

THE SHORT BREAKS PARTNERSHIP



Short Break Services and Personal Budgets

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Where local authorities or NHS bodies are responsible for meeting a disabled child or young person's needs for short breaks, this responsibility is now often discharged through a 'Personal Budget'. In short, although different legislation defines the terms in slightly different ways, a 'Personal Budget' is an amount of money identified by the public body to deliver agreed provision.

One mechanism to deliver a 'Personal Budget' will be a 'direct payment'. This is where the money to purchase the service is transferred to the disabled person or family, who then commission or arrange the required services themselves. Other personal budgets will be 'notional', i.e. held by the public body who commission the service in partnership with the disabled person or family. Finally, a personal budget may be wholly transferred to a third party, for example a local voluntary organisation. In whatever format they are delivered, the purpose of Personal Budgets is to achieve greater choice and control over provision for disabled children, young people and families.

Personal Budgets are particularly relevant to children and young people who have Education, Health and Care Plans, see Children and Families Act 2014 section 49. The SEND Code of Practice states as follows at para 3.38:

Young people and parents of children who have EHC plans have the right to request a Personal Budget, which may contain elements of education, social care and health funding. Partners must set out in their joint commissioning arrangements their arrangements for agreeing Personal Budgets. They should develop and agree a formal approach to making fair and equitable allocations of funding and should set out a local policy for Personal Budgets that includes:

- *a description of the services across education, health and social care that currently lend themselves to the use of Personal Budgets*
- *the mechanisms of control for funding available to parents and young people...*
- *clear and simple statements of eligibility criteria and the decision-making processes that underpin them.*

In order to make this happen, the Code of Practice (para 3.39) imposes a number of process requirements on local authorities and partners, including that there is a Personal Budget pathway developed within the EHC needs assessment and plan development process locally, and that partners 'identify how the new joint commissioning strategies¹ will support greater choice and control year on year, as

¹ Required by Children and Families Act 2014 section 26.

the market is developed and funding streams are freed from existing contractual arrangements’.

Personal Budgets are also achieving greater prominence for children and young people with complex health needs. Since October 2014, disabled children and young people who are eligible for continuing care have had a right to have a ‘personal health budget’. There is detailed guidance from NHS England on how this right should be realised.² 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’.

From the perspective of disabled people and families, two important questions often arise in relation to Personal Budgets:

1. Can the funding be accessed as a Direct Payment?
2. At what level should the Personal Budget be set?

The answer to the first question depends on which statutory agency is responsible for funding the service. In relation to short breaks which are provided by the local authority under its social care duties, it is likely that there will be a right to have the Personal Budget amount paid as a direct payment.

The statutory scheme governing local authority direct payments for disabled children derives from CA 1989 s17A³ and has been fleshed out by regulations⁴ and detailed guidance⁵. Under regulation 7(1)(c) of the 2009 regulations, local authorities are under a duty to make a direct payment where:

- the parent⁶ appears to the authority to be capable of managing a direct payment by themselves or with such assistance as may be available to them;
- the parent consents to the making of a direct payment (local authorities cannot insist that a person has a direct payment);

² 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.

³ In relation to social care services; there is now a separate scheme under the Children and Families Act 2014 and the Special Educational Needs (Personal Budget) Regulations 2014 governing SEN direct payments which is outside the scope of this article.

⁴ Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2009

⁵ Department of Health, *Guidance on direct payments for community care, services for carers and children’s services England*, 2009 (amended 29 October 2010). In relation to adults, the guidance has been replaced by the Statutory Guidance to the Care Act 2014 (Department of Health) Chapter 12 – but the 2009 guidance remains relevant to disabled children.

⁶ Or young person aged 16-17. A different test is applied in relation to social care direct payments for disabled adults under the Care Act 2014.

- the authority is satisfied that the person's need for the relevant service can be met by securing the provision of it by means of a direct payment; and
- the authority is satisfied that the welfare of the child will be safeguarded and promoted by securing provision by means of a direct payment.

Importantly, direct payments cannot be used to purchase prolonged periods of residential respite care (being capped at a maximum of four consecutive weeks in any period of 12 months).⁷ Otherwise there should be no restriction on the type of services and support that can be purchased using a direct payment, so long as it is meeting the eligible assessed needs of the child or young person.

In relation to short breaks funded by NHS bodies (typically CCGs) however, there is no right to have the Personal Budget paid as a direct payment. Guidance from NHS England⁸ sets out illustrative examples (at para 33) of why a CCG might decide not to provide someone with direct payments – for example, because 'the benefit to that individual of having a direct payment for healthcare does not represent value for money'.

The second question is the amount of any Personal Budget or direct payment. The short answer here is that the Personal Budget or direct payment must be fixed at an amount sufficient properly to meet the eligible assessed needs.⁹ Public bodies are of course entitled (and arguably required) to meet needs in the most cost-effective way. However fixed direct payment rates – for example on an hourly basis – will not be lawful if it is not possible to meet the assessed needs within those rates.

Public bodies need to be careful therefore in using 'resource allocation systems' or 'RASes' when determining the amount of a Personal Budget or direct payment. In **R (JL) v Islington LBC** [2009] EWHC 458 (Admin), the Judge observed (at [39]) that that she found it 'hard to see how a system such as this one, where points are attributed to a standard list of factors, leading to banded relief with a fixed upper limit, can be sufficiently sophisticated to amount to a genuine assessment of an individual child's needs'. RASes should only be used as a 'starting point' to generate an 'indicative' amount, which may then need to be altered upwards (or potentially downwards) to ensure the eligible needs are met; see *R (KM) v Cambridgeshire CC* [2012] UKSC 23 at [28].¹⁰

Any Personal Budget set in relation to an EHC Plan (and arguably any Personal Budget for a disabled child or young person at all) must be set in compliance with Children

⁷ Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 regulation 13.

⁸ NHS England, *Guidance on Direct Payments for Healthcare: Understanding the Regulations*, March 2014.

⁹ See for example regulation 10 of the Special Educational Needs (Personal Budget) Regulations 2014; 'The local authority must ensure that the amount of direct payments is sufficient to secure the agreed provision'.

¹⁰ Although *KM* was an adult social care case, the same principle applies to the allocation of funds to a disabled child, whether by a local authority or NHS body.

and Families Act 2014 s 19. As most readers of this article will now be well aware, section 19 mandates regard to a range of matters, including:

- the views, wishes and feelings of the child and his or her parent, or the young person; and
- the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes.

These matters have to be kept in mind when decisions are taken on (for example) the amount of a Personal Budget and whether to make the funds available by way of a direct payment.

Where direct payments are made, it is vital that parents are given proper support in relation to the obligations that come with them. These are addressed in detail in the guidance for social care direct payments issued in 2009 and amended in October 2010. See in particular the section headed 'Specific delivery issues' at pages 47-54. Written contracts should be provided for any support staff employed to deliver support via direct payments, and the guidance sets out the essential terms of such contracts at para 137. The guidance states at para 139 that 'councils may wish to include a payroll service, which will take responsibility for administering wages, tax and National Insurance for the direct payment recipient'. Guidance is also given on the need for criminal records checks for anyone employed to deliver care via a direct payment. A further important consideration is now the potential requirement for direct payment workers to be enrolled onto a workplace pension scheme.¹¹ Local authorities will need to advise parents and young people in relation to this complex issue via their direct payments support services.

The guidance also deals with the question of local authority responsibilities to fund additional costs associated with direct payments:

114. In estimating the reasonable cost of securing the support required, councils should include associated costs that are necessarily incurred in securing provision, without which the service could not be provided or could not lawfully be provided. The particular costs involved will vary depending on the way in which the service is secured, but such costs might include recruitment costs, National Insurance, statutory holiday pay, sick pay, maternity pay, employers' liability insurance, public liability insurance and VAT. Some councils have found it helpful to include a one-off start-up fund within the direct payments to meet these costs as well as other forms of support that might be required, such as brokerage, payroll services and Criminal Records Bureau checks on employees.

¹¹ See the guidance on this complex issue from Disability Rights UK, Factsheet F61 at <http://www.disabilityrightsuk.org/individual-employers-and-workplace-pension-schemes-personal-assistants>

A major area of concern for some direct payments recipients is the level of scrutiny afforded by the public body as to how the direct payments are used. The guidance on local authority direct payments states that:

- *Monitoring arrangements should be consistent both with the requirement for the council to be satisfied that the person's needs can and will be met, and with the aim of promoting and increasing choice and independence (para 220).*
- *Councils should focus on achieving agreed outcomes, rather than on the service being delivered in a certain way (para 221).*
- *Councils should aim to ensure that the information that the direct payment recipient is asked to provide is straightforward and the least onerous possible, consistent with monitoring requirements (para 222).*
- *The fact that the council is making direct payments rather than arranging services itself does not affect its responsibility to review an individual's care package at regular intervals (para 225).*
- *The frequency of monitoring will be dictated by the length of time the person has managed direct payments...and their particular circumstances. For children...reviews may be necessary more often so that the council remains satisfied that the direct payments promote and safeguard the welfare of the child (para 226).*

In the light of the Children and Families Act, there is an obvious need 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. In this regard the SEND Code of Practice states at para 9.111 that:

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.