

# Challenging cuts to short break services

Steve Broach / Alex Rook - January 2015

*This document was prepared with input from Alex Rook, Partner at Irwin Mitchell Solicitors and Steve Broach, Barrister at Monckton Chambers*

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## Introduction

This resource is intended to:

1. Promote awareness of the 'short breaks duty' and what short break provision families with disabled children should expect to be available in their area
2. Explain the legal framework around the provision of short break services highlighting opportunities for families with disabled children to challenge cuts to these services
3. Provide template letters to families with disabled children to help challenge decisions by local authorities that result in cuts to the provision of short break services
4. Signpost families to sources of legal support

## What are 'short breaks' and why do they matter?

Short breaks are part of a continuum of services which support disabled children 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<sup>1</sup>.

Short breaks are a fundamental support service to families with disabled children, helping them to lead ordinary lives. In October 2006, the parliamentary hearings on services to disabled children found overwhelming evidence for the positive impact of short breaks for families with disabled children and identified a lack of access to these services as the single biggest cause of unhappiness with service provision for families with disabled children.

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<sup>1</sup> Short Breaks: Statutory guidance on how to safeguard and promote the welfare of disabled children using short breaks, para 2.1

Over 10 years, successive Mencap surveys have found in the region of 80 per cent of parent carers of children with learning disabilities say they have reached or are close to reaching 'breaking point'. Families with disabled children often face extremely high levels of stress and this has a significant impact on the health and relationships of parent carers. A survey by Contact a Family in 2004 found that 76 per cent of families had experienced stress or depression and 72 per cent were suffering from lack of sleep.

Access to short breaks mitigates these problems and the Short Breaks Pathfinder Evaluation study found a direct relationship between the level and range of short breaks and '*lower levels of psychological distress, higher levels of life satisfaction and better health*'.

Short breaks also have a direct positive impact on the disabled children and young people that benefit from them. Parent carers who contributed to EDCM's short break services tracking research and the Department for Education's short breaks pathfinder evaluation were enthusiastic about the improved confidence and maturity their children gained by participating in quality short breaks. The opportunity to experience new activities and socialise with peers helps disabled children and young people develop skills required to live more independently and reach their potential. Most importantly, quality short breaks provide opportunities for children and young people to have fun, opportunities which are much more readily available to their non-disabled peers, and these opportunities are highly valued by children, young people and parents.

## **Investment in short breaks – Aiming High for Disabled Children**

However, prior to the parliamentary hearings in 2006, gaining access to short break services was extremely difficult. A key theme that emerged in the hearings was that families with disabled children were forced to fight to get access to the right services for their child and the support that would allow their family to function. The Government responded to this problem with the Aiming High for Disabled Children: Better Support for Families report, part of the 2007 Comprehensive Spending Review. This committed £340 million revenue funding between 2008 and 2011 to transform Local Authority services for disabled children, with £280 million specifically allocated to expand the types of short break service available and increase accessibility to disabled children, young people and their families. This grant was intended to make provision for an additional 40,000 fortnightly short breaks between 2008-11.

In December 2008, the Children's Plan committed an additional £90 million local authority capital funding for short break services from 2008 to 2011, bringing the funding allocation for short breaks for this period to £370 million. In addition, the Department of Health's 2009 Child Health Strategy '*Healthy lives, brighter futures*' announced that £340 million of Primary Care

Trust baseline funding for 2008/09– 2010/11 should be allocated to disabled children to be spent on short breaks, community equipment, wheelchairs and children's palliative care.

The Government and EDCM undertook research to assess the impact of this unprecedented investment in short break services and both found significant improvements, although these were unevenly spread across the country. The most important benefit for families with disabled children was the much greater levels of provision that allowed local authorities to move away from a crisis model, where residential short breaks were provided to a low volume of children at high cost, to a preventative model where far greater numbers of families benefited from provision that was far more responsive to their needs and cheaper to provide.

In many areas, this move was assisted by the development of self-referral models that allowed families to access provision without having to undertake social care assessments, which were typically required only for the most intensive interventions. These models were popular with many parent carers because they enabled families to receive services more easily and empowered them to meet their own needs through the available provision.

## The short breaks statutory duty

EDCM considered it essential to campaign for stronger rights to regular, reliable and appropriate short breaks for the disabled children and their families, in addition to the increased funding through AHDC. To this end, EDCM campaigned to get the Children and Young Persons Act 2008 amended to include a new duty to provide short breaks.

The 2008 Act inserted a new sub-paragraph into paragraph 6(1) of Schedule 2 to the Children Act 1989, so that this paragraph now reads as follows (amendment underlined):

(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 wording of new sub-paragraph (c) is critically important. The duty on Local Authorities to provide breaks from caring is to provide breaks intended not only to avoid crises but to support parents to care 'more effectively'. This dual purpose for short breaks is expanded on in the regulations made under the new duty, being the Breaks for Carers of Disabled Children Regulations 2011.

The central aspects of the 2011 Regulations include:

- Local Authorities must not only consider the needs of parent carers who are at crisis point, but must also *'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 undertake education, training or any regular leisure activity, meet the needs of other children in the family more effectively, or carry out day to day tasks which they must perform in order to run their household'* (regulation 3)
- Local Authorities 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' (regulation 4). These services must include a range of:
  - day-time care
  - overnight care
  - educational or leisure activities for disabled children outside their homes, and
  - services available to assist carers in the evenings, at weekends and during the school holidays
- Local Authorities are required to publish a short breaks services statement (regulation 5), which must set out details of:
  - the range of services provided in accordance with regulation 4
  - any criteria by which eligibility for those services will be assessed, and
  - how the range of services is designed to meet the needs of carers in their area.

The short breaks duty therefore requires provision of a range of short breaks which give disabled children the same opportunities to play and socialise that other children experience, while allowing their parents to provide care more effectively through having a break from caring. Although the duty under regulation 4 is to provide the range of services *'so far as is reasonably practicable'*, this does not mean that a Local Authority is free to reduce funding for short breaks and prioritise other services. Parliament has clearly stated that short breaks should be funded so far as possible taking competing pressures into account – in other words, that funding for short breaks must be a priority for Local Authorities when budgets are set.

## **Funding for short breaks after Aiming High for Disabled Children**

A key intention of Parliament in passing the short breaks duty was to sustain the improvement in short break provision beyond the life of the ring-fenced AHDC funding. Concerns about sustainability were borne out by the fact that

in many areas funding ear-marked for short breaks through PCT funding was not dedicated to this purpose. EDCM's research later revealed that some areas began making cuts to short breaks provision even before the end of AHDC funding, despite the passage of the new legal duty.

An additional £800m was announced in December 2010 by the Department for Education (DfE) explicitly to continue investment into Short Break Services, as well as £40m capital investment in 2011-12. This continued investment in short breaks was made available through the Early Intervention Grant (EIG)<sup>1</sup> for four years, allocated in sums of £198m/£202m/£206m/£210m between 2011/12 and 2014/15.

However, there has been dissatisfaction with how the EIG has distributed funds to local authorities. According to the Local Government Association, the total EIG represented a 32 per cent budget cut compared to all the previous grants that it replaced. The EIG was subsequently transferred into the Business Rates Retention (BRR) system from 2013-14, with funding for expanding early education for disadvantaged children taken out of the EIG and transferred into the ringfenced DSG that amounted to £534 million in 2013/14 and £760 million in 2014/15. In addition, a 'top-slice' of £150m per year was retained by the DfE and later allocated back to local authorities as specific non-ringfenced grants including the special educational needs reform grant of £70m in 2014/15.

Elizabeth Truss MP, then Minister for Education and Childcare, responded to a Parliamentary Question in January 2014 that funding for early intervention through the EIG (and subsequently BRR system), DSG and DfE funding through its 'top-slice' had actually increased from £2.2 billion in 2011-12 to £2.5 billion in 2014-15 despite complaints by local authorities of increasing budgetary pressures caused by these changes. The complex changes to the funding streams for children's services has obscured the explicit intention of additional funds granted to local authorities over this period to sustain the development of short break services.

## Cuts to short break services in 2015/16

After successive years of cuts to Local Authority budgets (albeit that it appears funding for early intervention services such as short breaks has actually been maintained to date), the 2015/16 financial year is likely to see significant cuts to children's services generally and short break services for disabled children in particular. One particularly striking example is Hampshire, which has consulted on reducing its short breaks budget for 2015/16 by £1.85 million, a reduction of nearly two thirds from its current budget of £3 million. Many other Local Authorities are also proposing significant cuts to the funding available for short break services.

It is therefore essential that disabled children and young people, parents and local groups understand the legal basis for short break services so that these

<sup>1</sup> The EIG brought together a range of ringfenced and non-ringfenced funding streams into a single non-ringfenced grant for children's services not included in the Dedicated Schools Grant (DSG).

proposed cuts can be challenged. Local Authorities will set their budgets for 2015/16 in February 2015. There is therefore still (just) time to lobby Councillors, in particular the Lead Member for Children's Services<sup>1</sup>, to seek to persuade them to remove or reduce any proposed cuts to short break services. The template letters included towards the end of this resource can assist with this.

Although it will be most helpful to raise legal issues in relation to cuts to short break services before Local Authority budgets are set, it is still useful to raise many of the issues set out below at any point. A Local Authority budget is simply an estimate of its expenditure. It is always open to a Local Authority to spend more than its budget in a particular area – and indeed it may have to do so if this is required in order to comply with its legal duties, as may well be the case in relation to short breaks.

Also, even if budgets are cut the next question is how the available funds are going to be allocated. Many of the issues below – for example the '*sufficiency duties*' (being duties to secure a sufficient supply of short break services) and the Public Sector Equality Duty – are directly relevant to how funds are allocated and how decisions are taken about the way in which spending on short breaks is reduced.

## Legal Issues

There are five key sources of law which can require Local Authorities to provide short break services to disabled children and their families, whether generally or to specific children and families:

1. The short breaks duty set out above – contained in **paragraph 6(1)(c) of the Children Act 1989 and the Breaks for Carers of Disabled Children Regulations 2011**. This duty requires the provision of a wide range of short breaks that is sufficient to meet local need. To comply with the duty Local Authorities will need to know how many disabled children live in their area, what their level of need for short breaks is likely to be and what services are available and will then need to assess whether the available services are sufficient to meet the anticipated need. Many Local Authorities have chosen to comply with the short breaks duty by providing breaks on a '*non-assessed*' basis – i.e. a certain level of break is available when a minimum level of need is shown without any detailed assessment. This is good practice though not required by law; what is required is that any eligibility criteria governing access to any type of short break are published so that families can understand them. The new SEND Code of Practice (at para 4.44) requires that these criteria, which must be included within the Short Breaks Services Statement, are published alongside the 'Local Offer' which is a central plank of the reforms introduced by the Children and Families Act 2014.

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<sup>1</sup> This is the elected councillor who has specific responsibility for children's services within the Council.

**2. Section 2 of the Chronically Sick and Disabled Persons Act ('CSDPA') 1970.**

The CSDPA 1970 is the legal duty which creates the individual right to short break services for some disabled children<sup>1</sup>. Although the CSDPA 1970 duty is complex, its essence is that it requires Local Authorities to provide services (or direct payments) to meet needs where it is 'necessary' to do so. In deciding whether it is 'necessary' to meet a disabled child's needs, a Local Authority is entitled to take account of its resources<sup>2</sup>, which means the threshold for when it is 'necessary' to provide a service may be higher when there is less funding available to the Local Authority. However once it is accepted that it is necessary to meet a child's needs by providing (for example) a short break service, then that service must be provided regardless of cost<sup>3</sup>. The way in which a Local Authority should determine whether it is necessary to meet a disabled child's needs through the provision of short break services is by undertaking an assessment pursuant to section 17 of the Children Act 1989 and the *Working Together to Safeguard Children* statutory guidance. Disabled children are all children 'in need' under Children Act 1989 section 17(10)(c) and (11) and so are entitled to a social work assessment under the *Working Together* guidance on request.

**3. Section 27 of the Children and Families Act 2014.** This new duty, in force from September 2014, requires every Local Authority to consider the extent to which the social care (and educational) provision is sufficient to meet the needs of children and young people in its area. Much like the short breaks duty discussed above, this requires the Local Authority to know (1) what the level of need for short breaks is in its area and (2) whether these needs are being met through the provision of sufficient short breaks.

4. Human rights obligations, in particular **Article 8 of the European Convention on Human Rights (ECHR)**. The provision of short breaks is a central way in which the state fulfils its obligation to respect the family and private life rights of disabled children and their family members under Article 8 of the European Convention on Human Rights. These rights are informed by the other relevant international conventions, including the UN Convention on the Rights of the Child (UNCRC) and the UN Convention on the Rights of Persons with Disabilities (UNCRPD). In particular, Article 19(b) of the UNCRPD requires a range of community support to be provided to disabled

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<sup>1</sup> The CSDPA 1970 currently imposes the main duty to provide social care services to both disabled children and adults. From 1 April 2015 the CSDPA 1970 duty is being repealed in relation to disabled adults when the Care Act 2014 comes into force, however the CSDPA 1970 duty will remain in force for disabled children. Short breaks in a child's home are provided under section 2(1)(a) of the CSDPA 1970 and short breaks in the community (such as specialist play and leisure activities) are provided under section 2(1)(c).

<sup>2</sup> As decided by the House of Lords (by a 3:2 majority) in *R v Gloucestershire CC ex parte Barry* [1997] AC 584.

<sup>3</sup> The High Court's judgment in *R (JL) v Islington LBC* [2009] EWHC 458 (Admin) establishes that it is unlawful for Local Authorities to 'cap' the level of short breaks given to disabled children to meet the CSDPA 1970 duty, the duty being to meet the child's eligible assessed needs.

children (and adults) and Article 23 of the UNCRC calls for 'special care' for disabled children. Most powerfully, Article 3 of the UNCRC requires the best interests of children (including disabled children) to be 'a primary consideration' in all decisions taken affecting them. This means that disabled children's interests must be considered first and can only be overridden if all other factors outweigh them<sup>1</sup>. It is well established that the best interests obligation under Article 3 UNCRC applies both to high level decisions such as the setting of budgets as well as decisions about individual children<sup>2</sup>. Article 3 UNCRC (read with Article 8 ECHR) therefore requires analysis of the impact of any proposed reduction of funding for short breaks for disabled children.

5. Duties under the **Equality Act 2010**. Firstly, Local Authorities and providers of short break services are required to make '**reasonable adjustments**' to their policies, procedures and practices to promote access to short break services for all disabled children<sup>3</sup>. While cost is a relevant factor in deciding whether it is 'reasonable' to make an adjustment, if it is 'reasonable' to change the way a short break service is provided then the cost of doing so cannot be passed on to the family.<sup>4</sup> Secondly, the **Public Sector Equality Duty under section 149 of the Equality Act 2010** requires Local Authorities to have 'due regard' to a series of specified needs relating to disabled children (amongst other protected groups) when carrying out their functions. The need which is most relevant to short breaks is the need to advance equality of opportunity for disabled children.<sup>5</sup> There is no duty on Local Authorities to achieve this result, but Local Authorities must take this need into account in all their decision making, including decisions about how much funding to allocate to short break services.

Where Local Authorities are proposing to cut short break services, families and local groups may want to consider the following legal issues which draw on the duties summarised above – and consider one further central point, being the duty to have a fair consultation. These issues are framed as questions which can be raised with the Local Authority councillors and officers – and if the answers are not satisfactory then the family or local group may want to seek legal advice.

1. Is the **consultation** on the proposed cut to short break funding fair? The Supreme Court's recent judgment in *Moseley v LB Haringey*<sup>6</sup> shows that a high standard of fairness is required in consultations which propose cuts to benefits or services. In particular, consultees must be provided with sufficient information about the proposals to make an informed and intelligent response – which is likely to include information about alternative options

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1 See ZH (Tanzania) [2011] UKSC 4

2 See General Comment No 14 from the UN Committee on the Rights of the Child on 'the right of the child to have his or her best interests taken as a primary consideration'

3 Under sections 20-22 of the Equality Act 2010

4 Equality Act 2010 section 20(7)

5 Equality Act 2010 section 149(1)(b)

6 R (Moseley) v LB Haringey [2014] UKSC 116

which were considered and rejected prior to the consultation. Did the consultation on proposed budget cuts for your Local Authority include any information about alternatives? Was there anything else about the consultation which in your view made it unfair? In particular, were consultees told about:

- a. The Local Authority's reserves position, in particular its 'unallocated' reserves, being those reserves which are free to be spent on whatever service is deemed appropriate by the authority, and whether consideration had been given to spending from reserves to avoid or reduce the need for cuts in funding for short breaks?
  - b. What consideration had been given to raising Council Tax and what (if any) increase in Council Tax was proposed to avoid or reduce the need for cuts in funding for short breaks?
2. Has the Local Authority complied with the **Public Sector Equality Duty ('PSED')**? The key case on the PSED is now the Court of Appeal's judgment in *Bracking*<sup>1</sup>, the first challenge to the decision to close the Independent Living Fund<sup>2</sup>. The two key principles to emerge from the case are:
- a. Decision makers must have a proper understanding of the impact of cuts decisions on disabled people and other groups with protected characteristics (e.g. children) when they make cuts decisions.
  - b. It is necessary for decision makers to consider the particular needs set out in the PSED – for example the need to advance equality of opportunity for disabled people – in their decision making, not just refer generally to the impact once this has been understood.

Can your Local Authority demonstrate that it has complied with these requirements in putting forward proposed cuts to funding for short breaks?

3. Can the Local Authority show compliance with the '**sufficiency duties**' imposed by **regulation 4 of the Breaks for Carers of Disabled Children Regulations 2011** and **section 27 of the Children and Families Act 2014**? In particular does the Local Authority know (1) how many disabled children there are in its area, (2) what the likely need for short break services will be for these children and their families and (3) whether the level of short break services to be provided after the funding is cut will be sufficient to meet this need?

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1 *Bracking & Others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345. The Court of Appeal helpfully summarise the legal principles governing the operation of the PSED at para 24 of the judgment

2 After the first challenge succeeded in the Court of Appeal, the government remade the decision to close the Independent Living Fund and a second judicial review challenge failed.

4. If the funding is cut, will the Local Authority be able to meet its specific duty<sup>1</sup> under **section 2(1) CSDPA 1970** to provide short breaks to children for whom such a service is necessary to meet their needs? Is the Local Authority clear to which children this duty is owed? Are the Local Authority's eligibility criteria lawful, and in particular:
  - a. Is every disabled child able to access a social work assessment?
  - b. Is there no cap on the level of support which a child who is assessed as eligible can receive?
  
5. Is the proposed cut consistent with the Local Authority's **human rights obligations**? Is the Local Authority going to be able to demonstrate that the short breaks will be available will provide sufficient support to protect the private and family life rights of disabled children and their families? In particular, can the Local Authority evidence that the best interests of disabled children were treated as a primary consideration in the decision making process, as required by **Article 3 of the UN CRC, read with Article 8 ECHR**?

There are three specific legal problems which we suggest families and local groups look out for when considering proposals to cut funding for short break services:

1. Restriction of access to a social work assessment only to certain groups of disabled children, for example those with 'complex' needs. This is contrary to the *Working Together* statutory guidance, which clearly states that every child 'in need' should receive a social work assessment.<sup>2</sup> All 'disabled' children are children 'in need'; see Children Act 1989 section 17(10)(c) and (11)<sup>3</sup>. Statutory guidance such as *Working Together* must be followed unless there is a considered decision by the Local Authority that there is good reason not to do so<sup>4</sup>. As such unless the Local Authority can show that it has an alternative approach which is as good as that mandated by the guidance, which is highly unlikely, then it will be required to carry out a social work assessment on request for every disabled children.
  
2. Proposals to close or cut funding to specific services without ensuring that alternative services are provided which meet the needs of the

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1 Specific duties are duties which are owed to individuals, in other words here to an individual disabled child. This is in contrast to general duties which are owed to groups of people (such as disabled children and families) generally but which do not give rise to easily enforceable legal rights for individuals.

2 *Working Together* clearly states on p17 that in child 'in need' cases, 'assessments by a social worker are carried out under section 17 of the Children Act 1989'

3 Under section 17(11), 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...'. The term 'mental disorder of any kind' is very broad and clearly covers (for example) Asperger syndrome

4 See *R (TG) v Lambeth LBC* [2011] EWCA Civ 526

relevant children and families. While Local Authorities are entitled to meet eligible needs in the most cost-effective way, they must always ensure that these needs are actually met. It will be unlawful for the Local Authority to cut funding in a way which reduces access to services without putting an alternative suitable service in place where the service is being provided pursuant to the specific duty in section 2(1) CSDPA 1970 – as will generally be the case where there has been an assessment which led to the provision of a short break service.

3. Tightening of eligibility criteria which remove children who were previously receiving services from eligibility. This may be permissible – but in every case it will be necessary for a child receiving services to be re-assessed to see if they meet the new criteria before services are withdrawn. The European Court of Human Rights in *McDonald v United Kingdom* held that withdrawal of social care services without reassessment can give rise to a breach of Article 8 ECHR. Any new tougher criteria have to be rational and fair and must ensure compliance with:
  - a. The objects and purpose of section 17 of the Children Act 1989, which are that Local Authorities should provide support to children and families;<sup>1</sup>
  - b. Human rights obligations, in particular the obligation to support the private and family life rights of disabled children and their families in Article 8 ECHR.
  - c. The duty to provide services to meet needs where it is 'necessary' to do so imposed by section 2(1) CSDPA 1970. There will be some children and families for whom it is always going to be 'necessary' to provide a short break service given the nature and complexity of their needs no matter what restrictions there are on the Local Authority's finances. In relation to disabled adults these would be the individuals whose needs are assessed as 'critical' in the Fair Access to Care Services ('FACS') banding adopted in the current 'Prioritising Need' statutory guidance.<sup>2</sup> It will be plainly unlawful for a Local Authority to have eligibility criteria for disabled children's services which they would not be allowed to adopt for disabled adults because they are higher than the 'critical' FACS band.

## Template Letters

In the next section of this resource we provide two template letters. These should be used and adapted as families and local groups see fit to reflect the position locally. The letters can be sent by email, fax or post and the relevant names and contact details should be available on the Local Authority website. We would suggest that where possible the letter is sent by email with a copy sent by post.

<sup>1</sup> R (M) v Gateshead MBC [2006] EWCA Civ 221 at para 42

<sup>2</sup> This guidance is replaced from 1 April 2015 by the Care Act 2014 regulations and guidance, which will impose national eligibility criteria intended to be roughly equivalent to the current 'substantial' FACS band.

The first letter is designed to be sent to the Leader of the Council<sup>1</sup>, copied<sup>2</sup> to the Lead Member for Children's Services<sup>3</sup> and the Director of Children's Services<sup>4</sup>, before a decision to set the budget is taken, setting out the case to prioritise spending on short breaks services to ensure they meet their statutory duties. It is intended to provide a campaigning tool for local groups.

The second letter is intended to be sent to the Lead Member for Children's Services or the Director of Children's Services<sup>5</sup> in response to actual or proposed closure or reduction in short break services. Its purpose is to provide individual families and local groups with a first step to challenging a cut to a service that has been proposed or announced. This letter can also be adapted to be used to challenge any other decision that is taken to implement a cut to the short breaks budget, for example a decision to raise eligibility criteria or to reduce the hourly rate paid for short breaks accessed via direct payments. The template letter is drafted as if it is to be sent by an individual family but it can be adapted to be sent by a local group (replace 'I' with 'we' throughout).

In both cases, if there is no satisfactory response to the letter within a short timeframe (for example 14 days) then the family or local group may want to seek advice from one of the solicitors whose details appear in the final section of this resource. However we would emphasise that legal challenges to financial decisions by Local Authorities need to be brought as quickly as possible. As such if the local group has picked up a proposed budget cut before it is made or shortly after the budget is set, we would advise that you send the letter and at the same time seek legal advice, rather than waiting for any response.

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1 This is the elected Councillor who is the equivalent of the 'Prime Minister' for the Local Authority, setting the overall policy agenda. They will have significant influence over the Local Authority's budget.

2 By using the 'cc' line in an email to include their email addresses and sending a hard copy to them in the post.

3 As noted above, this is the elected councillor who has specific responsibility for children's services within the Council.

4 If the local group has a good relationship with the Lead Member and / or the Director, we would suggest that they are told that the letter is to be sent at least a day before it arrives so that they are not embarrassed if asked about it by the Council Leader

5 We would suggest that if you have a relationship with either the Lead Member or the Director you send it to them, copying it to the other person. If you don't have a relationship with either the Lead Member or the Director, send it to the Lead Member and copy it to the Director.

# Template letter 1 – challenging proposed cuts to short breaks budget

[View Document in Microsoft Word](#)

[ADDRESS OF LOCAL GROUP / FAMILY]

[DATE]

[NAME OF LEADER  
COUNCIL ADDRESS]

Dear Mr / Mrs [Name],

We are writing on behalf of [group name] to express our concern about the proposed cuts to the budget for short break services in our area.

As you know, our group [insert short description of the group, highlighting work around short breaks / support for families with disabled children. State how many children and families are involved with the group].

We know that short breaks are an essential support service for families with disabled children. Research by the charity Mencap has consistently shown that 8 in 10 families with children who have learning disabilities are at 'breaking point'. Contact a Family research shows that 76 per cent of families with disabled children experience stress or depression and 72 per cent suffer from lack of sleep. [Insert reference to any local evidence or research about short breaks here]. Short breaks are well recognised to be a vital part of the support which addresses these problems and helps keep families with disabled children together, not just surviving but thriving.

This is why we are so concerned to see the proposal to reduce spending on short breaks in our area by [insert summary of the proposals as known to the group].

We are aware that short breaks are legally required to be provided as a service for families with disabled children, including under the Children Act 1989, the Breaks for Carers of Disabled Children Regulations 2011, the Chronically Sick and Disabled Persons Act 1970, the Children and Families Act 2014, the Equality Act 2010 and the Human Rights Act 1998. We understand that the Local Authority has received a letter from the Every Disabled Child Matters campaign setting out in detail the legal duties to provide short breaks.

We would like to ask you the following questions and would be grateful if you could answer them within [7 / 14 days, depending on when the decision is to be taken – if in doubt put 7 days]:

1. How much money does the Local Authority currently hold in its reserves, and in particular how much money is in 'unallocated'

reserves, by which we mean reserves which are not earmarked for a specific purpose?

2. What if any consideration was given by the Local Authority to using its unallocated reserves to avoid or reduce the need to cut spending on short breaks?
3. What if any increase in Council Tax is proposed by the Local Authority for 2015/16?
4. What if any consideration was given to increasing Council Tax as a way of avoiding or reducing the need to cut spending on short breaks?
5. When the Local Authority consulted on the proposal to cut spending on short breaks, what if any information was given to consultees on these or other alternative ways of meeting the shortfall in funding available to the Local Authority?
6. Can the Local Authority show that it is going to be providing a level of short break service which is sufficient to meet the needs of children and families in our area after the funding cuts, as required by regulation 4 of the Breaks for Carers of Disabled Children Regulations 2011 and section 27 of the Children and Families Act 2014?
7. Can the Local Authority show that it is going to be able to provide short breaks to all disabled children for whom it is necessary to provide this service to meet their needs, as required by section 2 of the Chronically Sick and Disabled Persons Act 1970?
8. How will the Local Authority meet its obligation to promote the right to respect for private and family life under Article 8 of the European Convention on Human Rights if the short breaks budget is cut?
9. How will the Local Authority meet its obligation to treat disabled children's best interests as a primary consideration in its decision making process when deciding on the proposed cut to the short breaks budget, as required by Article 3 of the UN Convention on the Rights of the Child?
10. How can the Local Authority show that it has complied with the Public Sector Equality Duty in its proposed cut to the short breaks budget, in particular the duty under section 149(1)(b) of the Equality Act 2010 to have due regard to the need to advance equality of opportunity for disabled children?

We would urge you and your fellow councillors to reconsider the proposed cut to the short breaks budget for 2015/16. We would strongly argue that this would be a false economy, as cutting short breaks is likely to lead to the need to fund expensive crisis interventions for families who can no longer cope. We would also argue that the proposed cut will breach the legal duties that we have asked questions about above.

We look forward to your response and would welcome the opportunity to meet with you and fellow councillors to discuss our concerns and see whether the proposed cuts can be avoided or reduced. [If however there is no positive response to our letter we may take legal advice as to whether the proposed cut is open to challenge by way of judicial review – *delete this sentence if the group does not intend to take matters further*].

Yours sincerely,

[Names of those sending letter on behalf of group]

cc Lead Member for Children's Services  
Director of Children's Services

## Template letter 2 – challenging actual or proposed cut to services

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**[ADDRESS OF LOCAL GROUP / FAMILY]**

**[DATE]**

**[NAME OF LEAD MEMBER / DIRECTOR  
COUNCIL ADDRESS]**

Dear Mr / Mrs [Name],

I am writing on behalf of [my family / name of local group] to express concern about the [proposal / decision] to [close / reduce a particular short breaks service].

As you know, the [proposal / decision] taken is [insert summary of the proposal or decision as far as known].

I am particularly concerned about this [proposal / decision] because [insert summary of the particular concerns – for example 'my daughter uses this service and it has been a hugely positive experience for her, and I am not aware of any other service in our area that can meet her needs. Service A does not have capacity and Service B has no staff that can...']

I am aware that short breaks are legally required to be provided as a service for families with disabled children, including under the Children Act 1989, the Breaks for Carers of Disabled Children Regulations 2011, the Chronically Sick and Disabled Persons Act 1970, the Children and Families Act 2014, the Equality Act 2010 and the Human Rights Act 1998. I understand that the Local Authority has received a letter from the Every Disabled Child Matters campaign setting out in detail the legal duties to provide short breaks.

I would like to ask you the following questions and would be grateful if you could answer them within [7 / 14 days, depending on when the decision is to be taken – if in doubt put 7 days]:

1. Did the Local Authority consult on the proposal to [close / reduce] the service? [delete if you know that there was / was not a consultation]
2. In any consultation on the proposed [closure / reduction in service], what if any information was given to consultees on other alternative ways of meeting the shortfall in funding available to the Local Authority?
3. Can the Local Authority show that it is going to be providing a level of short break service which is sufficient to meet the needs of children

and families in our area after the [closure / reduction in service], as required by regulation 4 of the Breaks for Carers of Disabled Children Regulations 2011 and section 27 of the Children and Families Act 2014?

4. Can the Local Authority show that it is going to be able to provide short breaks to all disabled children for whom it is necessary to provide this service to meet their needs, as required by section 2 of the Chronically Sick and Disabled Persons Act (CSDPA) 1970, [if / when] the service is [closed / reduced]?
5. In particular, can the Local Authority show that all the children who are presently accessing the service in accordance with the CSDPA duty will be able to access an alternative service which is suitable for them and will meet their needs?
6. How will the Local Authority meet its obligation to promote the right to respect for private and family life under Article 8 of the European Convention on Human Rights [if / when] the service is [closed / reduced]?
7. How did the Local Authority meet its obligation to treat disabled children's best interests as a primary consideration in its decision making process when proposing to [close / reduce] this service, as required by Article 3 of the UN Convention on the Rights of the Child?
8. How can the Local Authority show that it has complied with the Public Sector Equality Duty, in particular the duty under section 149(1)(b) of the Equality Act 2010 to have due regard to the need to advance equality of opportunity for disabled children, in its decision making process in relation to this [closure / reduction in service]?

I would urge you to reconsider the proposed [closure / reduction in service]. I would strongly argue that this would be a false economy, as cutting short breaks is likely to lead to the need to fund expensive crisis interventions for families who can no longer cope. I would also argue that the proposed [closure / reduction in service] will breach the legal duties that I have asked questions about above.

I look forward to your response and would welcome the opportunity to meet with you to discuss these concerns and see whether the [proposed] [closure / reduction in service] can be avoided or reduced. [If however there is no positive response to our letter I may take legal advice on behalf of my family as to whether the proposed cut is open to challenge by way of judicial review – *delete this sentence if you do not intend to take matters further*].

Yours sincerely,

[Name of person sending letter]

cc Lead Member for Children's Services OR Director of Children's Services  
(depending on the person to whom the letter is addressed)

## Further Support and Legal Advice

We hope that this resource will help families and local groups convince Local Authorities not to cut funding for short breaks and / or not to close or reduce access to specific services. However if local campaigning fails to resist the cuts, as may well be the case given what is currently being proposed, then families and local groups may want to consider seeking further support, including advice on potential legal challenge.

Any challenge to decisions in relation to funding for short break services will be brought by way of an application for 'judicial review'. Judicial review is the process by which the High Court supervises the conduct of public bodies and makes sure they act in accordance with the law. What the Administrative Court (the part of the High Court which hears judicial review cases) is looking to do is identify where public bodies have got the law wrong and ensure this is put right.

Judicial review relies on 'public law' – the law which governs the conduct of public bodies. Public law is complicated, as the short summary above shows. As such it is practically impossible to bring a judicial review case without a specialist lawyer to help you. It is even more important that judicial review cases are not brought without specialist legal advice because if the claimant loses they are likely to have to pay the public body's legal costs – which may run in to tens of thousands of pounds.

However and importantly – legal aid remains available for judicial review cases. The huge advantage of legal aid to disabled children and families is that it not only pays for their lawyers but also provides 'cost protection', so that the public body cannot generally pursue costs against the family if the claim fails. It is also essential to note that in a challenge to issues around short breaks it is likely that the disabled child can be the claimant with a parent acting as 'litigation friend', giving instructions to the lawyers on behalf of the child. In such cases it will be the child's means that are assessed in relation to eligibility for legal aid not the parents – so even if the parents would not be eligible (because they have income or savings above the very low threshold) the child is likely to be eligible.

Judicial review challenges need to be brought promptly, particularly when large sums of public money are at stake. As such it is vital that families and local groups seek specialist legal advice as early as possible if they are thinking about a legal challenge. While local groups will not be eligible for legal aid, groups can play a key role both in putting families in touch with lawyers and in supporting the claim through providing evidence in the form of witness statements.<sup>1</sup> There are mechanism by which local groups can bring claims<sup>2</sup>, but in general it will be strongly preferable for the claim to be brought by one or more affected families who can access legal aid. A

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1 There is practically never any oral evidence in judicial review cases, all evidence being presented to the court in writing in advance of the hearing.

2 One of which is a 'Protective Costs Order', which limits the amount of the public body's costs that the group could be ordered to pay if the claim fails.

specialist solicitor will be able to advise on these options.

The most likely outcome if a claim for judicial review succeeds is that the decision will be quashed by the court. This is particularly helpful in cases involving cuts to funding or services, as a 'quashing order' puts the situation back as it was before the cut was made and requires the public body to go through a new decision making process if it wants to attempt to make the cut again lawfully. In many cases, no further attempt to cut the funding or service will be made by the public body after a successful judicial review challenge – showing that judicial review is a very powerful remedy.

On the following page is a list of solicitors who (1) have relevant legal aid contracts and (2) are known by EDCM to specialise in public law cases involving disabled children and families. The presence of a particular firm of solicitors on this list should not be taken as a recommendation by EDCM of their work – nor should the absence of any firm be taken as a criticism of their work or expertise. Families and local groups may want to ask around for recommendations of solicitors who have helped others in similar situations.

We have listed each firm in alphabetical order, given the area of the country in which each firm is based<sup>1</sup>, their website address and Twitter user name. Telephone contact details can be found on each firm's website.

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<sup>1</sup> If no area is stated then the firm has a national presence and most if not all the firms will take cases nationally

## List of solicitors who may be able to advise families and local groups on potential challenges to short break cuts

- **Ben Hoare Bell** (North East) – [www.benhoarebell.co.uk](http://www.benhoarebell.co.uk) On Twitter @BenHoareBell
- **Bhatia Best** (East Midlands) – [www.bhatiabest.co.uk](http://www.bhatiabest.co.uk) On Twitter @BhatiaBest
- **Bindmans** – [www.bindmans.com](http://www.bindmans.com) On Twitter @BindmansLLP
- **Coram Children’s Legal Centre** [www.childrenslegalcentre.com](http://www.childrenslegalcentre.com) On Twitter @CCLCUK
- **Deighton Pierce Glynn** – [www.deightonpierceglynnc.co.uk](http://www.deightonpierceglynnc.co.uk). On Twitter @dpg\_law
- **Irwin Mitchell** – [www.irwinmitchell.com](http://www.irwinmitchell.com). On Twitter @IMPublicLaw
- **Leigh Day** – [www.leighday.co.uk](http://www.leighday.co.uk). On Twitter @LeighDay\_Law
- **Maxwell Gillott** – [www.maxwellgillott.com](http://www.maxwellgillott.com) On Twitter @MaxwellGillott
- **Public Law Solicitors** (West Midlands) – [www.publiclawsolicitors.co.uk](http://www.publiclawsolicitors.co.uk). Not on Twitter.
- **SCOMO** – [www.scomo.com](http://www.scomo.com). On Twitter @ScottMoncrieff