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# Short Breaks for Disabled Children - Summary Report

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<b>Committee considering report:</b>	Council
<b>Date of Committee:</b>	31 May 2016
<b>Portfolio Member:</b>	Councillor Lynne Doherty
<b>Date Portfolio Member agreed report:</b>	24 May 2016
<b>Report Author:</b>	Juliet Penley
<b>Forward Plan Ref:</b>	Urgent Item

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## 1. Purpose of the Report

- 1.1 Due to Judicial Review proceedings brought against the Council by parents of users of short breaks services, Members are asked to consider the budgetary decision taken 1 March 2016 to reduce short breaks funding and to confirm whether that decision should stand.

## 2. Recommendation

- 2.1 The Council considers the report and its appendices and resolves that the decision of the 1<sup>st</sup> March 2016 be reaffirmed.

## 3. Implications

- 3.1 **Financial:** Should the Council, subsequent to this further Review, rescind on its decision, further savings from another area would need to be sought.  
We have also requested the precise amount of costs being sought by the litigants on this matter, but at the time of this report, this has not been confirmed.
- 3.2 **Policy:** None
- 3.3 **Personnel:** None
- 3.4 **Legal:** As detailed in the report
- 3.5 **Risk Management:** The risks associated with this Review concern financial matters. Should subsequent to the Council's Review, the Judicial Review proceeds and is successful, the Council is likely to be expected to cover costs of the Claimants and find additional savings elsewhere.
- 3.6 **Property:** None
- 3.7 **Other:** None

**4. Other options considered**

4.1 As detailed in the report

## Executive Summary

### 5. Introduction

- 5.1 Due to litigation brought against the Council by parents of users of short breaks services, Members are asked to consider the budgetary decision taken on 1 March 2016 to reduce short breaks funding and to confirm whether that decision should stand.
- 5.2 That decision was to increase short breaks funding at Castle Gate from £515,690.00 to £555,690.00 but to reduce short breaks funding provided to local voluntary organisations from £415,600.00 to £200,000.00 including transitional funding of £130,000.00.
- 5.3 Members are reminded that protecting and promoting the interests of vulnerable children is one of the Council's key strategic priorities. However, although the budgetary reduction will impact on children with special educational needs and/or disabilities, and family members and others who care for them, the recommendation remains to reaffirm the decision made on the 1 March 2016. This is due to the need to make budgetary savings, the need to protect other budgets from even greater reductions and the difficulty in raising the Council's income than it is or using reserves.
- 5.4 Enclosed with this report at Appendix B are documents relating to the decision of the 1 March 2016 including (i) the Budget Report; (ii) the Budget Consultation Report; (iii) Budget Proposals 2016-17: Short Breaks for Disabled Children Overview of Responses and Recommendations; (iv) Summary of Feedback Received and Key Findings; (v) Verbatim Responses (vi) Equality Impact Assessments at Stage 1 and Stage 2; and (vii) minutes of the budget meeting.
- 5.5 Also enclosed with this report at Appendix C are witness statements by (i) Alice Cullingworth of Irwin Mitchell solicitors including her exhibit AC1 where she sets out the likely effect of the budgetary decision on West Berkshire Mencap, Crossroads Care, Castle Gate and Guideposts, (ii) parents of children affected (these have been anonymised) setting out their concerns, (iii) Leila Ferguson of West Berkshire Mencap (iv) Mary Rainford of Crossroads Care and (v) Christine Lenehan of the Council for Disabled Children. Members are asked to consider the concerns expressed in these statements, in addition to the summary of the original consultation responses and the equality impact assessments referred to above. The witness statements of Alice Cullingworth, Leila Ferguson and Mary Rainford in particular address the likely loss of short breaks provision.
- 5.6 In addition, at Appendix A is a report by Juliet Penley, the Council's Children's Services manager. Her report is aimed at presenting Members with an additional analysis of the likely consequences of the budgetary decision about short breaks than Members had before, which should be read alongside the witness statements referred to above.
- 5.7 The essential question for Members is whether the budgetary reduction is justifiable despite the important need to protect and promote the welfare of children with special educational needs/disabled children and notwithstanding the consequences for such children and their carers. As Members will appreciate, whilst "statutory

needs” will continue to be met, there is likely to be less provision of targeted social and leisure activities where children can mix with other children and a variety of adult support workers outside of school hours and during holidays. This may have implications for the children concerned and their carers.

## 6. The Children Act 1989 and the Breaks for Carers of Disabled Children Regulations 2011

6.1 *Paragraph 6 of Schedule 2 to the Children Act 1989 provides as follows:*

*(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.*

6.2 From this, Members can see that the Council is required to provide services that are designed to minimise the effect on children of their disabilities, that help children lead lives that are as normal as possible and that help carers continue to care for children and/or to do so more effectively by giving them breaks from caring.

6.3 The Council will continue to provide services designed to have the effects just described and the Council will continue to meet the needs of children and carers who are in the greatest need and who qualify for statutory services under the Children Act 1989 and the Chronically Sick and Disabled Persons Act 1970. The effect of the reduction in the short breaks budget will be that the Council will fund fewer services of those kinds. This will mean that children and carers with statutory needs will have less choice, which may impact on the children’s ability to lead lives which are as normal as possible., whilst children and carers who do not have statutory needs will have fewer targeted services available to them. This may impact on the provisions set out in paragraph 6.1., as set out above and this may result in such children or carers developing statutory care needs. However the Council remains committed to meeting these needs.

6.4 It is not possible to assess the likely impact precisely in numbers, or otherwise, but Juliet Penley’s report together with the witness statements referred to above provide the best assessment the Council is able to provide on the likely impact of children and their carers.

6.5 Regulation 3 of the 2011 Regulations provides 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.*

6.6 From this, Members can see that in performing their duty to provide services designed to help carers continue to care for children and/or to do so more effectively by giving them breaks from caring. Members must have regard to (i) the needs of carers who would be unable to continue to provide care without breaks from caring and (ii) the needs of carers who would be able to care for their children more effectively if they had breaks from caring that (a) enabled them to undertake education, training or some leisure activity, (b) that enabled them to meet the needs of other children in the family more effectively or (c) that enabled them to carry out day-to-day household tasks.

6.7 Carers who would be unable to continue to provide care without breaks from caring will have a statutory entitlement to respite care but that is not the end of the matter because they may prefer and sometimes strongly prefer their children to have a wider range of breaks than will be available as a result of the Council's decision on short breaks funding.

6.8 Carers who will be able to provide care more effectively if they had breaks from caring, those carers and/or their children may or may not have a statutory entitlement to short breaks and respite care. If they have a statutory entitlement, then as a result of the Council's decision there will be a reduced choice of short breaks and respite provision and, in particular, there are likely to be fewer opportunities for their children to socialise and engage in activities involving other children. If they do not have a statutory entitlement then, there will be less of any targeted provision available which may result in those carers providing care less effectively. This may impact on the quality of life of carers and children.

6.9 *Regulation 4 of the 2011 Regulations provides as follows:*

*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.*

6.10 As Members will see from Juliet Penley's report no difficulty arises in relation to the provision of day-time care or overnight care which is generally provided where there

are statutory needs and which is and will remain sufficient. Where the budgetary reduction will have consequences is in relation to the provision by voluntary organisations of educational or leisure activities outside their homes and in the provision of services to assist carers in the evenings, at weekends and during the school holidays. This provision goes beyond basic care and enables disabled children/children with SEN to socialise more widely and undertake activities that other children may take for granted and that assist carers both to care more effectively and also look after other family members, have some relief from the pressures of caring and undertake other activities.

6.11 *Section 27 of the Children and Families Act 2014 provides as follows:*

*7 Duty to keep education and care provision under review*

*(1) A local authority in England must keep under review—*

- (a) the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability, and*
- (b) the educational provision, training provision and social care provision made outside its area for—*
  - (i) children and young people for whom it is responsible who have special educational needs, and*
  - (ii) children and young people in its area who have a disability.*

*2) The authority must consider the extent to which the provision referred to in subsection (1)(a) and (b) is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned.*

*(3) In exercising its functions under this section, the authority must consult—*

- (a) children and young people in its area with special educational needs, and the parents of children in its area with special educational needs;*
- (b) children and young people in its area who have a disability, and the parents of children in its area who have a disability;*
- (c) the governing bodies of maintained schools and maintained nursery schools in its area;*
- (d) the proprietors of Academies in its area;*
- (e) the governing bodies, proprietors or principals of post-16 institutions in its area;*
- (f) the governing bodies of non-maintained special schools in its area;*
- (g) the advisory boards of children's centres in its area;*
- (h) the providers of relevant early years education in its area;*
- (i) the governing bodies, proprietors or principals of other schools and post-16 institutions in England and Wales that the authority thinks are or are likely to be attended by—*
  - (i) children or young people for whom it is responsible, or*
  - (ii) children or young people in its area who have a disability;*
- (j) a youth offending team that the authority thinks has functions in relation to—*
  - (i) children or young people for whom it is responsible, or*
  - (ii) children or young people in its area who have a disability;*
- (k) such other persons as the authority thinks appropriate.*

*(4) Section 116B of the Local Government and Public Involvement in Health Act 2007 (duty to have regard to assessment of relevant needs and joint health and wellbeing strategy) applies in relation to functions exercisable under this section.*

*(5) "Children's centre" has the meaning given by section 5A(4) of the Childcare Act 2006.*

As Members will see, this requires the Council to consult (which it has done) and also keep under review whether the educational, training and social care provision made in its area for children and young people who have special educational needs or a disability is sufficient to meet those children's educational, training and social care needs. Members will be aware, the Council will always be under a duty to meet statutory needs for education, training and social care; including where there is an assessed statutory need for education, training or social care to be met in a particular way, for example, in a social or group setting.

- 6.12 However, Members should consider broadly whether, as a result of the Council's decision about short breaks funding, there will be sufficient short breaks provision in the Council's area to meet the wider, non-statutory needs of children with special educational needs or a disability. This may include the needs of children who (i) do not have a statutory need for short breaks provision, or (ii) whose need for short breaks provision exceeds their "statutory need" and (iii) children who need short breaks provision and who have a non-statutory need to have such provision in social or group settings.
- 6.13 The result of the decision i there will be lesser short breaks provision in the area, in particular of a kind that enable children to socialise with other children and a variety of adults in the ways that other children may take for granted., Juliet Penley's report sets out provides in what that would involve.
- 6.14 *Section 11 of the Children Act 2004*  
This provides as follows:
- 11(2) Each person and body to whom this section applies must make arrangements for ensuring that–*
- (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and*
  - (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.*
- 6.15 As a result Members need to consider whether the proposed reduction in short breaks provision is justifiable because of the need to make budgetary savings having regard to the need to safeguard and promote the welfare of children, in particular the children who stand to be adversely affected by the proposed decision.
- 6.16 Members must treat the need to safeguard and promote the welfare of children as a very important and powerful consideration, although it is not absolute and can be overridden if there are even more powerful considerations, which can include the need to make budgetary savings and the need to protect other areas of children's and adult's social care provision from further savings. In particular, Members need

to consider whether it is possible to use the Council's reserves, increase charges elsewhere or make even greater savings elsewhere.

6.17 *Section 149 of the Equalities Act 2010*

This provides as follows:

**149 Public sector equality duty**

*(1) A public authority must, in the exercise of its functions, have due regard to the need to—*

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

*(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).*

*(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*

- (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
- (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
- (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*

*(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.*

*(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*

- (a) tackle prejudice, and*
- (b) promote understanding.*

*(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.*

*(7) The relevant protected characteristics are—*

- age;*
- disability;*
- gender reassignment;*
- pregnancy and maternity;*
- race;*



- *religion or belief;*
- *sex;*
- *sexual orientation.*

(8) *A reference to conduct that is prohibited by or under this Act includes a reference to—*

*(a) a breach of an equality clause or rule;*

*(b) a breach of a non-discrimination rule.....*

- 6.18 Members are reminded of the consultation responses, Juliet Penley's report and in particular the witness statements and the equality impact assessments referred to above.
- 6.19 The essential point is that Members are required carefully to consider the important needs of children with special educational needs and/or disabilities and whether the short breaks funding decision is justifiable given the importance of (i) advancing equality between such children and others, (ii) reducing the disadvantages that such children suffer from, (iii) meeting the needs that they have that are different from the needs of other children and (iv) encouraging them to take part in public life, including in particular social, recreational and leisure activities in social and group settings.
- 6.20 As Members will appreciate, children with special educational needs and/or a disability will find it much harder than other children to engage in social, recreational and leisure activities and so enjoy a childhood of equal quality to other children. This problem will not be overcome simply by meeting statutory needs and/or by meeting statutory needs by providing one-to-one respite care by a carer in that it is obviously important for children with special educational needs and/or disabilities to engage in activities with other children and groups of adults as far as possible, as other children are able to do, irrespective of whether they are assessed as having a formal statutory need to do so.
- 6.21 Members will also appreciate that many children with special educational needs and/or a disability will struggle to cope with the loss of particular kinds of service, even if their needs continue to be met in different ways.
- 6.22 In addition, the provision of short breaks enables carers to provide care more effectively, allows greater time to be afforded to other children of the family and allows carers – who will often be women – to engage in education, work, leisure, household chores to a greater extent than would otherwise be the case.
- 6.23 These are all very important and powerful considerations but they are not absolute. Whilst these considerations must be treated as being very important and powerful it is still appropriate to try to weigh up exactly how important in these particular circumstances. It is legitimate to conclude that it is necessary for the Council to do less to promote the welfare of children and their carers than it would wish to do for budgetary reasons, including to protect the budgetary allocation for other vulnerable children and adults. It is however necessary for Members to feel confident that the short breaks budget reduction is proportionate and justified and that there are no other measures that reasonably could be taken, for example using reserves or increasing fees or reducing other budgets.

- 6.24 Members will also need to be satisfied that officers will properly monitor the impact of the reduction in short breaks funding and report back, in particular if any unforeseen risks materialise.

## 7. Best Value

- 7.1 The Council's decision reduces funding for voluntary providers but slightly increases funding for Castle Gate. As Members will be aware, the Council should not pass on disproportionate reductions to the voluntary and community sector.
- 7.2 The reason why funding for Castle Gate has been slightly increased is that Castle Gate is the only short breaks provider that provides residential care, which is an essential part of the Council's ability to discharge its statutory duties. It provides very high quality care and runs efficiently and if its funding was reduced the Council might be unlikely to be able to discharge its statutory duties. Castle Gate can also be used as a hub for providing a wide range of services and that is an aspect that Council officers are looking to develop.
- 7.3 By contrast, whilst the voluntary organisations concerned provide services of very great social value, to a high standard, their funding can be reduced without endangering the Council's ability to meet its statutory duties.
- 7.4 On 25<sup>th</sup> May a letter at Appendix D was received from Irwin Mitchell Solicitors representing the two claimants in court proceedings. The letter asks that the Council confirms that it will rescind its decision of the 1<sup>st</sup> March 2016 (in relation to short breaks), and meet again before the 30<sup>th</sup> June to take a new decision or reinstate the previous level of funding immediately and meet their reasonable costs. Members are asked to consider this in light of the Officer Recommendation.

## 8. Conclusion

- 8.1 It is recommended the Council approves the Officer's Recommendation that the decision of the 1st March 2016 should be reaffirmed.

## 9. Appendices

- 9.1 Appendix A – Report of Juliet Penley
- 9.2 Appendix B – Documents referred to in Paragraph 5.4 of this Report
- 9.3 Appendix C – Statements referred to in paragraph 5.5
- 9.4 Appendix D – Letter from Irwin Mitchell dated 25<sup>th</sup> May 2016