What's wrong with the Department for Education's 'Children's social care statutory guidance myth busting document'?

- It concerns primary and secondary legislation as well as statutory guidance.
- It contains inaccurate information about the law, yet includes this statement: *"Please note that all of the responses below have been agreed by the Department for Education and their lawyers in consultation with Ofsted*".
- It contradicts or weakens existing statutory guidance. However, in his letter in response to our joint letter[1], the Children's Minister's stated the 'myth busting' document *"does not seek to alter primary or secondary legislation, nor does it alter any statutory guidance".*
- The legal status of the document is unclear. It is undated and without any departmental contact/s.
- If local authorities follow the document's interpretation of what is allowed, they could be acting unlawfully.

The 'myth busting' question	What the document states local authorities are allowed to do	What's wrong with this answer
"Can we have one social worker for children and foster carers when a child is in a stable, long term placement?"	"Whilst the regulation states that there needs to be a qualified social worker for the child and the foster carer, it does not explicitly say that they need to have different social workers… "The Government response to the Foster Care in England review outlined that oversight and scrutiny in the system should be appropriate, effective, and proportionate and we will explore creative approaches to practice delivery with a small number of local authorities to consider where and how this approach could work. Any alternative model must demonstrate how children's rights and well-being are promoted and protected at all times."	It is inaccurate to state that separate social workers are not required by the existing statutory framework. The statement that "creative approaches" will be developed with "a small number of local authorities" does not mitigate this. The 'myth busting' document is published online; it claims to "clarify the relevant parts of statutory guidance" for local authorities generally; and therefore the inaccurate statement could be widely relied upon by local authorities and independent providers. The Children Act 1989[2] requires that children in care and care leavers are visited by a local authority representative – in accordance with regulations. One of the duties of the child's social worker is to speak to the child in private during each visit, unless the child refuses or the social worker believes this to be inappropriate or is unable to do so.[3] Clearly the safeguarding function of seeing the child alone would be undermined by the social worker being (correctly) viewed by the child as supervising and supporting the foster carers.[4] Existing care planning statutory guidance states visiting duties "will be best met if the visits are undertaken by the child's allocated social worker, other than in exceptional circumstances".[5] It distinguishes between children's social workers and supervising social workers. Separately, the national minimum standards for fostering services[6] and statutory guidance on fostering services[7] set out in detail the functions of supervising social workers and their relationships with children's social workers.

[1] On 4 September 2018, Article 39 and 49 others wrote to the Children's Minister, Nadhim Zahawi MP, asking for the inaccurate parts of the 'myth busting' document to be withdrawn. He replied on 10 September.
[2] Section 23ZA, inserted by Section 15 Children and Young Persons Act 2008.
[3] Regulation 29 The Care Planning, Placement and Case Review (England) Regulations 2010.
[4] Supervising social workers are also responsible for the annual review and approval of foster carers.
[5] Department for Education (2015) The Children Act 1989 guidance and regulations. Volume 2: care planning, placement and case review, paragraph 3.231.
[6] Department for Education (2011) Fostering services: National minimum standards, see especially paragraph 21.12.
[7] Department for Education (2011) The Children Act 1989 guidance and regulations. Volume 4: fostering services.

The 'myth busting' question	What the document states local authorities are allowed to do	What's wrong with this answer
"Can a Personal Adviser take on the role of the supervising social worker for foster carers, where the young person is staying put?"	"DfE and Ofsted have some reservations about whether the personal advisers will always have the right skills and capacity to take on the extra work, and would welcome details of any proposed new ways of working that would place this sort of responsibility on the Personal Adviser."	Section 23CZA of the Children Act 1989 sets out the local authority's duty to support foster carers in a staying put arrangement: *(3) It is the duty of the local authority (in discharging the duties in section 23C(3) and by other means)—* *(a) to monitor the staying put arrangement, and* *(b) to provide advice, assistance and support to the former relevant child and the former foster parent with a view to maintaining the staying put arrangement.* *(4) Support provided to the former foster parent under subsection (3)(b) must include financial support.* *(5) Subsection (3)(b) does not apply if the local authority consider that the staying put arrangement is not consistent with the welfare of the former relevant child.* *(6) The duties set out in subsection (3) subsist until the former relevant child reaches the age of 21."* The statutory function of Personal Advisers is set out in leaving care regulations: *A personal adviser shall have the following functions in relation to an eligible or a relevant child or a young person who is a former relevant child—* *(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.*[8] [Emphasis added] Existing statutory guidance states: "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".[9] 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.[10]

[8] Regulation 12 The Children (Leaving Care) (England) Regulations 2001.
[9] Department for Education (January 2015) The Children Act 1989 guidance and regulations. Volume 3: planning transition to adulthood for care leavers, paragraph 7.42.
[10] *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.

The 'myth busting' question	What the document states local authorities are allowed to do	What's wrong with this answer
"Can supervising social workers visit less frequently in stable and long term placements?"	"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."	The reference to "the minimum frequency of a visit once a year" is inaccurate. 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".[11]
"Can social workers visit less frequently than the normal six weekly basis in stable and long term placements?"	"In the case of a long term placement, which is intended to last until the child is 18, visiting requirements in the Regulations are at intervals of no more than six months. The authority must arrange a visit whenever reasonably requested by a child or foster carer regardless of the status of the placement."	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 after[12] – 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.[13] This means that the fewer number of visits which the 'myth busting' document presents as being permissible for stable and long term placements generally cannot be applied to: (a) children who lack sufficient understanding to give their consent; and (b) children who have sufficient understanding and have not given their consent.

[11] HM Government (2011) The Children Act 1989 Guidance and regulations. Volume 4: fostering services, paragraphs 5.67 and 5.68.
[12] 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.
[13] 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.

The 'myth busting' question	What the document states local authorities are allowed to do	What's wrong with this answer
"Do we always have to conduct an independent return home interview?"	"The Department and Ofsted agree that an independent return home interview should be offered to a child... The offer made must be genuine and the young person encouraged to accept, but if the child does not want this interview then it does not have to take place. We would expect good practice to be that the reasons for this are noted and recorded. "The guidance does not prescribe who the independent interviewer should be. This person will vary depending on the scenario and the needs of child. If the child does not want an independent interviewer they can chose who they want to do the interview. It is important that whoever does the interview is sympathetic to the child's perspective whilst also being able to take any necessary follow-up action, for example, sharing information with the right agencies around disclosures of harm, or reasons for patterns of repeat missing episodes."	This part of the 'myth busting' document contains three inaccuracies: (1) It states that children should always be offered a return interview. This differs from existing statutory guidance which states children must be offered a return interview.[14] (2) It states if the child does not want to be interviewed, then the interview does not have to take place. The existing statutory guidance does not say this (there is reference to children refusing to engage with an independent interviewer). It is important to recall that one of the reasons the new statutory guidance was issued in 2014 (replacing the 2009 version) was "widespread concerns about children in care being sexually exploited".[15] This is why its tone and content is all about encouraging children to trust and speak to professionals. (3) It 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".[16] For looked after children, the expectation in existing 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".[17] In addition, the document 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".[18]

[14] Department for Education (2014) Statutory guidance on children who run away or go missing from home or care, paragraph 31.
[15] https://www.gov.uk/government/consultations/statutory-guidance-on-children-who-run-away-or-go-missing-from-home-or-care
[16] Department for Education (2014) Statutory guidance on children who run away or go missing from home or care, paragraph 32.
[17] Department for Education (2014) Statutory guidance on children who run away or go missing from home or care, paragraph 69.
[18] Department for Education (2014) Statutory guidance on children who run away or go missing from home or care, paragraph 38.

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"Can we integrate the Youth Offending Team assessments within a looked after child remand assessment?"	**"**The Department, Ofsted and HMI Probation agree that the guidance does allow the Youth Offending Team assessments to be combined with looked after children remand assesments (sic). A single practitioner of either discipline could lead the combined assessment, but aspects of safeguarding and welfare must be completed by a social worker."	Looked after children remand assessments originate from the additional protections Parliament granted to remanded children in 2012.[19] Where a child is remanded to youth detention accommodation, the local authority is required by regulations to prepare a detention placement plan within 10 days.[20] The detailed matters to be included in this plan are also set out in the regulations.[21] Existing 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".*[22] [Emphasis added]
"Does an Independent Reviewing Officer (IRO) have to chair Child Protection conferences where their looked after children's situation is being assessed?"	"An IRO does not have to chair Child Protection conferences involving looked after children, but 'consideration' can be given to them chairing. The guidance allows for some flexibility around who chairs these conferences, but the IRO should attend."	The 'myth busting' document 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 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.*[23] [Emphasis added]

[19] Section 104 Legal Aid, Sentencing and Punishment of Offenders Act 2012.
[20] Regulation 47C(2) Care Planning, Placement and Case Review (England) Regulations 2010 (as amended by The Care Planning, Placement and Case Review (England) (Miscellaneous Amendments) Regulations 2013).
[21] Schedule 2A.
[22] Department for Education (2015) The Children Act 1989 guidance and regulations. Volume 2: care planning, placement and case review, para 8.33.
[23] 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.