

Unlawful Placements, Unregulated Placements and ‘Other Arrangements’

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The Covid-19/coronavirus pandemic has resulted in local authorities struggling to comply with all of the regulations required to make lawful placements. Ofsted¹ and the Department for Education (DfE)² have produced guidance indicating that they recognise the difficulties facing local authorities; Ofsted points out that it does not have the power to change or waive legislative requirements, but accepts that local authorities may have to take a pragmatic approach; and the DfE is ‘exploring flexibilities in the fostering regulations and guidance’. For the time being, current regulations should be followed as much as possible, although Ofsted is unlikely to criticise any authority or agency that steps outside the regulations, so long as they do so with appropriate safeguards and fully record their decision-making.

CoramBAAF has recently seen some local authorities allowing unlawful placements out of necessity, but then purporting to make them lawful by classifying them as “other arrangements” under s.22C(6)(d) of the Children Act 1989. We are concerned that this represents a misunderstanding of the Act and regulations, and raises the possibility that there will be less focus on the potential risks in the placement once it has been labelled “lawful”.

Section 22C(6) allows a local authority to make a placement with a foster carer who is connected to the child, with a foster carer who is not connected to the child, in a registered children’s home, or in accordance with ‘**other arrangements which comply with any regulations made for the purpose of this section**’. The only regulation that deals with this section is regulation 27 of the Care Planning, Placement and Review (England) Regulations 2010.

Regulation 27 requires that before placing the child in an **unregulated setting**, the local authority must be satisfied that the matters set out in Schedule 6 of the regulations have been considered. Schedule 6 sets out matters such as the tenancy status, location, any financial commitment required by the child, and other similar considerations clearly aimed at supported lodgings/semi-independent-type accommodation, which can be an appropriate placement for a 16/17-year-old and for which there are no other applicable regulations. It is therefore **unregulated**.

For other commonly used placements, the relevant regulations are as follows. Where a child is placed with a family friend, family member or other connected person, Regulation 24 of the Care Planning, Placement and Review (England) Regulations 2010 sets out the regulatory framework for the first 24 weeks. Where a child is placed with a foster carer, the Care Planning, Placement and Review (England) Regulations 2010 and the Fostering Regulations (England) 2011 determine the way in which the placement should be managed. If a child is placed in a residential home, the placement must comply with the Children’s Homes (England) Regulations 2015. If a child is placed with a connected person who is not approved under Regulation 24, with a foster carer where the placement is not in accordance with their terms of approval, or in a children’s home that has not been registered with Ofsted, the

¹ <https://www.gov.uk/guidance/ofsted-coronavirus-covid-19-rolling-update>

² <https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services>

placement is unlawful. It has not become **unregulated**, it has failed to meet the applicable regulatory requirements and is **unlawful**.

Possible examples are:

- A child is placed with a connected person under Regulation 24 whose assessment cannot be completed and presented to a fostering panel (perhaps because of the absence of a health report). Regulation 25 requires that if that carer has not been approved fully as a foster carer after 24 weeks, the placement must be terminated and other arrangements made for the child's accommodation. Failure to comply with the regulations makes the placement unlawful. If the placement continues to be the most appropriate placement for the child and it is not possible for the child to remain there lawfully (perhaps by obtaining a child arrangements order), it may be necessary for a senior manager within the local authority to accept that the unlawful placement should continue until the regulatory requirements can be met.
- A child needs a foster placement that meets their specific needs, but there are no available vacancies. A carer is willing to take the child, but the placement of the child would exceed their approved number of placements, or be outside their approved age range. Regulation 23 of the Care Planning, Placement and Review (England) Regulations 2010 allows such a placement for a maximum of six working days, after which the placement must be terminated unless the foster carer's terms of approval have been amended and agreed. If the approval cannot be amended in time, the fostering service provider, and the child's placing authority, may consider that the lack of alternative available placements could justify the continuation of the foster placement despite it having become unlawful.
- A residential unit has to close because the numbers of staff affected by Covid-19 symptoms make the unit unsafe. The local authority has to find a placement for two children with high levels of care needs, as a matter of urgency. The children cannot be placed in foster care and there are no other residential units immediately available. The local authority rents a house and engages staff to provide the necessary care for the child. Note that a local authority can ask for holiday accommodation to remain available, notwithstanding the closure required by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. Any setting that provides care wholly or mainly for children should be registered with Ofsted as a children's home, but it may be considered that the time and effort required to register a temporary arrangement as a children's home is disproportionate in the immediate circumstances.

In each of the above examples, the placement is a regulated placement and **cannot be authorised as 'other arrangements'**. As the placement fails to comply with the applicable regulations, it is an unlawful placement and any decision to continue with the placement in breach of the regulations should be taken by a senior manager, preferably at assistant director level. The reasons for the decision to continue with an unlawful placement should be clearly recorded, with the risks of the placement identified and case-specific support and monitoring arrangements detailed. The need for the placement and the reasons why it remains unlawful should be kept under frequent review, and a plan to approve or register the placement, or for the child to be moved to a lawful placement, as soon as practicable must be set out and followed. The child's independent reviewing officer should be consulted about the plan and should ensure that the placement is kept under appropriately frequent review.