded or provided through the NDIS.

It should be noted that many children who meet the developmental delay access criteria will receive early intervention supports and then exit the NDIS. Therefore, meeting the early intervention criteria does not mean a child meets the disability requirements in the NDIS Act.

Children who do not meet the early intervention access criteria may be supported in the early childhood early intervention gateway. In these situations, the NDIA should refer children to other community/mainstream supports via the early childhood early intervention gateway (see early childhood early intervention (ECEI) approach)

9.2.3 Streamlined process for determining the early intervention requirements for children with a developmental delay

The NDIA will be satisfied the provision of early intervention supports for a child with developmental delay will be likely to benefit the child as required by the early intervention requirements without further assessment (rule 6.8 of the Becoming a Participant Rules).

Therefore, children with a developmental delay will be able to access the NDIS under the early intervention requirements provided the early intervention support is most appropriately funded or provided through the NDIS (section 25(3)).

9.3 Determining whether early intervention supports are likely to benefit the person

The NDIA *must* be satisfied that the provision of early intervention supports (except for children with developmental delay) is *likely* to benefit the prospective participant by:

- reducing the person's future needs for supports in relation to disability (section 25(1)(b)); and
- achieving one or more of the following four outcomes:
 - i. mitigating or alleviating the impact of the person's impairment upon the functional capacity of the person to undertake one or more activities (section 25(1)(c)(i)); or
 - ii. preventing the deterioration of such functional capacity (section 25(1)(c)(ii));
 - iii. improving such functional capacity (section 25(1)(c)(iii)); or

iv. strengthening the sustainability of informal supports available to the person, including through building the capacity of the person's carer (section 25(1)(c)(iv)).

When considering whether the provision of early intervention supports is likely to benefit the person, the NDIA should consider:

- the likely trajectory and impact of the person's impairment over time (rule 6.9(a) of the Becoming a Participant Rules); and
- the potential benefits of early intervention on the impact of the impairment on the person's functional capacity and in reducing their future needs for supports (rule 6.9(b) of the Becoming a Participant Rules); and
- evidence from a range of sources, such as information provided by the prospective participant or their family members or carers. The NDIA may also in some cases seek expert opinion (rule 6.9(c) of the Becoming a Participant Rules).

When considering if a person is likely to benefit from early intervention supports, the NDIA may consider factors such as the time elapsed since the onset or diagnosis of the disability and whether there has been a recent, or impending, significant change in the person's impairment or disability.

9.4 Is the support most appropriately funded or provided through the NDIS?

The NDIA *must* be satisfied that early intervention support is most appropriately funded or provided through the NDIS (section 25(3)).

Therefore, the NDIA will consider whether a prospective participant's overall, or likely, need for early intervention support is most appropriately funded or provided through the NDIS.

A prospective participant does *not* meet the early intervention requirements if the NDIA is satisfied that early intervention support for the person is *not* most appropriately funded or provided through the NDIS, and is more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or through systems of service delivery or support services offered:

- as part of a universal service obligation; or
- in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability (section 25(3)).

When deciding if early intervention supports are most appropriately funded or provided through the NDIS, the NDIA must have regard to the considerations outlined in Schedule 1 of the National Disability Insurance Scheme (Supports for Participants) Rules 2013 (see is the support most appropriately funded or provided through the NDIS?).

9.5 Streamlined process for determining the early intervention requirement for children under 7 years of age

In some circumstances the NDIA will be satisfied that a prospective participant meets the early intervention requirements by reference to List D appended to this Operational Guideline.

List D has been developed to streamline the access process for children under 7 years of age who have been diagnosed with a condition/s included on the list.

9.5.1 'List D' conditions

Where a child under the age of 7 has been diagnosed with a condition/s on List D the NDIA will be satisfied that the child meets the early intervention requirements without further assessment.

A child does not need to have a condition on List D to become a participant in the NDIS.

9.5.2 Early intervention for hearing impairment for people aged 0-25

The NDIA will be satisfied that a person meets the early intervention requirements without further assessment when the person:

- is aged between birth and 25 years of age; and
- has confirmed results from a specialist audiological assessment (including electrophysiological testing when required) consistent with auditory neuropathy or hearing loss ≥ 25 decibels in either ear at 2 or more adjacent frequencies, which is likely to be permanent or long term; and
- the hearing loss of the person necessitates the use of personal amplification.

This streamlined access approach for early intervention acknowledges a rich body of evidence that recognises that early intervention support up to and including the age of 25 is critical for people with hearing impairment as the developing brain requires consistent and quality sound input and other support over that period to develop normally and ameliorate the risk of lifelong disability.

This same body of evidence suggests that brain development and language capability have been achieved by the age of 26. Therefore, adults aged 26 years and over are not immediately accepted to be likely to benefit from the same early intervention approach because there is no requirement to support the development of the auditory pathways. Adults aged 26 years and over with hearing impairment will therefore be assessed normally, on a case by case basis, having regard to the availability of all relevant evidence.

9.6 Reassessment of early intervention supports

Where a person has become a NDIS participant under the early intervention requirements, the NDIA will reassess their circumstances when reviewing their plan.

The purpose of the reassessment is to ensure that early intervention supports continue to provide a benefit to the person, as required by the early intervention requirements.

If a participant no longer meets the early intervention requirements, the NDIA will consider whether the person can continue to access the NDIS under the disability requirements.

In some circumstances, a person's access to the NDIS may be revoked if they do not meet either the disability or early intervention requirements.

Where the participant is a child with developmental delay, there is no requirement to reassess access to the NDIS on the child's sixth birthday, particularly where the child may have only recently gained access to the NDIS. In general, a plan of usual length for others with similar circumstances should be developed for these children (up to 12 months). The child's status may then be reassessed when reviewing their plan.