

THE SHORT BREAKS PARTNERSHIP



The Short Breaks Duty: An Introduction

By Steve Broach, Barrister at Monkton Chambers

There is a glaring gap in the legal scheme supposed to benefit disabled children and their families, which is the absence of any clear right to Short Break care. Short Breaks at home or in the community must be provided to a disabled child under section 2 of the Chronically Sick and Disabled Persons Act 1970 when they are necessary to meet that child's needs. However the 1970 Act is not specific in any way about Short Breaks, and residential Short Breaks are excluded from its reach.

This absence may be thought surprising when consideration is given to the 'Short Breaks duty' introduced by section 25 of the Children and Young Persons Act 2008. This new law was a direct response by campaigning from Every Disabled Child Matters and its supporters to create a new right to Short Breaks. It was prompted by the Disabled Children (Family Support) Bill 2006, a private members' bill sponsored by Gary Streeter MP, which if enacted (brought into law) would have created new rights to Short Breaks from local authorities and the NHS.

However the Short Breaks duty enacted in 2008 did not create a new right to Short Breaks for individual children and families. Instead it amended the schedule to the Children Act 1989 (para 6) to include a new duty to 'to assist individuals who provide care for [disabled] children to continue to do so, or to do so more effectively, by giving them breaks from caring'.

In Parliamentary debates on the new duty the then-Minister, Lord Adonis, said 'The new duty will ensure that Short Break services lose their Cinderella status and become an essential local authority service, thereby reflecting the importance attached to them by the families of disabled children...Short Breaks should not be used just as crisis intervention but should help carers to maintain and improve the quality of care they want to, and can, provide.'

The Minister highlighted a very important aspect of the duty, which is that it requires assistance to be provided to family carers of disabled children not just to allow them to continue to provide care, but so that they can do so more 'effectively'. However, the language of the duty suggests that it falls short of establishing an individual right to Short Breaks for any particular disabled child. Instead, what is required under the

duty is that there must be Short Breaks available in every local area to assist families generally.

The duty itself sets very little requirements as to the level or type of breaks which must be available. However much more detailed requirements are imposed on local authorities by the regulations made under the duty, being the Breaks for Carers of Disabled Children Regulations 2011 (also referred to as the Short Breaks Regulations). Regulations are law and must be followed in the same way as an Act of Parliament. The Short Break regulations do three important things:

1. Require local authorities in carrying out the duty to have regard to (a) the needs of carers at crisis point and (b) the needs of 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' (Regulation 3).
2. Expand the scope of the duty, so that local authorities are required to '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). This range of services must include:
 - a. day-time care in the homes of disabled children or elsewhere,
 - b. overnight care in the homes of disabled children or elsewhere, educational or leisure activities for disabled children outside their homes, and
 - c. services available to assist carers in the evenings, at weekends and during the school holidays.
3. Require the production of a 'Short Breaks services statement' (Regulations 5) setting out the range of services provided, any eligibility criteria and (importantly) 'how the range of services is designed to meet the needs of carers in [the] area'. The statement must be published and kept under review, which implies that it must be updated when necessary, e.g. when any eligibility criteria change. The statement must now be published on the website for the 'local offer' introduced under section 30 of the Children and Families Act 2014.

The following are some key points of interpretation in relation to each of the duties imposed by the regulations:

1. Regulation 3 effectively creates a purpose provision of Short Breaks. As well as crisis care, Short Breaks should enable family carers to study or undertake leisure activities, meet the needs of other children or carry out household tasks. What is obviously missing from this list is work, because the service designed to assist family carers of disabled children to work is childcare, which has its own statutory scheme. Given the wider duties on local authorities to safeguard and promote children's welfare it is also of course essential that every Short Break is a positive and safe experience for the disabled child.
2. The sufficiency duty in Regulation 4 is very important. In order for a local authority to comply with this duty it must know (a) the population of disabled children in its area and the level of need in that population and (b) the level of service currently available to meet that need. The local authority must then exercise its judgment informed by this evidence as to whether the range of services is 'sufficient to assist carers to continue to provide care or to do so more effectively'.
3. The 'Short Breaks services statement' required under Regulation 5 is an important aid to transparency and fairness in the allocation of Short Breaks. Through the statement families should know what breaks are available and what criteria need to be met to access them. The statement must also show that the sufficiency duty imposed by regulation 4 has been met – by setting out 'how the range of service is designed to meet the needs of carers in [the] area'.

To step back from the detail, the scheme imposed by the Short Breaks duty and the accompanying regulations is clearly significant progress in establishing Short Breaks as a vital statutory service. There is no doubt that under the duty every local authority must have a range and level of Short Breaks available which it considers to be sufficient to meet the needs of families in its area. That judgment on sufficiency must be properly informed by all the evidence.

However the duty falls short of giving any individual disabled child or family a right to a Short Break service. That right may of course be found elsewhere in the statutory scheme affecting disabled children, most often the 1970 Act, but also potentially section 20(1) of the Children Act 1989 in relation to residential Short Breaks where families are at crisis point.

In later editions of this bulletin we will look at other issues in relation to the Short Breaks duty and consider the effect of the departmental guidance on Short Breaks.

We will also try to answer any general questions on the duty readers may have, although case specific advice cannot be given. Further discussion on the wider duties to provide Short Breaks to disabled children and their families can be found at: <https://rightsinreality.wordpress.com/2014/09/15/short-breaks-for-family-carers-when-enough-is-enough/>

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This article has been developed as part of the Short Breaks Partnership project and is intended for general information and should not be relied on as legal advice. Case-specific advice should be sought in any particular case.

The Short Breaks Partnership is a consortium of four organisations; Contact a Family, Council for Disabled Children, Action for Children and Kids. For more information about the project or to sign up to the quarterly Short Breaks Partnership bulletin please contact shortbreaks@ncb.org.uk