

Open letter to Nadhim Zahawi MP
Parliamentary Under Secretary of State for Children and Families
Department for Education

By email

4 September 2018

Dear Minister

'MYTH BUSTING' GUIDE ON STATUTORY GUIDANCE

We write to express our deep concern about the 'myth busting' guide, which was recently published on your Children's Social Care Innovation Programme microsite.

Several parts of the document incorrectly describe the statutory framework for England's care system. Following legal advice, we ask that these sections be immediately withdrawn to avoid the risk of confusion and to prevent any harmful effects on vulnerable children and young people, and those caring for them.

It is of utmost importance that legal certainty be maintained when it comes to the care and protection of vulnerable children and young people looked after by local authorities. To frame as 'myths' a series of questions about the care system's statutory framework is unhelpful. This is because it gives the impression that key parts of current social work knowledge and understanding are untruths.

This 'myth busting' guide is available online, it carries your Department's logo and contains the statement that "all of the responses below have been agreed by the Department for Education and their lawyers in consultation with Ofsted". It is a reasonable assumption that those reading the guide will view it as having official approval and being intended to widely impact social work practice.

Although the so-called myths are not always clearly expressed, there are statements in the document which undoubtedly run counter to the current statutory framework. Whether intended or not, this could be construed as an encouragement to local authorities to act in contravention of the statutory framework.

Should amendments to regulations and statutory guidance be seen to be necessary, we ask that proposed changes be subject to proper consultation. If the reason for clarification and/or changes to the statutory framework is because of widespread misunderstanding, we would

ask that the Department clearly set out: the myths which are believed to currently exist; who is said to believe these myths; and why they are, indeed, myths.

Below we set out our principal concerns. We have sought to confine our comments to interpretations of the current statutory framework, rather than providing justification for the law as it stands.

Can we have one social worker for children and foster carers when a child is in a stable, long term placement?

The guide states “The current framework does not prevent such flexibility”. We contend that this is not a correct interpretation of the statutory framework.

Children Act 1989 statutory guidance on fostering services distinguishes between foster carers’ supervising social worker and the child’s social worker, and explains:

Every foster carer should be allocated an appropriately qualified social worker from the fostering service (the supervising social worker) who is responsible for overseeing the support they receive. It is the supervising social worker’s role to supervise the foster carer’s work, to ensure that they are meeting the child’s needs, and to offer support and a framework to assess the foster carer’s performance and develop their skills. They must make regular visits to the foster carer, including at least one unannounced visit a year.¹

Separate care planning statutory guidance describes the safeguarding role of visits to the child by the child’s social worker:

As part of their arrangements for supervising the child’s welfare the responsible authority has a duty to appoint a representative to visit the child wherever he or she is living [regulations 28 to 31]. Visits form part of a broader framework for supervising the child’s placement and ensuring that his/her welfare continues to be safeguarded and promoted. Visits therefore have a number of purposes, including to:

- support the development of a good relationship between the child and the social worker which will enable the child to share his/her experiences, both positive and negative, within the placement;*
- provide an opportunity to talk to the child and to offer reassurance if s/he feels isolated and vulnerable while away from family and friends;*

¹ HM Government (2011) The Children Act 1989 Guidance and regulations. Volume 4: fostering services, paragraph 5.67.

- *evaluate and monitor the achievement of actions and outcomes identified in the care and placement plan and to contribute to the review of the plan;*
- *identify any difficulties which the child or carer may be experiencing, to provide advice on appropriately responding to the child's behaviour and identify where additional supports and services are needed; and*
- *monitor contact arrangements, to identify how the child is responding to them and to identify any additional supports carers may need to support positive contact arrangements.*²

As acknowledged in the guide, the Fostering Services National Minimum Standards³ also distinguish between the child's social worker and the supervising social worker.

Separate regulations deal with the approval, supervision and support given to foster carers, and the actions required by local authorities to safeguard and promote the welfare of individual children living in foster care.

Care planning regulations set out the frequency of social worker visits to children⁴ and require that the child is seen in private, unless s/he has sufficient understanding and refuses this.⁵ Dispensing with the child's social worker could significantly undermine the statutory purpose of this 'seeing the child alone' duty. There is a very real danger that children will perceive the single social worker as working for 'the adults' and attached to the particular placement, rather than being there for them. The social worker themselves may additionally feel professionally conflicted, especially when there are concerns about a placement.

The Department's own data shows that children were moved from a foster care placement 360 times in England in 2016/17 because of standard of care concerns, and 430 times because of a child protection allegation.⁶ We do not believe that these figures are mirrored by the number of times action has been taken to deregister foster carers, indicating that the current system of separate support seeks to ensure that children are properly protected, while making certain foster carers are fairly assessed and managed.

Where, following a visit to the child, the local authority has concerns about the child's welfare, a review of the child's case must be arranged.⁷ This will ensure scrutiny by the

² Department for Education (2015) The Children Act 1989 guidance and regulations. Volume 2: care planning, placement and case review, paragraph 3.230.

³ Issued under the Care Standards Act 2000.

⁴ The Care Planning, Placement and Case Review (England) Regulations 2010.

⁵ Regulation 29 The Care Planning, Placement and Case Review (England) Regulations 2010.

⁶ Department for Education (2017) Children looked after in England including adoption: 2016 to 2017. Table B3: Reason for placement change for children who moved placements in the year.

⁷ Regulation 30 The Care Planning, Placement and Case Review (England) Regulations 2010.

child's independent reviewing officer. Allowing fostering providers to effectively supervise themselves inevitably undermines the present statutory framework.

Although regulations (as amended in 2015) state that 'long term' means the child is intended to stay with their present foster carers until they cease to be looked after⁸, the guide gives no indication as to how long a child should have been in a placement before their own social worker can be removed. Similarly, no definition of 'stable' is provided. It is also not clear whether a single (supervising) social worker could be expected to take on the statutory responsibilities of more than one child in a placement. None of this appears in existing statutory guidance and regulations because it is not current law or policy.

There are very strong child-centred reasons for the current statutory framework. It cannot be assumed that the interests of foster carers and child/ren will be the same, or will be possible for a single social worker to navigate. For example, it is not unknown for foster carers to take on a second child inappropriately and contrary to the wishes and needs of a child already settled with them because they are 'approved' for two children and their finances are based on this. Then there is the important role the child's social worker has in eliciting and responding to the child's wishes and feelings about seeing parents, siblings and other family members (or former carers). These are not fixed, and often change as a child gets older. In the current, established model, the child's social worker may be the social worker for separated children in sibling groups or for the family where siblings are still living. The work involved in helping children preserve relationships which are extremely important to them cannot be underestimated.

It is pertinent that the 2013 DfE consultation which led, in 2015, to a more flexible model of social work support for children in long term foster care did not propose a merger of the roles of the supervising social worker and the child's social worker. Indeed, this explained:

It is important that each member of the team – the foster carer or residential worker, supervising social worker and child's social worker – understands and is able to perform their own role and that they also understand and respect the roles of the other members of the team.⁹

⁸ Regulation 2(1) The Care Planning, Placement and Case Review (England) Regulations 2010 as amended by The Care Planning and Fostering (Miscellaneous Amendments) (England) Regulations 2015.

⁹ Department for Education (2013) Improving permanence for looked after children. Consultation, paragraph 8.2.

Revisions to care planning regulations introduced in 2015, as a consequence of the 2013 consultation, similarly did not lead to a merger of the two social workers. The Explanatory Memorandum explicitly refers to the child's social worker:

4.14 As part of the local authority's duty to safeguard and promote the child's welfare, an officer of the authority must visit the child in their placement at a specified minimum frequency. For the most part these visits will be carried out by the child's social worker...¹⁰

Can a Personal Adviser take on the role of the supervising social worker for foster carers, where the young person is staying put?

The guide states that, although they have "some reservations", the DfE and Ofsted "would welcome details of any proposed new ways of working" that would allow Personal Advisers to take on the role of a supervising social worker. The guide states this would be where a young person is in a Staying Put arrangement, but no other children are fostered within the family.

The absence of (other) foster children in a Staying Put arrangement does not diminish the local authority's statutory duties in respect of monitoring and supporting the Staying Put arrangement.¹¹ It also does not change the statutory function of Personal Advisers, which are set out in leaving care regulations:

- a) to provide advice (including practical advice) and support;*
- (b) where applicable, to participate in his assessment and the preparation of his pathway plan;*
- (c) to participate in reviews of the pathway plan;*
- (d) to liaise with the responsible authority in the implementation of the pathway plan;*
- (e) to co-ordinate the provision of services, and to take reasonable steps to ensure that he makes use of such services;*
- (f) to keep informed about his progress and wellbeing; and*
- (g) to keep a written record of contacts with him.¹² [Emphasis added]*

¹⁰ Explanatory Memorandum to The Care Planning and Fostering (Miscellaneous Amendments) (England) Regulations 2015.

¹¹ Section 23CZA(3) Children Act 1989.

¹² Regulation 12 The Children (Leaving Care) (England) Regulations 2001.

Statutory guidance explains: “Monitoring the ‘staying put’ arrangement will form an important part of the support package. The pathway planning process should review the arrangement on an on-going basis and progress should be recorded as part of that process”.¹³

Case law is clear that Personal Advisers cannot take on the role of social workers or the local authority in preparing or reviewing Pathway Plans.¹⁴ It is difficult, therefore, to see how the Personal Adviser could take on the role of a supervising social worker within the current statutory framework. Munby J (as he was then) in *Caerphilly* explained:

*Part of the personal adviser's role is, in a sense, to be the advocate or representative of the child in the course of the child's dealings with the local authority. As the Children Leaving Care Act Guidance puts it, the personal adviser plays a 'negotiating role on behalf of the child'. He is, in a sense, a 'go-between' between the child and the local authority. His vital role and function are apt to be compromised if he is, at one and the same time, both the author of the local authority's pathway plan and the person charged with important duties owed to the child in respect of its preparation and implementation.*¹⁵ [Emphasis added]

Can supervising social workers visit less frequently in stable and long term placements?

This section of the guide concludes with, “A judgement should be made on a case by case basis as to the suitability of the frequency of visit and if the foster carer has the capacity to meet the child’s needs with the minimum frequency of a visit once a year”. As it earlier states, one visit a year is the minimum number of unannounced visits.

Statutory guidance in respect of fostering services requires that supervising social workers “must make regular visits to the foster carer, including at least one unannounced visit a year” and “The fostering service should also provide support to the sons and daughters of foster carers and other people living in the foster carer’s household who play an important part in supporting children in placement”.¹⁶ Fostering services providers, whether local authorities or independent, “must provide foster parents with such training, advice, information and support, including support outside office hours, as appears necessary in the interests of

¹³ Department for Education (January 2015) The Children Act 1989 guidance and regulations. Volume 3: planning transition to adulthood for care leavers, paragraph 7.42.

¹⁴ *R (J) v Caerphilly County Borough Council* [2005] EWHC 586; *R (Deeming) v Birmingham City Council* [2006] EWHC 3719; *R (A) v London Borough of Lambeth* [2010] EWHC 1652.

¹⁵ *R (J) v Caerphilly County Borough Council* [2005] EWHC 586 [30]

¹⁶ HM Government (2011) The Children Act 1989 Guidance and regulations. Volume 4: fostering services, paragraphs 5.67 and 5.68.

children placed with them”.¹⁷ To suggest that one visit a year to a foster family would meet the current statutory framework is an incorrect interpretation of the current statutory framework. As with the above question on the removal of separate social workers for children and foster carers, the guide notably omits to specify what is meant by “stable and long term”. This imprecision could put children at risk.

Can social workers visit less frequently than the normal six weekly basis in stable and long term placements?

Care planning regulations (as revised in 2015) state that children in long-term foster placements – where the child will live until they cease to be looked after¹⁸ – can be visited as little as twice a year when they have been in that placement for at least one year but only if the child has sufficient understanding and agrees.¹⁹ This is a very important caveat that is not mentioned in the guide. It effectively means that the fewer number of visits cannot be applied to babies, young children and others who do not have the capacity to understand the implications of reducing local authority oversight.

Do we always have to conduct an independent return home interview?

This part of the guide contains three interpretations of the statutory framework which are incorrect.

First, it states that children should always be offered a return interview. This differs from the children who run away or go missing statutory guidance, quoted in the guide, which states children must be offered a return interview.²⁰

Second, the guide states if the child does not want to be interviewed, then the interview does not have to take place. The statutory guidance does not say this (though there is reference to children refusing) and we believe this statement risks undermining the clear expectation that professionals will do their utmost to encourage children to speak with an independent person

¹⁷ Regulation 17(1) The Fostering Services (England) Regulations 2011.

¹⁸ Regulation 2(1) The Care Planning, Placement and Case Review (England) Regulations 2010 as amended by The Care Planning and Fostering (Miscellaneous Amendments) (England) Regulations 2015.

¹⁹ Regulation 28(3A) The Care Planning, Placement and Case Review (England) Regulations 2010 as amended by The Care Planning and Fostering (Miscellaneous Amendments) (England) Regulations 2015:

(3A) Where—

- (a) C is in a long term foster placement and has been in that placement for at least one year, and
- (b) C, being of sufficient age and understanding, agrees to be visited less frequently than required by paragraph (2)(c),

the responsible authority must ensure that R visits C at intervals of no more than 6 months.

²⁰ Department for Education (2014) Statutory guidance on children who run away or go missing from home or care, paragraph 31.

about why they went missing. The guide's advice that "The offer must be genuine and the young person encouraged to accept" is weakened by the "but" that follows. "Refusal" is not the same as "does not want". The former reflects an informed choice. The latter is an emotional response, which may or may not be based on an understanding of what is involved or the importance of the process. A child may not want to be interviewed but, when given an explanation as to why return home interviews are undertaken, and what they entail, may agree to do something that s/he would rather not do because the benefits outweigh the concerns s/he has.

Third, the guide states the child can choose who they want to conduct the interview, if they do not want an independent interviewer. The statutory guidance does not say this in respect of children generally. It says the return home interview "is normally best carried out by an independent person (ie, someone not involved in caring for the child) who is trained to carry out these interviews and is able to follow-up any actions that emerge".

For looked after children, the expectation in the statutory guidance is that the return home interview "should usually" be conducted by someone "independent of the child's placement and of the responsible local authority". However, an "exception" to this is permitted when a looked after child "has a strong relationship with a carer or social worker and has expressed a preference to talk to them, rather than an independent person, about the reasons they went missing". But the statutory guidance adds: "The child should be offered the option of speaking to an independent representative or advocate".²¹

The guide omits to reference the provision in existing statutory guidance that parents or carers "should be offered the opportunity to provide any relevant information and intelligence of which they may be aware" when a child "refuses to engage with the independent interviewer".²²

Although the guide states "We would expect good practice to be that the reasons for [the child's refusal] are noted and recorded", no advice is given in the guide as to the need to be aware that children may be under duress to decline an interview, or under pressure to 'choose' a particular individual to conduct the interview (who could be the very person they have run away from). We fear this recording refusals advice dilutes the strong message of the statutory guidance that return home interviews are a crucial safeguard.

²¹ Department for Education (2014) Statutory guidance on children who run away or go missing from home or care, paragraphs 32 and 69.

²² Department for Education (2014) Statutory guidance on children who run away or go missing from home or care, paragraph 38.

Can we integrate the Youth Offending Team assessments within a looked after child remand assessment?

The guide states “A single practitioner of either discipline could lead the combined assessment, but aspects of safeguarding and welfare must be completed by a social worker”. We believe this aspect of the guide undermines the statutory purpose of granting looked after status – and protections – to all remanded children.²³

Statutory care planning guidance encourages partnership working but does not absolve local authorities of their duties relating to care assessments, reviews and visits. It states:

When undertaking assessments, reviews and visits, it is essential to understand the differing roles of the various partner services. The designated authority should work with other services e.g. YOTs. This may include combining meetings and regularly sharing information to support effective practice, in order to ensure the child’s needs are met and to minimise burdensome requirements on the child to participate in multiple assessments”.²⁴ [Emphasis added]

Given the centrality of the child’s welfare and safeguarding (which includes their future care and education outside of any criminal justice sanctions) in the statutory framework, and this being the very reason remanded children were granted looked after status, it is regrettable the guide suggests this form only “aspects of” the child’s assessment.

Does an Independent Reviewing Officer (IRO) have to chair Child Protection conferences where their looked after children’s situation is being assessed?

The ‘myth busting’ guide omits the crucial two preceding paragraphs of the statutory guidance, which are more favourable to the IRO chairing a child protection conference where their looked after child’s situation is being assessed:

Where a looked after child remains the subject of a child protection plan it is expected that there will be a single planning and reviewing process, led by the IRO.

The systems and processes for reviewing child protection plans and plans for looked after children should be carefully evaluated by the local authority and consideration given to how best to ensure the child protection aspects of the care plan are reviewed

²³ Section 104 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

²⁴ Department for Education (2015) The Children Act 1989 guidance and regulations. Volume 2: care planning, placement and case review, para 8.33.

*as part of the overall reviewing process leading to the development of a single plan. Given that a review is a process and not a single meeting, both reviewing systems should be aligned in an unbureaucratic way to enable the full range of the child's needs to be considered in the looked after child's care planning and reviewing processes.*²⁵ [Emphasis added]

CONCLUSIONS

Given the degree of inconsistency with established law, we have been advised the guide exposes local authorities to more judicial review cases. However, the vulnerabilities of looked after children and young people inevitably mean that many will be unaware that their corporate parents – in following this guide – are not acting consistently with the statutory framework.

As Minister with responsibility for the care system, we urge you to rectify this situation by withdrawing the above sections of the guide and ensuring that any further guidance is published following proper consultation, and that it has a clear status.

We remain fully committed to working in partnership with you and the Department in the interests of children, young people and families, and look forward to hearing from you soon.

All good wishes

The Aire Centre

Article 39

Association of Independent Visitors and Consultants to Child Care Services

Association of Lawyers for Children

Association of Professors of Social Work

Association of Youth Offending Team Managers

Become

British Association of Social Workers England

The Care Leavers' Association

Children England

Child Rights International Network

Coram Children's Legal Centre

Coram Voice

²⁵ Department for Education (2015) The Children Act 1989 guidance and regulations. Volume 2: care planning, placements and case review, paragraphs 2.11 and 2.12.

ECPAT UK
Family Action
The Fostering Network
Howard League for Penal Reform
Independent Children's Homes Association
Just for Kids Law
The MAC Project (Central England Law Centre and the Astraea Project)
Nagalro, Professional Association of Children's Guardians, Family Court Advisers and Independent Social Workers
National Association for People Abused in Childhood (NAPAC)
National Association for Youth Justice
National Association of Independent Reviewing Officers
National IRO Managers Partnership
NYAS (National Youth Advocacy Service)
Parents Of Traumatized Adopted Teens Organisation (The Potato Group)
Refugee Council
Social Workers Union
Social Workers Without Borders
Southwark Law Centre
UNISON

Dr Maggie Atkinson, Children's Commissioner for England 2010-2015
Sir Al Aynsley-Green, first Children's Commissioner for England 2005-10; now visiting Professor of Advocacy for Children and Childhood, Nottingham Trent University
Wendy Bannerman, Director of Right Resolution CIC
Jay Barlow, Napo National Vice-Chair
Liz Davies Emeritus Professor of Social Work, London Metropolitan University
Anna Gupta, Professor of Social Work, Royal Holloway University of London
Pam Hibbert OBE
Ray Jones, Emeritus Professor of Social Work, Kingston University and St George's, University of London
John Kemmis, former Chief Executive Voice, NAIRO Patron and Article 39 Expert Panel member
Dr Mark Kerr, Managing Partner, The Centre for Outcomes of Care
Jenny Molloy, Author, Adviser and Trainer
David Palmer, Lecturer in Criminal Justice Services, University of Northampton
Peter Saunders, Founder NAPAC
Mike Stein, Emeritus Professor, University of York

June Thoburn CBE, Emeritus Professor of Social Work, University of East Anglia
Dr Nigel Thomas, Professor Emeritus of Childhood and Youth, University of Central
Lancashire

Judith Timms OBE, Founder and Trustee of the National Youth Advocacy Service (NYAS)
and a Vice President of the Family Mediators Association

Jane Tunstill, Emeritus Professor of Social Work, Royal Holloway, London University

Copied to:

Isabelle Trowler, Chief Social Worker for Children and Families

Yvette Stanley, National Director for Social Care, Ofsted

Dame Glenys Stacey, HM Chief Inspector of Probation