Response to DCSF Care Planning Placement and Case Review Regulations Consultation

From Family Rights Group

Family Rights Group is a charity in England and Wales that advises parents and other family members whose children are involved with or require social care services. We run a confidential telephone advice service for families. Established as a registered charity in 1974, we work to increase the voice children and families have in the services they use. We promote policies and practices that assist children to be raised safely and securely within their families, and campaign to ensure that support is available to assist grandparents and other relatives who are raising children who cannot live at home.

Overall we consider the new regulations and guidance to be positive developments, particularly with the emphasis on children being consulted about plans made for them at all stages of the looked after process. We are also pleased that in the opening paragraphs of the CPPR guidance[1], reference is made to the intention underpinning the 1989 Children Act that intervention should support, rather than undermine, the parental role, and the importance of the local authority working in partnership with parents. However, we are concerned that the new regulations and guidance as currently drafted do not *consistently* reflect the importance of parents and the wider family in decision making and planning for looked after children. To that end, we have set out below our views on where we think that the regulations or guidance could be strengthened in this respect.

1. Parental involvement in decision making for looked after children

1.1 Consultation with parents in planning:

The draft guidance is inconsistent on the issue of consultation with parents. Whilst some statements are very clear that parents must be consulted during the planning and reviewing process, and that the general duty to consult with parents[2] and significant others in s22(4) CA89 would apply, there is nevertheless a sense in the guidance that they may be marginalised or even simply overlooked in certain key areas (discussed further below). It is important to

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1 **Abbreviations used in this response:**
ACPR: Arrangement for placement of Children Regulations 1991
CA89: Children Act 1989
CCPR guidance : Care Planning Placement and Review guidance
CYPA: Children and Young Persons Act 2008
Draft regulations: Care Planning Placement and Review regulations
PR: Parental responsibility
RCCR: Review of Children's Cases Regulations 1991

2 This duty applies whether or not the parent has parental responsibility (PR)

remember that parents and relatives remain very important to children throughout the time they are looked after, not least because

- 92% of looked after children return home to their families or their home communities and contact with their families is the key to early discharge from care (Bullock et al 1999);
- parents/others with PR have PR throughout the time that children are accommodated and their agreement is needed to any plan for the child (Reg 3 ACPR 1991)..

We therefore recommend that the guidance is revised to ensure consistent consultation and involvement of parents throughout the planning process. Specifically the following issues need to be addressed:

a) Where a child is not yet looked after, the consent of parents/others with PR should be sought **before** consultations are carried out regarding placement of the child (CPPR para 4.4). It should also be stated in CPPR para 10.50 that parents need to be consulted;

b) Care Plans and health care**: c**learly a child's state of health is an important matter and we support the inclusion of regulation 7 detailing the role of the local authority in ensuring that health assessments are carried out. However, in our view it is vital that Regulation 7 should include provision for the consent of the parents or other persons with parental responsibility to be sought prior to an medical examination taking place. Many children who are looked after will be too young to give informed consent to a medical examination, and in the case of those for whom there is no care order, the local authority does not have parental responsibility for them. Moreover, the carrying out of a medical examination without parental consent, or even a requirement to attempt to seek that consent, is likely to alienate parents further, which can have ramifications in terms of the future relationship between parent and child as well as the working relationship between the parent and local authority. **We therefore suggest that** the regulations are amended to provide that, so far as reasonably practicable, parental consent should be sought prior to any medical assessment of the child. The CCPR guidance should also include a paragraph stressing the importance of involving parents in matters concerning their children's health.

c) The Child's PEP: Parents should be involved in the development of their child's PEP (CPPR para 6.9). Although the draft regulations require the local authority to record details of the wishes and feelings of parents (reg 5(1)(f) in relation to education, there is no mention in the CCPR guidance (para 6.9) of working in partnership with parents when preparing the PEP.

d) Parents should be consulted about the placement **before the plans are firmed up** so that they have opportunity to make their views known (CPPR para 10.53); it is simply too late if they are notified of a placement which is either made or about to be made;

e) Placements and disruption in education: We are surprised to see that there is no provision in the draft regulations (Reg 10) for ascertaining the wishes and feelings of parents on any potential disruption of education before making a change to a placement. Although the general duty in s22(4) CA89 would apply to such a decision, we consider that a mandatory duty to consult parents should be included in the regulations and also in guidance in 10.14-10.15. As a minimum, we would expect to see specific reference to parental consultation as part of the s22(4) CA duty in the CCPR guidance (para 10.15). Again, this is a key area where parents should be supported in their parenting role.

f) Review prior to termination of placement: Para 10.63 delete 'where possible and appropriate' in line 3 and replace with something stronger i.e unless this would place the child at risk of harm/cannot be found/contrary to child's' welfare;

g) The comment in CPPR para 13.18 that primary responsibility is with parents does not just apply to short breaks – it should apply to all accommodated children not least because parents typically have PR and the LA does not, hence their agreement to any plan is required.

1.2 Consultation with parents in the reviewing process

Although the guidance talks about the need to consult with parents about reviews (paras 15.14-15.20) and again the general consultation duty in s.22(4) would apply, the new draft regulations concerning reviews (reg35-40) do not include a requirement for local authorities or the IRO to seek and take into account the views of parents prior to the review, nor to involve them at the review meeting. This weakens the position in the current regulations (RCCR) which states:

(1) Before conducting any review the responsible authority shall, unless it is not reasonably practicable to do so, seek and take into account the views of-

(a) the child;
(b) his parents;
(c) any person who is not a parent of his but who has parental responsibility for him; and
(d) any other person whose views the authority consider to be relevant;

including, in particular, the views of those persons in relation to any particular matter which is to be considered in the course of the review. (reg 7 RCCR). Moreover the section on helping parents to participate in reviews in the current guidance to IROs has been reduced in the draft IRO handbook (para 4.17 IRO handbook).

We hope that this omission to ***require*** local authorities to consult with parents/others with PR/significant others is an oversight and that such a requirement will be included in the revised version. We do not think it is adequate to leave this to guidance. Moreover the guidance itself on reviews is inconsistent. Whilst making positive statements about the s22(4) duty and the need to consult

with parents about reviews there is still a sense that parents could simply be sent some forms to fill in giving their views, and may meet with the IRO, but are unlikely to attend the review meeting (e.g. para 4.1.4 & 4.11.6 IRO handbook). Indeed there is more in the guidance on how to exclude parents from review meetings than how to empower them to participate effectively (15.14-15.20 CCPR and para 4.11.2 IRO handbook).

We therefore strongly recommend that

i) The regulations are amended to include a requirement to consult with parents similar to the existing provision in Reg 7 RCCR; and

ii) the CCPR guidance including the IRO handbook is amended so that it consistently addresses the need to:
   - support parents to participate in the review (especially in section 4 eg:4.1.7,4.11.2-3, 4.11.7, 4.15.2 IRO handbook);
   - support wider family who are involved with the child to be consulted/involved in reviews (CPPR paras 15.14 and 15.19 and section 4 IRO handbook) and
   - consider advocates / interpreters for parents as well as children at review meetings (IRO handbook para 4.3.3). This is discussed further below.

1.3 Parental advocacy

Although mention is made of the need to consider securing the support of an advocate for a *child* during the care planning process, the guidance does not make any reference to the need to consider the support of an advocate for *parents* during meetings or reviews concerning their children. This is particularly important when meetings are planning for a permanent placement of the child away from the parents and/or wider family (CPPR para 4.19).

Research indicates advocacy in relation to local authority decision-making processes helps parents to feel more confident in their role as a parent, and helps them to feel empowered and supported and thus more able to respond to and engage with local authority children's services in relation to plans for their children (Lindley 1999). ***We therefore recommend that*** the CCPR guidance and the IRO guidance include reference to the importance of advising parents of independent sources of advice and advocacy services available to them, at all meetings and reviews concerning their child as is referred to in relation to contact issues (CPPR para 8.13)

2. Wider family and friends as carers for looked after children

2.1 Assessing family and friends as local authority foster carers

<u>i) When to assess Family and Friends carers:</u> The new s22C CA89 (amended by s.9 CYPA) prioritises the rehabilitation of a child with his/her parents, and, if that cannot be achieved, gives preference to placement with a relative, friend or other

connected person (subject to certain safeguards). Under the new provisions, the relative, friend or connected person must also be a local authority foster carer. This clearly means that the individual must be assessed as a foster carer in accordance with the Fostering Services Regulations. We are pleased that provision is made in the regulations (reg24) for temporary approval of such a person as a local authority foster carer to enable a child to be placed with such a person, pending approval.

However, we are concerned that the CCPR guidance does not give guidance on the circumstances in which a relative, friend or connected person should be assessed as a local authority foster carer. It is our experience that many family and friends caring for children who cannot live at home in circumstances where there is a clear duty on the local authority under s20 CA89 to provide accommodation for the child are nevertheless not assessed as foster carers because the child is deemed not to be placed in that accommodation by the local authority (s20 and s23(2) CA89) and thus have 'looked after' status. Typically this arises where a child is placed with a relative in an emergency following child protection enquiries in which the local authority decides it is not safe for the child to remain at home, yet they avoid applying for an EPO or care order precisely because the relative has stepped in to care for the child. Thus, even where the local authority have been closely involved in the decision that the child should live with the relative, friend or connected person, often citing 'going into care' as the only alternative option for the child, the family or friend carer is still treated either as private foster carer, or it is treated as a private arrangement made within the family.

Despite there being a body of case law which has addressed this issue, the experience of families who ring Family Rights Group's advice line suggests that this is not being followed in practice. **We therefore strongly recommend** that section I of the guidance on who is a looked after child and section 11 on placement includes the legal principles that can be extracted from the current case law as to when a relative or friend should be assessed as a foster carer, and the references of the case law itself. We have attached to this response Annex A in which we set out the relevant case law and our understanding of the principles that can be extracted from those judgments.

ii) How to assess Family and Friends carers: We are aware from our extensive experience of advising families and training professionals that the National Minimum standards (NMS) and assessment tools typically used are primarily designed for unrelated carers who have no established relationship with the child and are thus not tailored to circumstances where a family member is wanting to taking on the care of a child known to them. This means that assessment is weighted in favour of objective factors about the suitability of carers to take on the care of any child, at the expense of considering the specific benefits to a particular child of being placed with a named person who is already close to them. There are instances where family and friends fail the local authority

assessment yet go on to be granted a residence order because the court considers the care they are offering to be in the child's best interests following the welfare principle.

We welcome the fact that the government has indicated in the recent Green Paper (Support for All) that it will develop new NMS designed specifically for family and friends carers, which should partially help to address this problem. However, in order to promote the child's welfare and meet the requirements of s.22C regarding placement with relatives as first choice over unrelated foster carers, local authorities will need to have an assessment tool specifically designed to assess family and friends carers who have an existing relationship with the child.

Family Rights Group, in consultation with BAAF and The Fostering Network has developed just such a tool which is currently being piloted with 10 local authorities. This pilot needs to be evaluated and it is hoped that, following any necessary revisions, it will be available nationally as part of the BAAF series of forms. **It would be helpful if** the guidance could refer to this being in development and if the department would consider funding the evaluation in order to speed up its availability.

iii) Training on assessment of Family and Friends carers: There is a need for guidance on assessment of family and friends carers including a clear expectation that both those conducting assessments and local panels which approve family and friends carers are aware of the difference between family and friends care and unrelated care. This should include the provision of local training and, potentially, setting up a panel specifically to deal with family and friends care placements (CPPR para 11.39). This should cross refer to forthcoming Family and Friends guidance which should also address the same issue;

iv) Advice about IRM: Family and friends carers need to be referred to independent sources of advice and advocacy where they are not approved as foster carers so they can get advice about the Independent Review Mechanism. (CPPR para 11.30)

2.2 Family group conferences (FGC)

We are disappointed that there is not more reference in the guidance to the potential use of FGCs when making plans for looked after children, particularly in relation to making permanence plans for looked after children. The new Vol Guidance to the CA89 (published 2008) chapter 3 refers to the usefulness of FGCs as a way of engaging the wider family in planning for the child (CPPR paras 3.8 and 3.24). We anticipate that the forthcoming guidance on family and friends care will address this. We think it is important that all guidance gives the same message, hence:

i) we recommend further reference to the potential usefulness of FGCs in paragraphs 4.5, 4.9, 4.14, 4.19, 10.6, 10.9, 10.15, 11.2, 11.14, 11.28 CCPR and paras 4.3.1-4.3.3 IRO handbook. Also 5th bullet page 21 IRO handbook should be amended to say that consideration is given to offering a FGC to the families of all children who are looked after

ii) we urge the government to encourage local authorities to offer a family group conference to the child, their parents and extended family before, or where this is not possible as soon as reasonably practicable after a child becomes looked after;

2.3 Support for family and friends carers:

We recommend that guidance addresses the need for local authorities to assist family and friends carers to access counselling, advice, information and other support services and also training tailored to support them to meet the child's needs, as for other foster carers (CPPR para 7.4). This would be best achieved by

- published information about the support available to them and the criteria the local authority uses when deciding whether to provide such support;
- there being a dedicated named family and friends worker; and
- Specifically, first bullet on page 86 in CPPR para 15.23, adding 'and if so how the LA will support this including help with legal costs'.

Again the guidance on these points should cross refer to the forthcoming guidance on family and friends care, which will no doubt address these matters in more detail.

2.4 Sufficiency duty (s.22G):

Local authorities need to conduct an audit of those family and friends carers who are providing care for children who are looked after and also those on the edge of care so as to inform strategic planning in accordance with the sufficiency duty in s.22G, since they are an increasingly large number of carers raising children on the edge of care. **We therefore recommend that** CPPR paras 10.35-10.37 and the sufficiency guidance are expanded to include this..

3. Contact provisions for looked after children

a) There is a need to strengthen the guidance on the benefits of contact for looked after children with their parents and relatives as it currently seems to be weaker than the existing guidance in Vol 3 CA Regulations and Guidance (eg in para 7.18)

b) Contact with friends – do they consent to having their details recorded in the care plan? See CPPR para 7.19

c) There is a need for much more detailed guidance on support for contact arrangements including potential referral to mediation, financial and non-financial support (CPPR para 8.3). This is largely missing and should be similar to what is in the special guardianship guidance on this issue.

d) There is a need to address the importance of contact for looked after children with their siblings who live with their parents or other relatives/friends or those under a RO/SGO, not just those who are looked after (CPPR para 8.15). This appears to be omitted in the current draft.

e) The guidance needs to be stronger on supporting contact when there are difficulties eg: in CPPR para 8.3

4. Miscellaneous comments on drafting of regulations/guidance

4.1 Independent visitors: Regulation 49 and CPPR guidance para 9.1 to 9.5
The current provision in para 17 of Sch 2 CA 89 sets out a number of descriptions of children to whom an independent visitor should be appointed, namely where:
"(a) communication between the child and—
(i) a parent of his, or
(ii) any person who is not a parent of his but who has parental responsibility for him, has been infrequent; or
(b) he has not visited or been visited by (or lived with) any such person during the preceding twelve months"

The new s23ZB sets out the requirement to appoint an independent visitor where the child falls within a description to be prescribed in regulations, or it is in the child's interest. However, the new draft regulation 49 does not set out any description of children to whom an independent visitor should be appointed. This information is instead set out in the CPPR guidance, at paragraph 9.4 and 9.5. CPPR para 9.4 repeats the former sch 2 para 17 CA89 description, and this is further added to by CPPR para 9.5.
It is of concern to us that

- the children who fall within these descriptions are not to be protected by a statutory duty to appoint a visitor, and
- the new s23ZB clearly envisages regulations setting out the matters contained in para 9.4 and 9.5 of the CPPR guidance
- the guidance itself seems to be premised on these descriptions in fact being set out in s23ZB (see CPPR para 9.4 and 9.5 first sentences).

We would urge the DCSF to ensure that the draft regulations are amended to set out in full the range of looked after children for whom a local authority must appoint an independent visitor (s23ZB(1)(a)) and those children for whom they should consider appointing an independent visitor (if it is in the child's interests).

4.2 Short breaks: It is important to clarify that this applies to all children in need, hence in CPPR para 13.1 add to the end of the first sentence '*and other children in need*'

4.3 Local Authority's representative frequency of visits should be determined by the '***needs of child and'*** the circumstances of the case (see CPPR para 14.6) as it says further on in CPPR para 14.11

4.4 Other children who fall within the definition of looked after:
The guidance provides an important opportunity to assist practitioners to promote good practice. There is a considerable body of quite complicated case law which has established when a child is provided with accommodation under s.17 and s.20 and hence in the latter case when a child is looked after. This is set out in more detail in Annex B. We consider that the guidance should summarise this case law in Section 1 where it talks about who is defined as a looked after child so as to assist practitioners to understand to whom these regulations and guidance apply.

ANNEX A: Legal principles derived from case law on when a child placed with a relative is a looked after child

Was the child placed by the LA as a result s20 duty to accommodate?

R(D)-v- Southwark LBC [2007] EWCA Civ 182 :

The child 'S' alleged that she had been assaulted by her father. The local authority contacted D and asked her to care for S. A dispute arose as to whether this was a private fostering arrangement or a placement by the local authority.

The Court of Appeal held that it was a placement under s23(2) and ruled:

- Where the local authority played a major role in making arrangements for a child to be fostered, it was more likely to be concluded that it was exercising its powers and duties as a public authority pursuant to s.20 and s.23 of the Act.
- Further, if a local authority was facilitating a private arrangement in which the foster carer would have to approach the parents for financial support, this should be made clear to the foster carer.
- In this case, the local authority had taken a central role in arranging for S to live with D, there had been no contact between D and either parent, and the local authority had led S to believe that it would arrange for financial support.

R (on the application of A) Coventry City Council [2009] EWHC 34 (Admin) (2009) 1 FLR 1202

T was 15 years old and had been living with his father (F), and his partner after the death of his mother. Following an argument T ran away and went to stay with his elder brother, who was living with the mother (C) of one of his friends. C agreed that T could stay too, but she informed the local authority that she was finding it difficult to support T without financial assistance and that she was in arrears with her rent and council tax. T's F did not have any contact or take any part in the arrangements for T's care. The LA initial assessment noted C's concern that she could not continue to look after T without financial assistance. When C later complained to LA about the lack of financial assistance, they claimed T was privately fostered by an arrangement made between C and T, and that the responsibility for paying for T's care and accommodation rested with F.

The High Court held:

- T was a child in need, in the local authority's area and that F was prevented from providing him with suitable accommodation or care.

- C had made it clear from the outset that her ability to keep T on any permanent basis was dependent on the provision of funding, and her financial position was known to the local authority. C was never told that she was expected to accommodate T at her own expense.
- Therefore, in its dealings with C, the local authority **was to be taken as having exercised** its powers and duties pursuant to s.20 and s.23.
- Alternatively - If the LA had made a decision that it was not under a duty to accommodate T (as opposed to making no decision at all) then that decision must have been flawed, as accommodate that is uncertain as to duration because it is not founded on any secure financial footing cannot be said to be 'suitable' accommodation.

NB The relevant reports had made it clear that F had not co-operated at any stage of the process, and it was evident that as a 15-year-old boy, T could not enter into a binding private fostering arrangement with C.

R (Collins) –v- Knowsley MBC EWHC 2551 Admin QBD Dec 2008 Family Law P 1270, (2009) 1 FLR 493

C was a teenage girl referred to LA due to concerns about school attendance. C's step father had PR but she spent little time with him, being mostly in care of boyfriend's mother. Her step father then died. Discussions took place with LA in which boyfriends mother offered to look after her long term. The boyfriend's mother then applied for fostering allowance. LA refused on basis that she was not looked after.
High court held:
LA was under a duty to provide accommodation for girl and had organised placement with boyfriend's mother. LA therefore obliged to pay fostering allowance.

Annex B: Legal principles on when a child is looked after because accommodation is provided under s.20, rather than s.17:

Accommodation of UASC should be under s.20 not s.17 CA89

- Unaccompanied asylum seeking children (USAC) should be normally be accommodated under s20 CA 1989.

Department of Health: Local Authority Circular 2003/13 states

> *"For example, where a child has no parent or guardian in this country, perhaps because he has arrived alone seeking asylum, the presumption should be that he would fall within the scope of section 20 and become looked after, unless the needs assessment reveals particular factors which would suggest that an alternative response would be more appropriate. While the needs assessment is being carried out, he should be cared for under section 20."*

The issue was considered in **R (H) v Wandsworth LBC; R (B) v Hackney LBC; R(B) v Islington LBC [2007] 2 FLR 822**

Three child claimants all of whom had arrived in England as UASC, applied for judicial review of decisions by the respondent local authorities concerning their care. The three cases were unconnected on their facts, but involved a common question of law, namely whether a local authority providing accommodation to a lone child in need could specify that the care was provided under s17CA when the facts of the case meant that there was also a duty to provide accommodation under s20.

Court held

1. When providing accommodation to a lone child, a local authority could not specify that it was doing so in the exercise of a power under s.17 when, on the facts of the case, there was also a duty to do so under s.20.
2. If a local authority did in fact provide accommodation to a child in need and if, on the facts, a duty to do so arose under s.20, the accommodation had to be regarded as having been provided under s.20 and not under s.17, R (on the application of G) v Barnet LBC (2003) UKHL 57, (2004) 2 AC 208 applied.

A young person aged 16-17 presenting as homeless to a housing department should be assessed as a child in need, and if they require accommodation this should be provided under s20CA89

- Where a young person is already known to be a 'child in need', accommodation must be provided under s20 CA, LACS should NOT refer the individual to the housing department – R (on the application of S) v Sutton LBC (2007) EWCA Civ 790, (2007)

- A 16-17 yr old presenting to the housing dept as homeless should be offered temporary accommodation and referred to LACS for further assessment. If the assessment shows the child to be a child in need LACS must provide accommodation under s20 – R (on the application of M) v Hammersmith and Fulham LBC (2008) UKHL 14, (2008) 1 WLR 535. There is no power to continue to house a child under the housing legislation once it is shown the LA have a duty to provide accommodation under s20.

- Where a child fulfilled all of the elements required by the CA 1989 s.20(1), LACS is under a duty to provide him with accommodation under that section. It cannot side-step that duty by claiming to have provided him with accommodation under the general duty in s.17(1 – R(G) v Southwark (HL) (2009) 2 FLR 380

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