

# Short Breaks for Disabled Children

A legal guide for local authorities



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This guide is intended to provide general information only and should not be relied on as providing legal advice. In particular this guide cannot and does not provide advice in relation to individual cases. Where legal issues arise specialist legal advice should be taken in relation to the particular case.



## 1. Key Points

- Short breaks are a vital support service for families with disabled children.
- There is a raft of relevant legal duties in relation to the funding, commissioning and provision of short breaks by local authorities. In essence, these duties require local authorities to:
  - Take into account a range of important considerations in making strategic decisions about the commissioning and funding of short breaks;
  - Assess the needs of any disabled child whose family may want or need services above the level available locally without an assessment; and
  - Provide short breaks to children where an assessment shows that they are necessary to meet their needs, taking account of the family context.
- When making commissioning and funding decisions, local authorities must ensure that regard is paid to all the relevant legal duties, in particular the short breaks duty<sup>1</sup> and the duties in the 2011 Regulations<sup>2</sup>. Failure to give proper consideration to these duties is likely to result in the High Court quashing the decision if challenged on judicial review.
- Although all ‘disabled’ children are entitled to some form of assessment<sup>3</sup>, short breaks only have to be provided where one of the relevant statutory duties applies. Other than in relation to residential short breaks, the key duty is in section 2(4) of the Chronically Sick and Disabled Persons Act 1970. This requires short breaks to be provided where an assessment shows that they are ‘necessary’ to meet the child’s needs. In deciding what is ‘necessary’, local authorities can take account of their own resources. It is likely that local authorities can also take account of the resources otherwise available to families.
- The courts have upheld the use of eligibility criteria by local authorities to control access to short breaks. However it is essential that any eligibility criteria are (1) published, including as part of the short breaks services statement and (2) consistent with the duties owed to individual children and families, particularly the duties to (a) assess all children ‘in need’ and (b) meet children’s assessed needs where it is ‘necessary’ to do so.
- There are important duties on the NHS to provide short breaks to disabled children with complex health needs and to co-operate with local authorities in the provision of short breaks generally.
- It is essential that there is a positive transition to adult services for every disabled young person. New legal requirements are intended to ensure that no young person faces a ‘cliff edge’ and loses their children’s services at 18 without the necessary decisions having been taken for their future care and support.

1 Para 6(1)c) of schedule 2 to the Children Act 1989.

2 The Breaks for Carers of Disabled Children Regulations 2011.

3 See the discussion below in relation to the need for a proportionate approach to assessment.

## 2. Introduction

Short breaks<sup>4</sup> for disabled children are now well recognised to be a vital service which help families with disabled children to lead 'ordinary lives'. The importance of short breaks was reflected first through significant investment under the Aiming High for Disabled Children programme and then through the introduction of new legislation, in particular the Breaks for Carers of Disabled Children Regulations 2011.

The Council for Disabled Children ('CDC') is however concerned that some local authorities are significantly reducing expenditure on short breaks in response to growing pressures on budgets for children's services.<sup>5</sup> Short breaks may be particularly vulnerable to funding cuts if they are wrongly seen as a 'non statutory' service. As pressures on local authority budgets continue to increase, CDC wants to help local authorities to ensure that decisions on short breaks funding and other key policy decisions are taken in compliance with all the relevant legal duties. The purpose of this guide is to assist local authority officers and Members to understand the law in relation to short breaks and to apply it effectively. This should assist in supporting and protecting the provision of vital services for families. It is important in CDC's view that the level of awareness and understanding of the law relating to short breaks is the same in every local authority.

The guide also covers the duties on NHS bodies in relation to short breaks and so will be relevant to the health partners of local authorities, particularly Clinical Commissioning Groups. We hope the guide will also be helpful to families and providers who want to understand the legal duties on local authorities and their health partners.

This guide builds on two guidance documents on short breaks produced by central government:

1. *Short Breaks: Statutory Guidance on how to safeguard and promote the welfare of disabled children using short breaks*, published in April 2010 ('the statutory guidance'). This guidance focuses in particular on the decision as to whether overnight short breaks should be provided under section 17 or section 20 of the Children Act 1989 and the consequences in relation to 'looked after' status if section 20 provision is made.
2. *Short breaks for carers of disabled children: Departmental advice for local authorities*, published in March 2011 ('the departmental advice'). This non-statutory guidance was produced alongside the introduction of the short breaks duty and the 2011 Regulations.

There are also a number of resources in relation to short breaks produced recently under the banner of the Short Breaks Partnership. For example, Contact a Family have produced a short breaks toolkit for parent carer forums<sup>6</sup> and a guide for parent carer forums on local authority responsibilities to provide short breaks<sup>7</sup>.

This guide is intended to build on the statutory guidance, departmental advice and other existing

4 'Short breaks are part of a continuum of services which support children in need and their families. They include the provision of day, evening, overnight and weekend activities for the child or young person, and can take place in the child's own home, the home of an approved carer, or in a residential or community setting.' See DCSF, *Short Breaks: Statutory Guidance on how to safeguard and promote the welfare of disabled children using short breaks*, April 2010 at para 2.1.

5 The Every Disabled Child Matters campaign report, 'Short Breaks in 2015: An Uncertain Future', showed that a majority of local authorities (56%) cut funding on short breaks between 2011/12 and 2015/16. The average funding reduction was 15%. However there was very significant variation in the approach to spending in this area between different authorities.

6 See [http://www.cafamily.org.uk/media/923948/short\\_breaks\\_toolkit.pdf](http://www.cafamily.org.uk/media/923948/short_breaks_toolkit.pdf)

7 See <https://www.actionforchildren.org.uk/media/5998/sbp-01-local-authority-responsibilities-to-provide-short-breaks.pdf>

materials. There is a particular focus on more recent developments, for example the relevant features of the new scheme for SEN and disability introduced by the Children and Families Act 2014 and the key aspects of the *Working Together to Safeguard Children* statutory guidance reissued in 2015. The guide also summarises an important judgment concerning a decision by a local authority (West Berkshire) to reduce funding for short breaks provided by the voluntary sector and suggests a series of questions local authorities may want to ask to ensure that funding decisions in this area are taken in compliance with the legal duties.

### 3. Overview of Legal Duties

Legal duties in relation to short breaks include both duties owed to individual children and families in relation to assessment and care planning and wider commissioning obligations on local authorities. The guide covers the key statutory duties found within the following legislation:

- Children Act 1989 and the Breaks for Carers of Disabled Children Regulations 2011
- Chronically Sick and Disabled Persons Act 1970 ('CSDPA 1970')
- Children Act 2004
- Children and Families Act 2014
- Equality Act 2010
- NHS Act 2006 (as amended by the Health and Social Care Act 2012)
- Care Act 2014 (in relation to transition to adult social care)

### 4. Local Authority Commissioning Duties

Short breaks for disabled children will be provided by a wide range of organisations, including private and voluntary sector organisations. Many local areas have adopted a tiered approach, with targeted and specialist short breaks provided to supplement the universal services available to all children and families.

West Sussex County Council undertook an extensive consultation exercise to look at the future shape of short breaks at a time when long term block contracts were coming to an end. A Steering Group was established to ensure that new services were fully co-produced and to oversee the project.

This resulted in commissioning services across a number of different categories, including 'Targeted Fun and Play, Social, Arts, Sports and Leisure activities', 'Increasing access to universal services - tailored, personalised support, enabling families to help themselves' and a category for innovative projects.

A dynamic purchasing system provides the flexibility needed to respond to the changing needs of families. Commissioning is focussed on ensuring an equitable geographic spread and contract lengths vary between the different categories in order to allow more flexibility.

Feedback from families obtained in 2014 informed the commissioning of new providers in April 2016

Details of all short break services in every local area must be published as part of the 'Local Offer'.<sup>8</sup> The local authority has a vital role in ensuring that sufficient and appropriate short breaks are commissioned in their local area. This includes the decision as to the funding the local authority chooses to allocate to short breaks each year as part of setting its revenue budget. This funding may be specifically allocated to short breaks or may form part of an overall budget for disabled children's services.

It is essential that local authorities adopt a participatory approach to commissioning decisions in relation to short breaks, involving children, young people and families at every stage in the decision.<sup>9</sup> Effective participation is likely to be a requirement of rational decision making at 'common law'.<sup>10</sup> Moreover section 19 of the Children and Families Act 2014 requires regard to the views, wishes and feelings of children, young people and parents in decisions which affect them.<sup>11</sup>

### Section 17 – children 'in need'

The starting point for consideration of the legal framework relating to short breaks is the general duty<sup>12</sup> to provide services for children in need under section 17(1) of the Children Act 1989. The duty is to 'safeguard and promote the welfare of children within their area who are in need; and so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.'

Importantly, all 'disabled' children are children 'in need', see section 17(10)(c) and (11). There is no requirement for a child to have a particular level of disability or to need any support from the local authority to qualify as a child 'in need'.<sup>13</sup> All that matters is that the child falls within the definition of 'disabled' in section 17(11), which reads as follows; 'a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity.'

While this definition may benefit from updating it is clearly very broad. Local authorities should note in particular that a child with a 'mental disorder of any kind' is 'disabled' and therefore a child 'in need'. This will include conditions such as autism and ADHD which are found within the relevant diagnostic manuals for mental disorders.<sup>14</sup>

8 Under section 30(1) of the Children and Families Act 2014, local authorities must 'publish information about the provision expected to be available within and outside its area for children and young people who have special educational needs or a disability'. The information published must include information about 'Social care provision for children and young people with special educational needs or a disability and their families including services provided in accordance with section 17 of the Children Act 1989', see paragraph 13 of schedule 2 to the Special Educational Needs and Disability Regulations 2014.

9 See the departmental advice at para 2.6.

10 The common law is the body of legal duties and standards identified by judges in their judgments, recognising the standards of a civilised society at any given time.

11 Section 19 of the 2014 Act applies where local authorities are 'exercising a function under this Part in the case of a child or young person'. In the absence of authoritative guidance from the courts, the section 19 duty should be considered to apply to commissioning decisions, not simply to decisions in individual cases. In any event it is likely that the section 19 duty merely reflects the position at common law (see above).

12 A 'general duty' is a duty owed to a group of people generally, but which does not give rise to any enforceable right to services for a particular individual within the group (this being a 'specific' duty).

13 By contrast, non-disabled children will be 'in need' only if (in essence) they require support from the local authority, see section 17(10)(a) and (b).

14 Most notably DSM-5, being the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders.

As set out below, the primary duty in relation to children ‘in need’ is to assess their needs in the family context. There is not a duty to provide services to every child ‘in need’; the relevant ‘specific’ duty to provide services to disabled children is found in section 2 of the Chronically Sick and Disabled Persons Act 1970, which is discussed below. For commissioning purposes, compliance with section 17(1) requires here that there is a range and level of services appropriate to the needs of disabled children in the area which helps safeguard and promote their welfare and support their upbringing by their families.

### The Short Breaks Duty

The general duty in section 17(1) is supplemented by further duties relating to particular groups of children in need. These are found in schedule 2 to the Children Act 1989. In relation to disabled children, para 6 of schedule 2 provides that (emphasis added):

- ‘(1) Every local authority shall provide services designed—
- (a) to minimise the effect on disabled children within their area of their disabilities;
  - (b) to give such children the opportunity to lead lives which are as normal as possible; and
  - (c) to assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.’

The duty in para 6(1)(c) of schedule 2, often described as the ‘short breaks duty’, was inserted by the Children and Young Persons Act 2008. It was intended to ensure that the improvement made by investment in short breaks through the Aiming High for Disabled Children programme was not lost. The effect of the short breaks duty is that the services provided by every local authority to children in need must include both ‘crisis’ breaks and breaks designed to ensure that family life can be sustained effectively.

### The 2011 Regulations

Regulations have been made to supplement the short breaks duty, in the form of the Breaks for Carers of Disabled Children Regulations 2011 (‘the 2011 Regulations’).<sup>15</sup> The key regulations read as follows:

#### 3. Duty to make provision

In performing their duty under paragraph 6(1)(c) of Schedule 2 to the 1989 Act, a local authority must—

- (a) have regard to the needs of those carers who would be unable to continue to provide care unless breaks from caring were given to them; and
- (b) have regard to the needs of those carers who would be able to provide care for their disabled child more effectively if breaks from caring were given to them to allow them to—
  - (i) undertake education, training or any regular leisure activity,
  - (ii) meet the needs of other children in the family more effectively, or
  - (iii) carry out day to day tasks which they must perform in order to run their household.

<sup>15</sup> Para 6(2) of schedule 2 to the Children Act 1989 provides that the short breaks duty must be performed in accordance with the regulations. The effect of duties imposed by regulations is the same as if the duty was imposed by the primary legislation (i.e. an Act of Parliament).

#### 4. Types of services which must be provided

(1) In performing their duty under paragraph 6(1)(c) of Schedule 2 to the 1989 Act, a local authority must provide, so far as is reasonably practicable, a range of services which is sufficient to assist carers to continue to provide care or to do so more effectively.

(2) In particular, the local authority must provide, as appropriate, a range of—

- (a) day-time care in the homes of disabled children or elsewhere,
- (b) overnight care in the homes of disabled children or elsewhere,
- (c) educational or leisure activities for disabled children outside their homes, and
- (d) services available to assist carers in the evenings, at weekends and during the school holidays.

#### 5.— Short breaks services statement

(1) A local authority must, by 1st October 2011, prepare a statement for carers in their area (a “short breaks services statement”) setting out details of—

- (a) the range of services provided in accordance with regulation 4,
- (b) any criteria by which eligibility for those services will be assessed, and
- (c) how the range of services is designed to meet the needs of carers in their area...

CDC suggests that what this means in practice for local authorities is as follows:

- Under regulation 3, in taking decisions in relation to the commissioning and provision of short breaks local authorities must have regard to the need for both crisis short break care and breaks to help families live ordinary lives. In particular, the matters at regulation 3(b)(i)-(iii) must be given careful consideration – the need to study and undertake leisure activities, meet the needs of other children and maintain their homes and households.
- Regulation 4 extends the duty in para 6(1)(c) of schedule 2 by requiring local authorities to provide a sufficient range of services for parent carers, ‘so far as is reasonably practicable’. This range of services must be sufficient both to avoid crises and enable carers to care ‘more effectively’. The range of services in every local area must include all the different types of services listed in regulation 4(2) – daytime and overnight care, educational or leisure activities outside the home and services available in the evenings, weekends and school holidays. It is suggested that compliance with regulation 4 will require local authority commissioners and Members to consider:
  - The level of demand for short breaks from families in their area. This must go beyond simply measuring the number of families actually receiving short breaks, as there is likely to be unmet demand for services.
  - The current supply of short breaks, from all the relevant sources of support including the voluntary sector and private sector.
  - Whether the current level of supply is sufficient to meet demand.
  - If not, whether it is reasonably practicable to take steps to increase the supply.
- Regulation 5 requires local authorities to publish a ‘short breaks services statement’ which must set out the available range of services, any eligibility criteria and how the range of services should meet carers’ needs.<sup>16</sup> The short breaks services statement must be published as part of the Local Offer, not least because it will contain any eligibility criteria that the local authority is operating to govern access to short breaks.<sup>17</sup>

<sup>16</sup> See further chapter 3 of the departmental advice.

<sup>17</sup> See para 18 of schedule 2 to the SEN and Disability Regulations 2014 for the requirement that the Local Offer should include information as to eligibility criteria.



## Childcare

The 2011 Regulations do not refer to supporting parents of disabled children to work. This is because the service intended to support parents to work is childcare, and there are separate duties on local authorities in relation to childcare for parents of disabled children (up to 18) under the Childcare Act 2006. In particular:

- Section 6 of the Childcare Act 2006 imposes a duty on local authorities to secure sufficient childcare in their area for parents who wish to work or study in relation to work, so far as is 'reasonably practicable'. Importantly, section 6(2) states that in deciding whether childcare is sufficient local authorities must have regard to the needs of parents for 'the provision of childcare which is suitable for disabled children'
- Section 8 gives local authorities a power to assist any person who provides childcare, including by providing financial assistance. This would allow local authorities to meet the additional costs of childcare for disabled children, where these go beyond what providers ought to accommodate under their reasonable adjustments duty under the Equality Act 2010.

There may also be a duty to provide childcare to a disabled child under section 2 of the Chronically Sick and Disabled Persons Act 1970 if an assessment shows that this is necessary to meet the child's needs in the family context. This supplements the general childcare duty in section 18 of the Children Act 1989.<sup>18</sup>

Every 'Local Offer' must include 'sources of information, advice and support...about childcare for children with special educational needs or a disability'.<sup>19</sup>

## Other Key Duties

The primary duties in relation to commissioning short breaks are those set out in para 6(1)(c) of schedule 2 to the Children Act 1989 and the 2011 Regulations, as summarised above. However there are a number of other key statutory duties which will be relevant to local authority commissioning decisions in this area.

Firstly, section 27 of the Children and Families Act 2014 requires local authorities to

- Keep the social care provision made inside and outside its area for disabled children and young people under review (sub-section 1); and
- Consider the extent to which this provision is sufficient to meet the needs of these children and young people (sub-section 2).<sup>20</sup>

Section 27 CFA 2014 is what is sometimes described as a 'process duty'. It requires local authorities to consider these matters, not to achieve any particular outcome. However the outcome required in relation to short breaks is set by regulation 4 of the 2011 Regulations, as described above – in essence, that the provision of short breaks is sufficient to meet local need, so far as reasonably practicable. What section 27 CFA 2014 adds is a clear requirement to consider the question of sufficiency in all relevant decision-making, including budget setting. In considering sufficiency, local authorities will have to give careful

<sup>18</sup> Section 18(5) of the 1989 Act reads: 'Every local authority shall provide for children in need within their area who are attending any school such care or supervised activities as is appropriate (a) outside school hours; or (b) during school holidays.'

<sup>19</sup> See para 15(c) of schedule 2 to the SEN and Disability Regulations 2014.

<sup>20</sup> In *R (DAT and BNM) v West Berkshire Council* [2016] EWHC 1876 (Admin), the Judge held at [30] that section 27 of the 2014 Act applies where a local authority 'makes a decision which will necessarily affect the scope of the provision referred to in section 27' – i.e. education or care provision.

consideration to any relevant comments made concerning the Local Offer.<sup>21</sup> Local Authorities will need to have regard to a range of data sources, including its Joint Services Needs Assessment (JSNA) and its disabled children's register <sup>22</sup>.

Secondly, local authorities are required to carry out all their functions having regard to the need to safeguard and promote the welfare of children; see section 11(2) of the Children Act 2004.<sup>23</sup> It is very important that this duty refers to the need both to safeguard and to promote children's welfare. As such local authorities have to keep in mind the need to improve the position of children in their area, including disabled children. Section 11 of the 2004 Act will therefore be relevant to all commissioning decisions in relation to short breaks, in particular the level of budget to be allocated to this area compared with other areas.

In a similar way, the 'public sector equality duty' or 'PSED' under section 149 of the Equality Act 2010 applies to everything done by local authorities. The PSED mandates 'due regard' to a series of needs, being the need to:

- Eliminate discrimination
- Advance equality of opportunity; and
- Foster good relations between different groups.

The provision of short breaks to disabled children is obviously relevant to addressing all of these needs, as short breaks:

- Help address the discrimination disabled children face in being able to access mainstream leisure activities, clubs and so on;
- Promote equality of opportunity for disabled children compared with their non-disabled peers; and
- Increase disabled children's visibility in the community and their contact with non-disabled people (including short break workers), thus reducing stigma and improving community relations. In this regard specialist and targeted short breaks must supplement wider efforts to promote community inclusion for disabled children, particularly through making universal services more inclusive.

As a result there must be careful consideration by local authorities of the needs specified under the PSED when budgets are set and commissioning decisions are taken. The extensive case law which has developed under the PSED also demonstrates that compliance with this duty requires local authorities to understand the likely impact of their decisions and take steps to mitigate any negative impact on protected groups.<sup>24</sup> This will be particularly relevant where decisions are taken which are likely to be adverse to disabled children and families, for example decisions to reduce budgets for short breaks.

Other aspects of the Equality Act 2010 will be relevant to commissioning decisions in relation to short breaks. For example, local authorities will need to ensure that short breaks are culturally appropriate for

21 See regulation 56 of the SEN and Disability Regulations 2014 for the requirement to consider and publish comments on the Local Offer, including on 'the quality of the provision that is included and any provision that is not included'. Local authorities have a positive duty to 'seek' comments from disabled children, young people and parents on Short Break provision, as well as all the other provision covered in the Local Offer.

22 The Warwickshire case (see below in relation to the duty to assess) emphasises that the duty to maintain such a register under paragraph 2 of schedule 2 to the Children Act 1989 remains in force.

23 In *R (DAT and BNM) v West Berkshire Council* [2016] EWHC 1876 (Admin), the Judge held at [29] that section 11 of the 2004 Act 'imposes a duty on a local authority to have regard to those factors when exercising any function in a way which affects a child'.

24 See *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, the successful challenge to the first decision to close the Independent Living Fund. In *R (DAT and BNM) v West Berkshire Council* [2016] EWHC 1876 (Admin), the Judge held at [41] that 'the fundamental requirement imposed by section 149 is that a decision maker, having taking reasonable steps to inquire into the issues, must understand the impact, or likely impact, of the decision on those of the listed equality needs which are potentially affected by the decision.'

the different communities in their area to avoid indirect race discrimination.<sup>25</sup>

Local authorities will also want to keep in mind their obligations to respect the human rights of disabled children and families. Under section 6 of the Human Rights Act 1998, it is unlawful for a public body (including a local authority) to breach the rights enjoyed by their residents under the European Convention on Human Rights ('ECHR'). These rights include the right to be free from inhuman and degrading treatment (Article 3 ECHR) and the right not to be discriminated against in the enjoyment of the other Convention rights (Article 14 ECHR).

The most obvious right which may be engaged by commissioning decisions in relation to short breaks is Article 8 ECHR, which includes the right to respect for private and family life. For the purposes of Article 8 a disabled child's 'private life' includes their 'physical and psychological integrity'<sup>26</sup> and their 'ability to function socially'<sup>27</sup> – in essence, their well-being. The Courts have repeatedly held that Article 8 ECHR may impose a 'positive obligation' on public bodies to provide support to ensure that these rights are realised. For example the Court of Appeal has held that 'Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue'.<sup>28</sup>

Serious breaches of local authority assessment and care planning duties to disabled children may also result in breaches of Article 8 ECHR.<sup>29</sup> Where human rights breaches occur, children and families may be entitled to damages.<sup>30</sup>

The courts are increasingly turning to the other international human rights conventions to understand what the rights set out in the ECHR mean for disabled children.<sup>31</sup> The most prominent of these are the UN Convention on the Rights of the Child ('UN CRC') and the UN Convention on the Rights of Persons with Disabilities ('the Disability Convention'). As such it will be important for local authorities to keep in mind:

- the duty to ensure that disabled children's best interests are treated as a primary consideration in all decisions which affect them<sup>32</sup>;
- children's rights to age-appropriate play, leisure and recreational activities<sup>33</sup>; and
- the right to support for disabled children's full inclusion and participation in the community.<sup>34</sup>

25 See the departmental advice at para 2.3.

26 *Pretty v UK* (2002) 35 EHRR 1.

27 *R (Razgar) v Home Secretary* [2004] 2 AC 368 at [9].

28 See *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406 at [43].

29 See as a recent example *Kent CC v M and K* [2016] EWFC 28 in relation to breaches of the human rights of a 'looked after' girl aged 14 at the time of judgment.

30 By way of 'just satisfaction', see section 8 of the Human Rights Act 1998. The breaches in the Kent case (above) resulted in an award of £17,500 in damages, although this included damages for a lengthy failure to issue care proceedings as well as serious assessment and care planning failures over a period of three years.

31 See for example *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47. In the challenge to the 'named person' scheme in Scotland, *Christian Institute and others v Lord Advocate* [2016] UKSC 51, Lady Hale stated at [72]; 'As is well known, it is proper to look to international instruments, such as the UN Convention on the Rights of the Child 1989 ("UNCRC"), as aids to the interpretation of the ECHR.'

32 See Article 3 of the UN CRC and Article 7 of the Disability Convention.

33 See Article 31 of the UN CRC.

34 See Article 19 of the Disability Convention.

In CDC's view it is likely that careful compliance with the statutory duties set out above, and those below in relation to individual children and families, will ensure that the obligations under Article 8 ECHR are also met.

Finally, specifically in relation to older children and young people, section 507A of the Education Act 1996 requires local authorities to secure 'sufficient recreational leisure-time activities which are for the improvement of their well-being' for 13-25 year olds with learning difficulties or disabilities, subject to the same 'so far as reasonably practicable' qualification as found in regulation 4 of the 2011 Regulations.

### The West Berkshire judgment

A recent High Court judgment emphasises the importance of ensuring that funding decisions in relation to short breaks are taken in compliance with all the relevant legislation.

In *R (DAT and BNM) v West Berkshire Council* [2016] EWHC 1876 (Admin), a local authority faced with an 'exceptionally difficult financial position'<sup>35</sup> decided to reduce the funding allocated to voluntary sector providers of short breaks by 52% between 2015/16 and 2016/17. This decision was challenged by the families of two disabled children in the area.

The Judge found that this decision was unlawful because there was 'no trace' in the materials before councillors of any reference to the relevant legal duties relied on by the claimants.<sup>36</sup> As such 'members' attention was not drawn to mandatory relevant considerations'.<sup>37</sup>

The decision was also taken in breach of the PSED. Although officers had provided members with the necessary factual information that would have enabled them to have due regard to the statutory needs<sup>38</sup>, the summary of the PSED provided to members did not accurately capture the effect of the duty in the context of the decision.<sup>39</sup>

A second decision taken by the local authority to 'reaffirm' the first decision had 'no effect' because there was 'a very clear appearance of predetermination'.<sup>40</sup>

Both decisions were therefore 'quashed' by the Court, meaning the local authority will reconsider the funding to be allocated to voluntary sector short break providers.

Taking account of the West Berkshire judgment, CDC would suggest that local authorities could ask themselves the following questions to help ensure compliance with all the relevant law when taking decisions in relation to funding and commissioning short breaks:

35 Judgment at para 9.

36 Judgment at para 48. The duties relied on in particular were regulations 3 and 4 of the 2011 Regulations section 27(2) of the Children Act 2014, section 11 of the Children Act 2004 and the best value statutory guidance, which was relevant given that funding to the voluntary sector had been reduced.

37 Judgment at para 48.

38 Judgment at para 46.

39 Judgment at para 45.

40 Judgment at para 49. The Judge held that 'the way in which the issue was presented to members [for the second decision] gave a very clear impression that they were expected to apply a rubber stamp to [the first decision]'.<sup>40</sup>

Do we have the information we need about disabled children and families in our area, for example from the JSNA<sup>41</sup> and the disabled children's register?

Do we understand:

- The number of children and families in our area?
- The types of impairments and levels of need they have?
- What services they want and value?



Do we understand the current type and level of short break services available?  
Do we know what the gaps are, taking account of comments from families?

In particular, have all comments on the 'Local Offer' relating to short breaks been considered?<sup>42</sup>



Have we considered the matters required by the relevant legislation, including:

- The need to provide both crisis care and short breaks to help families care more effectively for their children.<sup>43</sup>
- The needs of both families who would be unable to continue to provide care without short breaks and families who would be able to provide care more effectively if short breaks were provided to allow them to engage in 'ordinary life' activities.<sup>44</sup>
- The extent to which the short breaks that will be available will be sufficient to meet the needs of disabled children in the area.<sup>45</sup>
- The need to safeguard and promote the welfare of disabled children<sup>46</sup> and the requirement to treat children's best interests as a primary consideration<sup>47</sup>.
- The need to eliminate discrimination faced by disabled children, advance their equality of opportunity compared with other groups and foster good community relations.<sup>48</sup>
- The need to promote the private and family lives of disabled children and their families<sup>49</sup> disabled children's rights to age-appropriate play, leisure and recreational activities<sup>50</sup> and their right to full inclusion and participation in the community<sup>51</sup>.



41 Joint Services Needs Assessment.

42 See regulation 56(2) of the SEN and Disability Regulations 2014 for the requirement to publish a response to comments on the 'Local Offer', including details of any action the authority intends to take.

43 Para 6(1)(c) of schedule 2 to the Children Act 1989, the 'short breaks duty'. See pX above.

44 Regulation 3 of the 2011 Regulations.

45 Section 27 of the Children and Families Act 2014.

46 Section 11(2) of the Children Act 2004.

47 Article 3 of the UN Convention on the Rights of the Child.

48 Section 149(1) of the Equality Act 2010, the 'PSED'.

49 Article 8 ECHR.

50 Article 31 of the UN Convention on the Rights of the Child.

51 Article 19 of the UN Disability Convention.



If the proposal conflicts with any of the needs listed above, have we considered whether the negative impact can be avoided and / or mitigated?<sup>52</sup>

Are we confident that our proposals will ensure the outcomes required by the legislation are met, including that:

- The local authority will be providing, so far as reasonably practicable, a range of services sufficient to assist carers to continue to provide care or to do so more effectively.<sup>53</sup>
- This range will include day and overnight care, educational or leisure activities and services available in the evenings, at weekends and during school holidays.<sup>54</sup>
- There will be sufficient recreational leisure-time activities for older disabled children (those aged over 13), so far as reasonably practicable.<sup>55</sup>
- Any eligibility criteria used to control access to short breaks are (1) published as part of the short breaks services statement<sup>56</sup> and (2) consistent with the duties owed to individual children and families discussed below, particularly the duty under section 2 of the Chronically Sick and Disabled Persons Act 1970.
- We are confident that we will be in a position to meet the duties owed to individual children and families.

<sup>52</sup> In the context of the PSED, decision makers must 'must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: R (*Kaur & Shah*) v LB *Ealing* [2008] EWHC 2062 (Admin) at [23]-[ 24]. CDC suggests that the same approach would be required in relation to the other 'have regard' duties in this area.

<sup>53</sup> Regulation 4(1) of the 2011 Regulations.

<sup>54</sup> Regulation 4(2) of the 2011 Regulations.

<sup>55</sup> Section 507A of the Education Act 1996.

<sup>56</sup> Regulation 5 of the 2011 Regulations.

## 5. Local Authority Duties to Individual Children and Families

The duties on local authorities in relation to short breaks for individual disabled children and families can be summarised as follows:

- Duties to assess (both the child and their parent carer(s))
- Duties to decide, subsequent to the assessment, whether it is necessary to provide short breaks
- Duties to provide short breaks where the decision is that it is necessary to do so, taking account of both the child's needs and the wider family context.

It is important to emphasise that local authorities are encouraged by the Department for Education to make short breaks available on a non-assessed basis.<sup>57</sup> It may well be that families who receive short breaks on a non-assessed basis are satisfied with this provision and will not request an assessment.

However:

- The criteria used to determine how families will receive short breaks without an assessment must be fair and non-discriminatory. For example, restricting the availability of such breaks to children who attend special schools is likely to give rise to unlawful discrimination.<sup>58</sup>
- If a child or their parent requests an assessment then (as set out below) there is a duty to assess in each case.

### Duties to Assess

In relation to the duty to assess, the House of Lords has determined that there is a duty to assess all children in need.<sup>59</sup> As set out above all 'disabled' children are children 'in need' and so are entitled to an assessment.

However the form of this assessment is not set out in the legislation. Although the guidance suggests that assessments should be carried out by social workers<sup>60</sup>, the High Court has held that children with lower levels of need may be assessed differently, for example through use of the Common Assessment Framework.<sup>61</sup>

Every local area must publish a 'threshold document' which must include details of the process and criteria for 'early help' assessments and assessments by children's social care.<sup>62</sup> Local authorities must also publish a local protocol for assessment, setting out 'clear arrangements for how cases will be managed once a child is referred into local authority children's social care'.<sup>63</sup>

In whatever form they take, assessments of disabled children must be 'holistic', taking full account of the family context. For example, the departmental advice states (para 1.7) that 'The impact of a child's disability on their siblings must be an integral part of the family's assessment.'

57 See the departmental advice at paras 4.5-4.6.

58 Under the Equality Act 2010 and / or Article 14 ECHR, which prohibits discrimination in the enjoyment of other ECHR rights. It is very likely that children attending mainstream schools would have a sufficiently clear 'status' to claim discrimination under Article 14.

59 See *R (G) v Barnet LBC* [2003] UKHL 57 at [32], [77], [106], [110], [117] (Lords Nicholls, Hope, Millett and Scott).

60 *Working Together to Safeguard Children*, March 2015, p18.

61 *R (L and P) v Warwickshire CC* [2015] EWHC 203 (Admin). The implications of the Warwickshire judgment for assessments of disabled children are considered in more detail in CDC's 'Case Law Update 4', available at <https://councilfordisabledchildren.org.uk/help-resources/resources/case-law-review-4>

62 *Working Together to Safeguard Children*, March 2015, para 18.

63 *Working Together to Safeguard Children*, March 2015, para 65.



One of the most frequently mentioned benefits to families of a short break for their disabled child is time to attend to the needs of their nondisabled children.’

Social care assessments of disabled children may also take place as part of an education, health and care needs assessment (‘EHC needs assessment’) under section 36 of the Children and Families Act 2014. Any EHC needs assessment must involve advice being obtained in relation to the child’s social care needs.<sup>64</sup>

There is also a clear duty to assess the needs of parent carers of disabled children, found in sections 17ZD-ZE of the Children Act 1989.<sup>65</sup> The required ‘parent carer’s needs assessment’ (‘PCNA’) must be carried out where it appears to the authority that the parent carer may have needs for support or the authority receive a request from the parent carer to assess.<sup>66</sup> This is a very low threshold and will usually mean that a PCNA has to be carried out on request by a parent carer of a disabled child. PCNAs can be carried out on a stand-alone basis or can be combined with any other assessment of the parent carer or disabled child. CDC would urge local authorities to ensure PCNAs are combined with child in need assessments and / or other relevant assessments wherever possible, assuming this is consistent with the family’s wishes. Completing separate PCNAs risks subjecting families to unnecessary duplication in assessments and incurring unnecessary costs. It may also make joined-up decision making on the package of support to be provided to the child and family more difficult.

The local authority must consider the completed PCNA and make a number of decisions, most importantly whether or not to provide services to the parent carer or the disabled child.<sup>67</sup> This again emphasises the requirement for a joined-up approach to be taken to the child’s needs and the parent carer’s needs.

There is however no specific duty to provide support to parent carers of disabled children following completion of a PCNA. Support to family members of disabled children can always be provided under section 17(3) of the Children Act 1989. However the duty to do so is ‘general’, i.e. no particular child or family can claim an individual right to support through this route.

PCNAs are only available for persons with parental responsibility for disabled children.<sup>68</sup> As such assessments for other family carers (for example grandparents) continue to be carried out under section 1 of the Carers (Recognition and Services) Act 1995.<sup>69</sup>

64 As required by regulation 6(e) of the SEN and Disability Regulations 2014. See further Identifying the social care needs of disabled children and young people and those with SEN as part of Education, Health and Care Needs Assessments; A briefing from the Council for Disabled Children <https://councilfordisabledchildren.org.uk/help-resources/resources/identifying-social-care-needs-disabled-children-and-young-people>

65 As inserted by section 97 of the Children and Families Act 2014. Section 1 of the Carers (Recognition and Services) Act 1995 may also require carers assessments for non-parent family carers, for example grandparents.

66 This is subject to the local authority being satisfied that the disabled child and family are eligible for support under section 17. However given the breadth of the section 17 duty this is unlikely to be an issue in many cases. Local authorities will however want to take advice on the exclusion of adults who lack the necessary immigration status from support under section 17.

67 See section 17ZF.

68 See section 17ZD(2) for the definition of a ‘parent carer’.

69 These assessments only have to be carried out where the person ‘provides or intends to provide a substantial amount of care on a regular basis for the disabled child’; section 2(b).



## Duties to Provide

Local authorities are always able to go beyond their duties and provide short breaks to *any* disabled child where they consider that to do so would help safeguard or promote their welfare, see section 17(1) of the Children Act 1989. However given the increasing pressure on local authority budgets it is essential that local authorities identify in every case whether there is a specific duty to provide short breaks, following an appropriate assessment.

There are two ‘specific’ duties which may result in a right to short breaks for disabled children, being those in section 2(4) of the Chronically Sick and Disabled Persons Act 1970 (‘CSDPA 1970’) and section 20(1) of the Children Act 1989.

The duty in section 2(4) of the CSDPA 1970 is to provide any of a specified list of services where the outcome of an assessment<sup>70</sup> is a decision that it is necessary to do so. The list of services which may be ‘necessary’ for a child is in section 2(6), and includes short breaks at home and in the community.<sup>71</sup>

Local authorities can take account of their resources in determining whether it is ‘necessary’ to meet a child’s needs.<sup>72</sup> It is likely that the law also permits local authorities to take account of the resources available to the family in deciding whether it is ‘necessary’ to provide short breaks.<sup>73</sup> Consideration of family resources must however be rational, reasonable and fair, taking proper account of all relevant matters including financial and other pressures on the family.

However once a local authority accepts that it is ‘necessary’ to meet a child’s needs (whether through providing short breaks or otherwise), the duty under the CSDPA 1970 is to provide an appropriate level of support to meet those needs. Consideration of the local authority’s resources is then limited to ensuring that the most cost-effective (not necessarily the cheapest) option is chosen.<sup>74</sup>

The duty under the CSDPA 1970 can be discharged either by the local authority commissioning or providing services or by making a ‘direct payment’ to the family.<sup>75</sup> Where direct payments are made these must meet the reasonable cost of securing the necessary services.<sup>76</sup> The relevant guidance states that:

‘This means that the direct payments should be sufficient to enable the recipient lawfully to secure a service of a standard that the council considers is reasonable to fulfil the needs for the service to which the payments relate. There is no limit on the maximum or minimum amount of direct payment either in the amount of care it is intended to purchase or on the value of the direct payment.’<sup>77</sup>

70 See *R (Spink) v Wandsworth LBC* [2005] EWCA Civ 302 for the connection between the duties under the Children Act 1989 (here the assessment duty) and the service provision duty under the CSDPA 1970.

71 See *R (JL) v Islington LBC* [2009] EWHC 458 (Admin) at [98]-[99]. Short break care in the child’s home is provided under section 2(6)(a), while the provision of ‘recreational facilities outside the home’ is covered by section 2(6)(c).

72 *R v Gloucestershire CC ex parte Barry* [1997] AC 584.

73 See *R (KM) v Cambridgeshire CC* [2012] UKSC 23 at [19] and *R (Spink) v Wandsworth LBC* [2005] EWCA Civ 302 at [46], a case about housing adaptations which is likely also to apply in the short break context.

74 See *R (KM) v Cambridgeshire* [2012] UKSC 23 at [19]-[23].

75 Direct payments are made under section 17A of the Children Act 1989 and the Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2009. There is a duty to make direct payments to parents of disabled children where the requirements of regulation 7(1)(c) of the 2009 Regulations are met. See further paras 2.11-2.18 of the departmental advice

76 See the definition of ‘gross payments’ in section 17A(3A)(a)

77 DH / DCSF, Guidance on direct payments for community care, services for carers and children’s services, England 2009, para 111.

Direct payments must also cover ‘associated costs that are necessarily incurred in securing provision, without which the service could not be provided or could not lawfully be provided’.<sup>78</sup> The guidance gives the following examples of these costs; ‘recruitment costs, National Insurance, statutory holiday pay, sick pay, maternity pay, employers’ liability insurance, public liability insurance and VAT’.

The CSDPA 1970 duty does not extend to the provision of accommodation.<sup>79</sup> As such there will only be a ‘specific’ duty to provide overnight breaks to disabled children when the duty under section 20(1) of the Children Act 1989 applies. This duty is intended only to address ‘actual crises’.<sup>80</sup>

CDC considers that short breaks should be provided under section 20 of the 1989 Act where it is appropriate to do so, and in particular where the test in section 20(1) is met – in short, that the parent(s) is / are prevented from providing the child with suitable accommodation or care. However it is vital that short breaks should not be provided under section 20 in a way that masks safeguarding concerns and delays or prevents local authorities taking appropriate action to address these concerns, including initiating care proceedings.

For families who are not in crisis, overnight short breaks will be provided to children under either section 17(6) or section 20(4) of the Children Act 1989.<sup>81</sup> Neither of these provisions are ‘specific’ duties and so there is no right to services under them. It is very important that local authorities are clear whether overnight breaks are being provided under section 17(6) or section 20(4) of the 1989 Act, as it is only provision under section 20(4) which can give rise to ‘looked after’ status with its additional protections.<sup>82</sup> The statutory guidance on short breaks gives detailed advice on when it is appropriate for short breaks to be provided under section 20(4).<sup>83</sup>

Direct payments cannot be used to purchase prolonged periods of residential care (being capped at a maximum of four consecutive weeks in any period of 12 months).<sup>84</sup>

## Planning and Review Requirements

Where services such as short breaks are provided to disabled children following an assessment, there must be a clear plan setting out who is going to do what, where and when to help the child. In this regard the Working Together guidance states (para 53):

‘Where the outcome of the assessment is continued local authority children’s social care involvement, the social worker and their manager should agree a plan of action with other professionals and discuss this with the child and their family. The plan should set out what services are to be delivered, and what actions are to be undertaken, by whom and for what purpose.’

As set out in chapter 2 of the statutory guidance, where a child is receiving overnight short breaks under

78 Direct payments guidance, para 114.

79 See *JL v Islington* at [98].

80 See *JL v Islington* at [96].

81 See chapter 2 of the statutory guidance.

82 There is a ‘modified’ form of looked after status for disabled children attending certain residential short breaks under section 20(4), see regulation 48 of the Care Planning, Placement and Case Review (England) Regulations 2010. The requirements of regulation 48 are addressed in the short breaks statutory guidance (see below), see in particular para 2.18-2.23. A key requirement is a short break care plan for the child, addressing the matter set out at paras 2.20-2.21.

83 DCSF, *Short Breaks: Statutory Guidance on how to safeguard and promote the welfare of disabled children using short breaks*, April 2010 – see in particular paras 2.7-2.8.

84 Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2009 regulation 13.

section 20 of the Children Act 1989, there will be a requirement for either a care plan or a short break care plan.

The statutory guidance states (para 3.19) that reviews for children who are receiving short breaks but who are not looked after should take place at least every six months. Reviews for looked after children must take place in accordance with the Care Planning, Placement and Case Review Regulations 2010.

Further information on planning and review requirements for ‘looked after’ children is given in the parallel legal guide on the use of section 20 of the Children Act 1989.

## Charging

Local authorities have the power to charge for services provided under section 17 of the Children Act 1989.<sup>85</sup> For children under 16, local authorities may take account of the parents’ financial circumstances in deciding what if any charge to levy. For 16 and 17 year olds it is the child’s own means which must be taken into account. Local authorities may not charge a person who is in receipt of income support or a range of other benefits.<sup>86</sup> The amount charged cannot be more than the person can reasonably be expected to pay.<sup>87</sup>

CDC would suggest however that local authorities should avoid charging for short breaks, because to do so may result in:

- Increased pressure on families who are unwilling to pay charges for breaks; and
- Challenges in relation to discrimination or unfairness in charging policies.

## Deprivation of liberty

The provision of short breaks to disabled children may raise issues as to ‘deprivation of liberty’ within the meaning of Article 5 of the European Convention on Human Rights. The Supreme Court has held that the ‘acid test’ for a deprivation of liberty is that the person is under continuous supervision and control and is not free to leave the setting.<sup>88</sup> This is most likely to arise in the provision of residential breaks, but could also apply to day activities.

If there are concerns in relation to deprivation of liberty legal advice will need to be sought on the facts of the individual case. It is essential that any deprivation of liberty is appropriately authorised. In many cases, parents of children will be able to provide consent to avoid what would otherwise have been a deprivation of liberty.<sup>89</sup> However this will not apply for (1) many looked after children, including children who are subject to a care order and (2) children aged 16 or 17.<sup>90</sup> In these cases authorisation will be needed from the courts.

85 See section 29 of the 1989 Act.

86 See section 29(3).

87 See section 29(2).

88 *Cheshire West and Chester Council v P* [2014] UKSC 19.

89 *Re D (A Child) (Deprivation of Liberty: Parental Responsibility)* [2015] EWHC 922 (Fam)

90 *Birmingham CC v D* [2016] EWCOP 8

## 6. Using eligibility criteria to control access to short breaks<sup>91</sup>

Local authorities have finite budgets and are faced with potentially limitless demand for short breaks. As such it is unsurprising that the courts have upheld the use of eligibility criteria by local authorities to control access to short breaks. The fundamental principles of the lawful use of eligibility criteria are that:

- Short breaks are provided to first to children and families with higher levels of need before children and families with lower levels of need; and
- Children whose needs are assessed to meet the 'specific' statutory duties receive a level of service (or direct payments) sufficient to meet those needs.

It is essential to keep in mind the distinction between using eligibility criteria to limit access to assessments and using criteria to limit access to services. As set out above, all 'disabled' children are entitled to some form of assessment from their local authority in relation to the provision of services such as short breaks. A local authority which chooses to assess some disabled children via the Common Assessment Framework and others through a social work led assessment will need rational and appropriate criteria to distinguish between these groups. Criteria which prevent some disabled children from accessing any form of social care-related assessment are highly likely to be unlawful.

In relation to access to services such as short breaks, important guidance for local authorities can be found in the *Islington* judgment.<sup>92</sup> In that case the High Court made clear that:

- Eligibility criteria can only be used after an assessment of the child's needs, not in place of an assessment at the appropriate level for the child, in accordance with the local assessment protocol.<sup>93</sup>
- Criteria need to distinguish between the relevant statutory duties, and in particular must reflect the duties under section 2(4) CSDPA 1970 and section 20(1) Children Act 1989 summarised above.
- Where criteria are used in relation to the CSDPA 1970 duty, there must be no 'cap' on the maximum amount of support available.<sup>94</sup>
- In setting the criteria, local authorities must keep in mind all the relevant commissioning duties set out above. In the *Islington* case the criteria had been set in breach of the predecessor to the PSED.<sup>95</sup>

It is essential that local authorities are transparent with families about any eligibility criteria used to control access to short breaks. There is now a statutory requirement for any eligibility criteria being operated by local authorities in this area to be published as part of their Local Offer.<sup>96</sup> Moreover any relevant criteria must be included in the short breaks services statement required by regulation 5 of the 2011 Regulations, which must itself be part of the Local Offer.

91 See further chapter 4 of the departmental advice.

92 *R (JL) v Islington LBC* (see footnote 71)

93 It is suggested that this requirement does not prevent local authorities adopting simple criteria for access to non-assessed short breaks, so long as (1) these criteria are fair and non-discriminatory and (2) families are clear that they are always entitled to an assessment which will lead to an individualised decision about the level of short breaks to which the child and family may be entitled. The provision of short breaks on a non-assessed basis is supported by the departmental advice to local authorities published in 2011, see paras 4.5-4.6.

94 This reflects the fact that, as set out above, there is an absolute duty to meet eligible needs under the CSDPA 1970, subject only to the requirement to ensure that cost-effective methods of meeting needs are chosen.

95 Being the duty then found in section 49A of the Disability Discrimination Act 1995, the 'disability equality duty'.

96 See para 18 of schedule 2 to the SEN and Disability Regulations 2014.

## 7. Health responsibilities

Following the reforms introduced by the Health and Social Care Act 2012, the primary responsibility for meeting the health needs of disabled children rests with Clinical Commissioning Groups (CCGs). Certain specialised services (for example ‘tier 4’ child and adolescent mental health services) are dealt with at a national level by NHS England.

The primary duty on CCGs is to commission services ‘to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility’.<sup>97</sup> This implies a duty to assess disabled children to see if it is necessary to meet their reasonable requirements for short breaks.

All specialist health provision for disabled children must be clearly set out in each Local Offer.<sup>98</sup>

There are important co-operation duties on local authorities and CCGs, including:

- Children Act 2004 section 10, which requires local authorities and health bodies to co-operate to safeguard and promote the welfare of children in their area
- NHS Act 2006 section 82, which requires NHS bodies and local authorities to co-operate to advance the health and welfare of their populations
- Children and Families Act 2014, which imposes a range of duties in relation to co-operation including a requirement for joint commissioning arrangements to be in place in every area (section 26).

It is important to keep in mind that there are limits to the kind of health-related support that can be provided by a local authority. In particular local authorities are not permitted to act as a ‘substitute NHS for children’.<sup>99</sup> As such high levels of medical care (including nursing care) for children will be the responsibility of CCGs, not local authorities. Under the Children and Families Act where a disabled child with complex needs has an Education, Health and Care Plan, the CCG must ‘arrange the specified health care provision for the child or young person’, see section 42(3). However many disabled children with complex health needs who may need short breaks will not have the significant special educational needs required for an EHC Plan to be put in place.

Guidance for children with complex needs is found in the National Framework for Children and Young People’s Continuing Care (reissued February 2016).<sup>100</sup> The National Framework is said merely to provide ‘advice’ to CCGs and so is unlikely to impose any formal legal obligations. However any CCG which departs significantly from the National Framework may have to justify this if challenged in court. The National Framework sets out a three stage process of assessment, decision making and development of a package of care. Decisions on eligibility for continuing care should be provided to families within 6 weeks. Eligibility should be determined by reference to the ‘decision support tool’, which considers the level of a child’s needs across a number of ‘domains’. Importantly, the National Framework states that ‘Unless there is a good reason for this not to happen, continuing care should be part of a wider package of care, agreed and delivered by collaboration between health, education and social care’.

CCGs will also need to consider disabled children’s rights to health, including those in article 25 of the UN Convention on the Rights of Persons with Disabilities and article 24 of the UN Convention on the Rights of the Child, which will be relevant when decisions are made which engage the rights protected under the Human Rights Act 1998. Both the UN Conventions describe disabled children’s rights to the

97 Section 3 of the National Health Service Act 2006 (as amended).

98 See para 12 of schedule 2 to the SEN and Disability Regulations 2014.

99 See *R (T and D) v Haringey LBC* and another [2005] EWHC 2235 (Admin) at [68].

100 Available at <https://www.gov.uk/government/publications/children-and-young-peoples-continuing-care-national-framework>

‘highest attainable standard of health’.

Children who are accepted to be eligible for continuing care will be entitled to a personal budget, and can receive a direct payment.<sup>101</sup> There is however no right to direct payments in health – it will be up to the CCG in each case to decide whether the child’s needs should be met that way if it is what the family want, subject to the usual public law requirements of fair, rational and reasonable decision making.

Following the Children and Families Act reforms, it should be possible for education, social care and health to join up funding in a co-ordinated Personal Budget, with some or all of the funds paid by a direct payment. The SEND Code of Practice supports this at para 9.111

Local authority commissioners and their partners should seek to align funding streams for inclusion in Personal Budgets and are encouraged to establish arrangements that will allow the development of a single integrated fund from which a single Personal Budget, covering all three areas of additional and individual support, can be made available. EHC plans can then set out how this budget is to be used including the provision to be secured, the outcomes it will deliver and how health, education and social care needs will be met.

## 8. Transition to adulthood

It is vitally important that disabled children and families do not suddenly lose their entitlement to short breaks as the child turns 18 and becomes an adult. It is particularly important that local authorities and CCGs take into account the fact that support from school may be coming to an end when deciding on packages of care for young people over 18, including short breaks.

To address this, the Care Act 2014 has introduced:

- A number of duties to carry out transition assessments, including duties in relation to children and their family carers as the child approaches their 18th birthday<sup>102</sup>; and
- Important duties to ensure the continuation of provision from children’s services until the full process of transition under the Care Act 2014 has been completed.<sup>103</sup> This means either a decision that the eligibility criteria are not met or (if the young person has eligible needs) that support is in place pursuant to a care and support plan.

The key duty on local authorities under the Care Act 2014 is to meet eligible needs.<sup>104</sup> Unlike under the CSDPA 1970 for children, there is no specified list of services which local authorities must provide. However local authorities are required to take into account the wishes and preferences of the adult

<sup>101</sup> See NHS England, *Guidance on the “right to have” a Personal Health Budget in Adult NHS Continuing Healthcare and Children and Young People’s Continuing Care*, September 2014. ‘Personal budgets’ may be ‘notional’ (held by the local authority), held by a third party or involve a direct payment to the family. There may be ‘exceptional circumstances’ (guidance p15) where a personal health budget can be refused; the guidance suggests this could be ‘due to the specialised clinical care required or because a personal health budget would not represent value for money as any additional benefits to the individual would not outweigh the extra cost to the NHS’.

<sup>102</sup> See sections 58-65 of the Care Act 2014. All references in the footnotes which follow unless otherwise stated are to the Care Act 2014.

<sup>103</sup> See section 66, covering provision of services under section 17 Children Act 1989 and section 2 CSDPA 1970 and giving particular consideration to situations where an EHC Plan is no longer to be maintained for the young person.

<sup>104</sup> See section 18. Eligibility is determined by reference to the Care and Support (Eligibility Criteria) Regulations 2015, made under section 13.



before deciding how eligible needs should be met.<sup>105</sup> Where possible care and support plans must be agreed between the adult and the local authority.<sup>106</sup>

There is also an important duty in section 5 of the Care Act 2014, which requires local authorities to shape the market in services in their area. As such local authorities must take steps to ensure there is a sufficient supply of short breaks to meet local need as disabled young people transition to adulthood.

Effective transition planning for disabled young people with complex health needs is legally even more important. This is because of the requirement to ensure that the health and associated care needs of disabled adults who are eligible for NHS continuing care are met by CCGs rather than local authorities. Both the National Frameworks for children<sup>107</sup> and adults<sup>108</sup> emphasise the importance of effective transition planning well before the young person's 18th birthday.

The children's framework specifies at para 117 that:

- At 14, the young person should be brought to the attention of the CCG as likely to need an assessment for NHS Continuing Healthcare.
- At 16-17 years of age, screening for NHS Continuing Healthcare should be undertaken using the adult screening tool, and in appropriate cases there should be an agreement in principle that the young person has a primary health need, and is therefore likely to need NHS Continuing Healthcare .
- At 18 years of age, full transition to adult NHS Continuing Healthcare or to universal and specialist health services should take place.

Young people who have been provided with short breaks under section 20 of the Children Act 1989 and have therefore been 'looked after' may well benefit from the leaving care provisions under the 1989 Act. Information in relation to these duties is set out in the parallel legal guide in relation to the use of section 20.

## 9. Frequently Asked Questions

### ***Is it accurate to describe short breaks for disabled children as a 'non statutory' service?***

No. As set out above there are a raft of relevant statutory duties governing the provision of short breaks to disabled children. These duties range from 'general' duties in relation to sufficiency (regulation 4 of the 2011 Regulations) to 'specific' duties to provide short breaks to individual disabled children (section 2(4) CSDPA 1970; section 20(1) Children Act 1989).

### ***When does the law require a local authority to provide a family with short breaks?***

In essence:

- When the local authority decides following an assessment of the child, taking into account any PCNA, that it is necessary to provide short breaks at home or in the community to meet the child's needs (section 2(4) CSDPA 1970); or
- When a family are in 'actual crisis' and the parents are temporarily prevented from providing the child with suitable accommodation or care (section 20(1) Children Act 1989).

<sup>105</sup> See in particular the duty to promote individual well-being in section 1

<sup>106</sup> See section 25(5).

<sup>107</sup> National Framework for Children and Young People's Continuing Care (reissued February 2016), paras 111-128.

<sup>108</sup> National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (revised November 2012), paras 124-138.

This means that not every 'disabled' child will be entitled to a short break. The law requires that a proper assessment is carried out where a family may want or need services above those available locally without an assessment, and careful decisions are made about whether either of the above duties apply in the light of the assessment.

### ***Are short breaks a service for the child or the family?***

Both. Short breaks are services provided to children. As such they must comply with the overarching obligation in section 17(1) of the Children Act 1989 to safeguard and promote the child's welfare. It is inconsistent with that obligation to simply 'warehouse' children so that their parent(s) get a break. In every case a short break must be a positive experience for the child.

At the same time it is clear from para 6(1)(c) of schedule 2 to the 1989 Act that a key purpose of short breaks is to give families a break from caring. As such a service which requires a parent to attend with their child is not a short break, albeit that it may be an entirely appropriate way of meeting other assessed needs.

As such para 1.1 of the departmental advice states:

'We know that short breaks benefit both disabled children and their parents.

Children benefit from new interests, relationships and activities, while parents can catch up with 'everyday activities' (sleep, cleaning, shopping), attend to their physical and psychological wellbeing, and maintain and develop social networks.'

### ***Where should short breaks be recorded in a child's EHC Plan?***

Where a short break (other than an overnight break) is provided following an assessment which shows that the break is necessary to meet the child's needs, then it is discharging the local authority's duty under section 2(4) of the Chronically Sick and Disabled Persons Act 1970. In that case, the short break provision should be recorded in section H1 of the child's EHC Plan.

In all other cases, short break provision should be recorded in section H2 of the child's EHC Plan.<sup>109</sup> This will include all overnight or residential breaks, as accommodation cannot be provided under the 1970 Act.

<sup>109</sup> At least insofar as the provision is 'reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN', which will usually be the case. See SEN and Disability Code of Practice at p162 and p168.