

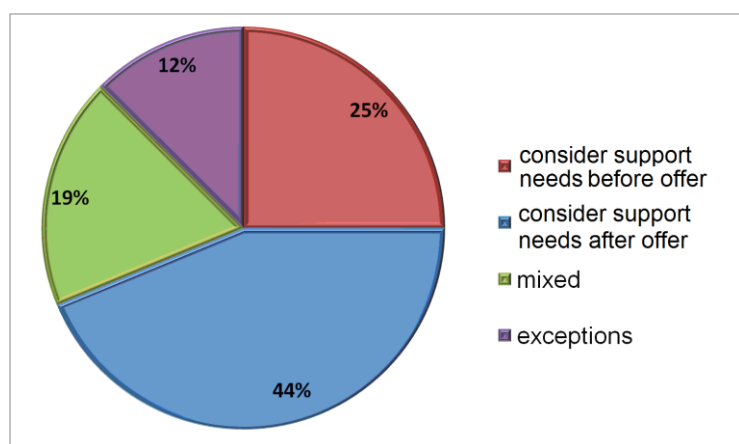


SPA recommendations on good practice in the consideration of support needs within the admissions process to higher education for applicants with disabilities

February 2011

These recommendations have been developed by SPA with admissions and disability support practitioners in response to concerns from admissions staff about possible discrimination in their admissions practices. Many queries focussed on the timing of offers in relation to assessment/consideration of support needs of applicants declaring a disability.

SPA ran a discussion forum on 22 November 2010, when admissions and disability support practitioners from 22 universities shared views on existing practice with colleagues from [ECU](#)¹, [SPA](#) and [UCAS](#). The pie chart below illustrates reported practice for those institutions registered to attend the discussion forum. This cannot be seen as a representative sample of the sector, but is indicative of the variation in treatment of applications with a declared disability.



Source: 22 institutions registered to attend the SPA Discussion Forum, November 2010

Flowcharts are available in **Appendix A** which map out the common processes when support needs are considered before or after an offer is sent to the applicant.

Implications of the Equality Act 2010

The [Equality Act](#) which came into force in October 2010 defined the discriminatory nature of treating one group differently to another because of their disability. The implications for higher education are far wider than the single process considered within this paper, so policymakers are strongly advised to seek further guidance. Further information is available within an [ECU briefing document](#) and [Equality and Human Rights Commission guide](#), but an institution should seek its own legal advice if there is any ambiguity.

¹ Equality Challenge Unit – www.ecu.ac.uk

Section 91 of the Act specifically relates to further and higher education admissions and applies to England, Scotland and Wales, but not Northern Ireland. This section stipulates that it is unlawful to discriminate against, harass or victimise someone in either the **arrangements** for deciding who to admit or the **terms** of admission. This includes both direct discrimination (e.g. treating individuals less favourably because of their disability) and indirect discrimination (e.g. a policy which applies equally to all, but which results in disadvantaging those with a disability).

As with previous legislation, an institution is expected to make reasonable adjustments to its admissions practices, services and facilities in respect of disabled applicants and it may treat a disabled applicant more favourably than a non-disabled applicant. However, the Act exempts the application of competence standards² from this requirement to make reasonable adjustments. Institutions may find it useful to review how they express their entry requirements and offers in terms of competence standards.

Interpretation of the Equality Act 2010

The varied practice indicated by the pie chart above relates to the different interpretation of legislation within the sector. Some institutions believe that sending an application to disability support staff to assess before making an offer could be seen as unfairly delaying an offer to only that group of applicants, thus discriminating on grounds of the arrangements for deciding who to admit. Other institutions have concluded that ensuring support needs can be met before an offer is made constitutes a reasonable adjustment proportionate to achieving a legitimate aim.

In contrast, some institutions believe that sending the offer at the same time as others ensures equal treatment of all applications (including those who do not disclose a disability) and removes any potential disadvantage from receiving an offer later than other applicants. However, if any consideration of support after the offer highlights barriers that cannot be overcome, then the offer to a disabled applicant may have to be withdrawn. This potentially runs foul of the contract formed by the offer and may constitute discrimination on grounds of the terms of admission. These opposing interpretations are summarised in the table below:

	Consider support needs before sending offer	Consider support needs after sending offer
compliant	Ensuring support needs can be met constitutes a reasonable adjustment proportionate to achieving a legitimate aim.	Provides equal treatment of all applications and removes any potential disadvantage from receiving an offer later than other applicants.
non-compliant	Delays an offer to only that group of applicants and therefore may discriminate on grounds of the arrangements for deciding who to admit.	If support needs cannot be met, withdrawing the offer potentially runs foul of the contract formed by the offer itself and may constitute discrimination on grounds of the terms of admission.

² Further information on competence standards is available on the SPA website at www.spa.ac.uk/good-practice/documents/competency-standards-admissions.doc

There is a lack of case law passing judgement on any of these interpretations, but to determine whether any, or even all, of these practices are discriminatory, an institution should assess whether applicants declaring a disability would be treated less favourably compared to all other applicants.

As mission statements, strategic aims and admissions policies vary from one institution to another, the treatment of applicants must be compared within individual institutions. Practice that may lead to unfavourable treatment at one institution may not be deemed unfavourable at another institution. For example, requiring an applicant with a disability to attend an interview would be unfavourable treatment at an institution that does not interview all applicants for that course, but might not be unfavourable treatment at an institution that does interview as standard.

Reviewing the treatment of applicants

The list below provides some examples where the timing of considering support needs may affect the treatment of applicants with disabilities. These examples are a guide only: institutions should review their own procedures and assess their impact on applicants declaring a disability. Institutions may be expected to hold relevant data, or be able to collect such data, to inform such a review.

	Consider support needs <u>before</u> sending offer	Consider support needs <u>after</u> sending offer	reason
Admissions has a key performance indicator, service level agreement or policy to send offers out within a short timeframe.	less favourable treatment		It would discriminate in the arrangements for that group of applicants.
Course has evidence that delayed receipt of an offer negatively impacts on conversion.	less favourable treatment		It would discriminate in the arrangements for that group of applicants.
There is any reject by default process that applicants pending support consideration cannot be exempted from	less favourable treatment		It would discriminate in the arrangements for that group of applicants.
Course guarantees equal consideration of applications, regardless of how long an application is held pending a decision.		less favourable treatment	It would discriminate in the terms of an offer to that group of applicants.

	Consider support needs before sending offer	Consider support needs after sending offer	reason
Admission decision-making process includes additional assessments, tests, interviews or other criteria on which performance may be affected by an applicant's disability.		less favourable treatment	It would discriminate in the arrangements for that group of applicants.
Ancillary services indirectly connected to admissions (e.g. campus accommodation; placement opportunities) have limited support infrastructure		less favourable treatment	It would discriminate in the arrangements for that group of applicants.
Course has evidence that agreeing support positively impacts on conversion.	more favourable treatment		It would be a proportionate measure to increase the number of students with a disability and might increase disclosure rates.
Course has a high number of students whose performance or retention has been affected by late implementation of support needs	more favourable treatment		It would be a proportionate measure to ensuring support is in place early.
Institution has specific physical barriers that prevent access for certain disabilities.		less favourable treatment	It would discriminate in the terms of an offer to that group of applicants.
Course has never had to deny entry to an applicant because of a barrier to support.	less favourable treatment		It would not be proportionate to meeting support needs.
Institution has evidence that a high proportion of applicants with disabilities do not disclose.	less favourable treatment		It would discriminate in the arrangements for only those applicants who disclose.

The relevant judgement in this issue rests with whether or not making different terms of, or arrangements for, admission to applicants declaring a disability constitutes a proportionate means to achieving a legitimate aim. If it is deemed to be proportionate than it would be justifiable to make adjustments to the admissions process for those applicants affected. It would be incumbent upon the institution to ensure there is an evidence base to support any such adjustments.

It should be noted that many courses within many institutions do not have methods of study, learning outcomes or physical barriers that are incompatible with support arrangements that can be provided. Such courses therefore carry a very low risk of an applicant being refused entry due to a declared disability and indeed many will never have refused entry on such grounds. Any courses where such

barriers do exist should provide clear and easily accessible information within their pre-application literature to help applicants make informed choices and to encourage disclosure. If a course provider deems such information is not required then it could be inferred that support needs will be met and do not form a restriction to the terms of an offer.

Withdrawing an offer

Withdrawing an offer if support needs cannot be met has been noted as a particular concern because it risks being in breach of contract (on grounds of the terms of admission). However, there is considerable ambiguity over the contract to admit, particularly when third parties, such as UCAS, are involved in the admissions process. Staff and applicants may be unaware of their rights, responsibilities and redress when entering into a contract to admit, or even when such a contract begins. SPA is developing guidance on a common understanding of the offer of admission, but staff considering disability support after an offer has been made should take into account the following points and seek clarity from their own legal advisors.

The terms of an offer are commonly understood to be those spelt out as conditions. These are usually academic conditions, subject to defined attainment in qualifications, but may include non-academic conditions. Alternatively, an offer may be unconditional, indicating that there are no conditional terms in the contract to admit.

Farrington and Palfreyman³ state that, “The contract is made when the conditions are fulfilled and the offer then accepted by the applicant.” There is some dispute over an institution’s right to change the offer prior to acceptance, but it appears clear that it should not be altered after acceptance.

The contract to admit is made between the institution and the applicant. Although an applicant or institution may enter into additional contracts with third parties (e.g. agents, including UCAS), this does not absolve the institution from its own contractual obligations, even if the third party has its own regulations and timelines for offer-making and acceptance. Similarly, agents (including UCAS) would not be liable for any acts or omissions in conveying the offer, as they would be acting on behalf of the institution.

An institution may have additional requirements not listed in the terms of an offer, whether that offer comes directly from the institution or via an agent, such as UCAS. Consideration of support needs may constitute such additional requirements, but if they are not known or understood by the applicant when receiving the offer, then the institution may be challenged for misrepresentation under the [Unfair Contract Terms Act](#). According to Farrington and Palfreyman, “A student cannot possibly be expected to be familiar with all the terms of the contract with the HEI when these are not clearly spelt out in any single readily accessible document.”

Any institution wishing to withdraw an offer because certain conditions cannot be fulfilled, such as meeting support needs, should be confident that those conditions were readily accessible and comprehensible at the point the offer was made. However, it should also ensure that measures are in place to help applicants find appropriate alternatives. Farrington and Palfreyman note that,

³ Farrington, D J and Palfreyman, D (2006). *The Law of Higher Education*. Oxford: Oxford University Press

“Although the courts would expect a student whose offer had been withdrawn after acceptance to seek to mitigate the loss by finding an alternative course, it would also expect the HEI to make every reasonable endeavour either to accommodate the student on another appropriate course or to find that student a place at another appropriate HEI, no matter how widely drawn the HEI’s prospectus disclaimer might be. In the last resort, when no reasonable alternative was available, the HEI could be liable to action for breach of contract with damages quantified according to the general principles of the law of contract.”

Although it should be rare for an institution to be unable to meet an applicant’s support needs, it is a foreseeable possibility, whether considering support needs after sending an offer as standard, or when an applicant discloses a disability after an offer has been made. All institutions should therefore have a clearly defined policy for handling such an eventuality, which should include:

- How all the terms in the contract to admit will be presented and accessed by an applicant;
- Measures for documenting that all reasonable adjustments were considered before withdrawing the offer;
- Measures for identifying appropriate alternatives within the institution;
- Measures for supporting the applicant in securing an appropriate alternative at another institution;
- Additional compensatory measures;
- Channels for complaint from the applicant.

All staff involved should be aware that the availability of appropriate alternatives will vary depending on the time of year, the competition for alternative courses and their availability within the local area or across specific types of institution. Measures should not be assumed to be equally effective throughout the admissions cycle or for all courses and particular care should be taken when an offer is withdrawn towards the end of the admissions cycle.

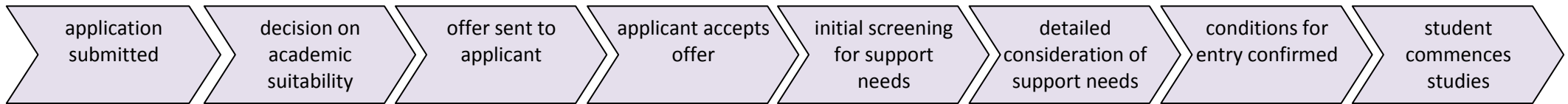
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Current common models for considering support needs within an admissions process

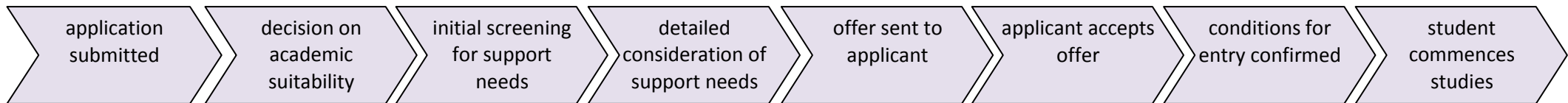
Summary flowcharts

(to be considered alongside SPA's recommendations paper)

1. Consider ***after*** offer



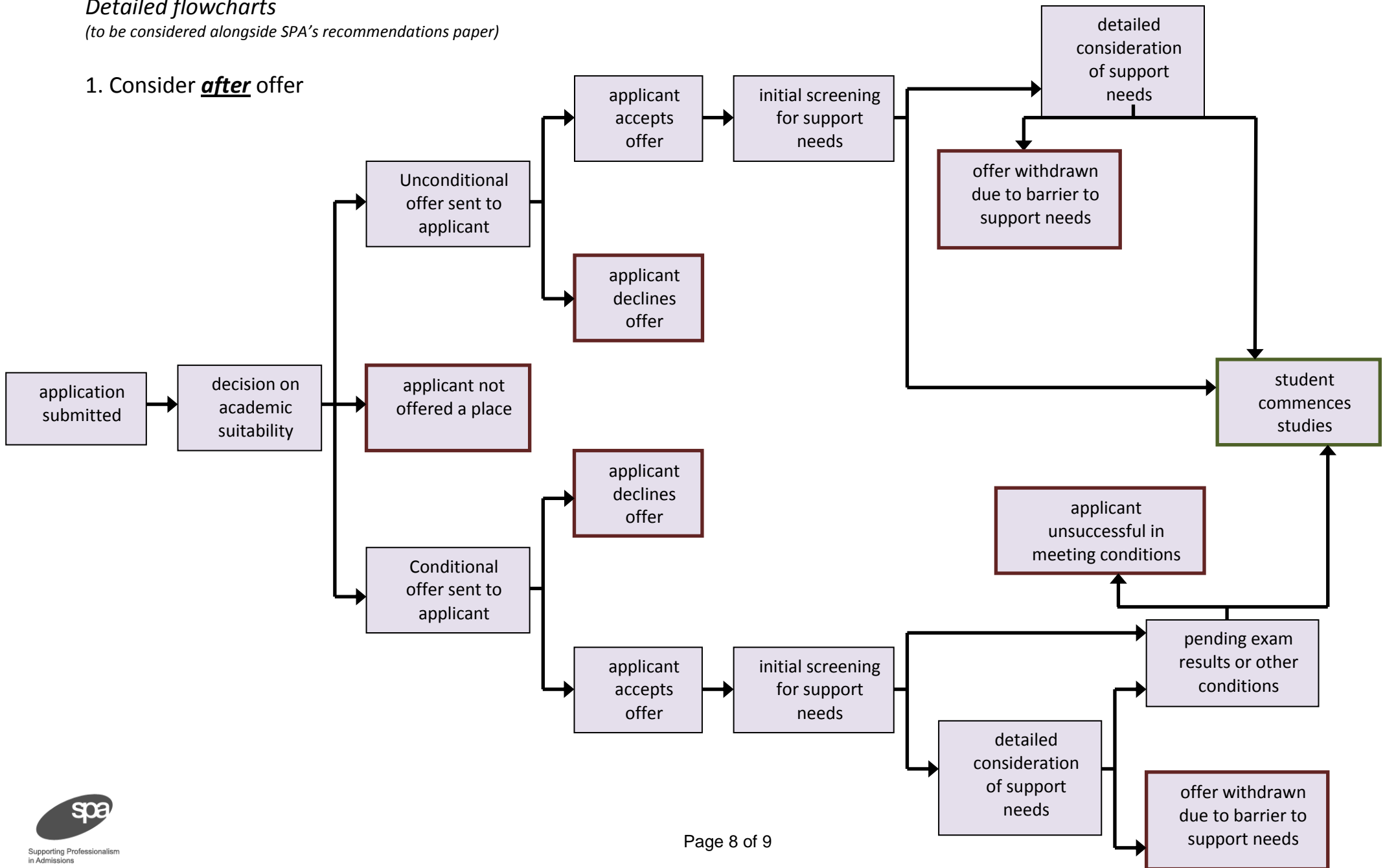
2. Consider ***before*** offer



Detailed flowcharts

(to be considered alongside SPA's recommendations paper)

1. Consider after offer



Detailed flowcharts

(to be considered alongside SPA's recommendations paper)

2. Consider before offer

