

構成員提出資料

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第12回「新しい社会的養育の在り方に関する検討会」提出資料（2017.4.21）

成果として提示すべき事項（委員長案～「社会的養護の課題と将来像」から「新たな社会的養育の構築」に向けて～）に関する意見

（そろそろ報告書をまとめる時期ですので、私見を述べます。）

一、1 ページ目の前文について

1、見直しの視点

奥山委員長案は、『社会的養護の課題と将来像』（2012）の問題点を、『児童の代替的養護に関する指針』（国連2029）との違いとして指摘しています。私も同じ捉え方ですが、まず強調すべきは「家庭養護 family-based care と家庭的養護 family like care の表層的な整合性」というより、『指針』における「目的」についてです。『指針』で謳われている「目的」のところが、この『課題と将来像』では抜け落ちているからです。

ちなみに『指針』の「目的」の(2)には「以下の事柄を狙いとする」と記され、(a)で「永続的解決策 Permanent solutions」を掲げ、(b)に「永続的解決策が実現不可能か、児童の最善の利益に沿っていない場合」には「最も適切な形式 the most suitable forms」の代替的養護を特定すること、と記されています。

2、「永続的解決策」における二つの原則

『指針』の手引書となっている『前進 MOVING FORWARD』によれば、「永続的解決策」は「必要性の原則 necessity principle」と「適切性の原則 suitability principle」の二つから説明されています。

そこでは社会的養護児童が“十把一からげ”や“残余対象”として副次的に扱われてしまわないように、第一に分離についてしっかりと判断することが求められています。それが『必要性の原則』ということです。そして次に、それでも必要な場合には児童の最善の利益が追求されるべきで、そこで求められるのが「適切性の原則」と呼ばれているものです。

したがって本検討会でも、まず「永続的解決策」という考え方に立ち、そこへ至るプロセスについて書込んでおくことが必要になるかと思えます。

3、「パーマネンシー保障」と「介入後の一連のプロセス」

本検討会においても、虐待対応件数が10万件を超えていること、児相がキャパシティオーバー状態になっているため里親や施設でおこなわれる社会的養護を含む「介入後の一連のプロセス」がおかしくなっていること、こうしたことを踏まえて「パーマネンシー保障」の重要性が議論されてきたと思えます。

したがって『指針』の「目的」について書き込むことによって、「パーマネンシー保障」という捉え方を通奏低音としながら、「必要性の原則」から「適切性の原則」へと至る一連の流れの中で「最も適切な形式」をつくり出すこと、との認識が深まることを願うものです。このことが「個別化」の視点であったと思います。

4、「新しい社会的養育」と「社会的養護」の関係

戦災孤児・浮浪児の緊急保護対策を必要としていた戦後の一時期、わが国でも施設が大規模化(スケールメリットのための「下限設定」)していったという時期がありました。これは「社会的養護」を“十把一からげ”や“残余的对象”として扱ってしまう「劣等処遇」につながる副次的アプローチという方向です。

今回の在り方検討委員会の方向性である「新しい社会的養育」(広義)という捉え方は「社会的養護」(狭義)を包括するものとして捉えられていますが、虐待対応に追われている今日にあっては、ふたたび保護が先行して養育の課題が見失われやすくなっています。それを考えると、「社会的養護」は養育の質の確保に向けた「脱副次化」を鮮明に打ち出すことが必要ではないかと考えます。この「社会的養護の脱副次化」の方向を包括して、「社会的養育」の議論が深められていくことを望みたいと思います。

(旭児童ホーム 伊達直利)



MOVING FORWARD: Implementing the ‘Guidelines for the Alternative Care of Children’



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CLICK TO REFER
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DEVELOPMENT AND KEY FOUNDATIONS OF THE *GUIDELINES*



In this chapter you will find:

2a. Background to the *Guidelines*

- i. Why and how the *Guidelines* were developed and approved
- ii. Purpose of the *Guidelines*

IMPLICATIONS FOR POLICY-MAKING:
Demonstrating a commitment to children's rights

2b. Pillars of the *Guidelines*

- i. Respecting the 'necessity principle'
- ii. Respecting the 'suitability principle'
- iii. Applying the principles of necessity and suitability
- iv. Taking account of the 'best interests of the child'

Focus 1: Participation of Children and Young People in Care Decisions and Care Settings

- Implications for policy-making
- Promising practice:
 - Case Study 1: Mkombozi, Tanzania
 - Case Study 2: Collective participation in child protection services, Norway
 - Case Study 3: Who Cares? Scotland training initiative, Scotland, United Kingdom

2b. Pillars of the *Guidelines*

The *Guidelines* have been created to ensure respect for two basic principles of alternative care for children, namely:

- that such care is genuinely needed (the ‘necessity principle’), and
- that, when this is so, care is provided in an appropriate manner (the ‘suitability principle’).

Each of these principles comprises two main sub-sets.

i. Respecting the ‘necessity principle’

Acting on the ‘necessity principle’ first involves **preventing situations and conditions** that can lead to alternative care being foreseen or required. The range of issues to be tackled is considerable: from material poverty, stigmatisation and discrimination to reproductive health awareness, parent education and other family support measures such as provision of day-care facilities. It is worth noting that, as the *Guidelines* drafting process progressed, government delegates expressed an increasing interest in ensuring that preventive responses were given the most comprehensive coverage possible.

The second action point for the ‘necessity principle’ concerns the establishment of a robust ‘**gatekeeping**’ mechanism capable of ensuring that children are admitted to the alternative care system only if all possible means of keeping them with their parents or wider (extended) family have been examined. The implications here are two-fold, requiring adequate services or community structures to which referrals can be made, and a gatekeeping system that can operate effectively regardless of whether the potential formal care provider is public or private.

Furthermore, the necessity of a placement must be regularly reviewed. These are clearly significant challenges for many countries but experience shows that they need to be confronted if unwarranted placements are to be avoided.

ii. Respecting the ‘suitability principle’

If it is determined that a child does indeed require alternative care, it must be provided in an appropriate way. This means that **all care settings must meet general minimum standards** in terms of, for example, conditions and staffing, regime, financing, protection and access to basic services (notably education and health). To ensure this, a mechanism and process must be put in place for authorising care providers on the basis of established criteria, and for carrying out subsequent inspections over time to monitor compliance.

The second aspect of ‘suitability’ concerns **matching the care setting with the individual child concerned**. This means selecting the one that will, in principle, best meet the child’s needs at the time. It also implies that a range of family-based and other care settings are in place, so that a real choice exists, and that there is a recognised and systematic procedure for determining which is most appropriate (‘gatekeeping’).

In developing this **range of options**, priority should clearly be given to ‘family and community-based solutions’ ([§ 53](#)). At the same time, the *Guidelines* recognise family-based settings and residential facilities as complementary responses ([§ 23](#)), provided that the latter conform to certain specifications ([§ 123](#), [126](#)) and are used only for ‘positive’ reasons (i.e. when they constitute the most appropriate response to the situation and the needs of the child concerned ([§ 21](#))).

For example, a child who is taken into care as a result of a negative family experience may be unable to cope with an immediate placement in another ‘family-based’ setting and may, therefore, first need a less intimate or emotionally-demanding environment. Equally, if foster care is envisaged as the most favourable solution, the foster-family will need to be selected according to its potential willingness and ability to respond positively to the characteristics of the child in question. Again, the suitability of a placement must be subject to regular review – when and how often being dependent on the purpose, duration and nature of the placement – and should take account of all pertinent developments that may have occurred since the original decision was made.

iii. Applying the principles of necessity and suitability

The following are among the key elements to take into account to ensure that alternative care is used only when necessary and is appropriate for the child concerned.

Q1
IS CARE GENUINELY NEEDED?

Reduce the perceived need for formal alternative care

- Implement poverty alleviation programmes
- Address societal factors that can provoke family breakdown (e.g. discrimination, stigmatisation, marginalisation...)
- Improve family support and strengthening services
- Provide day-care and respite care opportunities
- Promote informal/ customary coping strategies
- Consult with the child, parents and wider family to identify options
- Tackle avoidable relinquishment in a pro-active manner
- Stop unwarranted decisions to remove a child from parental care

Discourage recourse to alternative care

- Ensure a robust gate-keeping system with decision-making authority
- Make available a range of effective advisory and practical resources to which parents in difficulty can be referred
- Prohibit the ‘recruitment’ of children for placement in care
- Eliminate systems for funding care settings that encourage unnecessary placements and/or retention of children in alternative care
- Regularly review whether or not each placement is still appropriate and needed

Q2
IS THE CARE APPROPRIATE FOR THE CHILD?

Ensure formal alternative care settings meet minimum standards

- Commit to compliance with human rights obligations
- Provide full access to basic services, especially health-care and education
- Ensure adequate human resources (assessment, qualifications and motivation of carers)
- Promote and facilitate appropriate contact with parents/other family members
- Protect children from violence and exploitation
- Set in place mandatory registration and authorisation of all care providers, based on strict criteria to be fulfilled
- Prohibit care providers with primary goals of a political, religious or economic nature
- Establish an independent inspection mechanism carrying out regular and unannounced visits

Ensure that the care setting meets the needs of the child

- Foresee a full range of care options
- Assign gatekeeping tasks to qualified professionals who systematically assess which care setting is likely to cater best to a child’s characteristics and situation
- Make certain that residential care is used only when it will provide the most constructive response
- Require the care provider’s cooperation in finding an appropriate long-term solution for each child

THE NECESSITY PRINCIPLE

THE SUITABILITY PRINCIPLE

iv. Taking account of the ‘best interests of the child’

There are frequent references in the *Guidelines* to the ‘best interests of the child’. However, much confusion surrounds the meaning and implications of this concept in the context of promoting and protecting children’s rights. **Misinterpreting the aims and scope of the ‘best interests principle’ can lead in practice to highly inappropriate and harmful responses** to children who are, or are at risk of being, without parental care.

The child has the right to have his/her ‘best interests’ taken into account as ‘a primary consideration’ when decisions affecting the child are made by ‘public or private social welfare institutions, courts of law, administrative authorities or legislative bodies’ (CRC Article 3.1.). These decisions can have far-reaching consequences. So, it is all the more important to be clear about the way ‘best interests’ are to be approached when implementing the *Guidelines*.

Essentially, three interdependent requirements emerge from CRC Article 3.1:

1. **Whenever the entities mentioned above are involved, they must determine the best interests of the child.** This means making a decision on the basis of all information requested and/or made available. This responsibility for determining best interests is particularly important where there is a conflict of opinion or where there is no primary caregiver.
2. In coming to a decision that affects the child, these entities should also take account of **the rights and legitimate interests of any other party** (e.g. parents, other individuals, bodies or the State itself) as well as other pertinent factors. Thus, although priority to the child’s best interests is seen as the guiding rule in practice, decision-makers are not actually bound to follow this in every instance. Requirement 2 should be balanced with requirements 1 and 3 and should not be interpreted outside the context of these three CRC requirements.
3. When a **‘best interests’ decision has to be made between various appropriate and viable options for a child**, it should in principle favour the solution considered to be the most positive for the child – immediately and in the longer term. At the same time, any final decision should be thoroughly compliant with all the other rights of the child.

Importantly, from a rights perspective, ‘best interests’ do not transcend or justify ignoring or violating one or more other right – if that were so, the concept could never have figured in the CRC. The ‘right’ in the CRC simply seeks to ensure that the child has his or her best interests duly considered when decisions are made about the most effective way to safeguard overall rights. The responsibility for that decision-making clearly lies with the bodies specified; it cannot be taken over arbitrarily by others.

In a field such as alternative care – both in practice and from a policy perspective – it is reasonable to expect that **in the vast majority of situations, the child’s duly determined best interests should be followed**. If and when this is not the case, it has to be demonstrated that doing so would seriously compromise the rights and interests of others. One example of this, provided in the UNHCR *Guidelines* (see below), would be a decision not to place a child with an infectious disease in a foster family before treatment, even if family-based care has been determined as being in his/her best interests. Similarly, it is not unknown for the physical security of foster carers looking after a particular child to be threatened by third parties, resulting in the need to relocate that child to a group setting where staff protection can be better assured. It follows that situations where the child’s initially-determined best interests cannot be prioritised are truly exceptional.

Furthermore, the **‘best interests of the child’ are the determining factor in two situations** that are directly relevant to alternative care: examining the need to separate a child from his/her parents (CRC Articles 9.1 & 20.1); and exploring adoption as an option for a child who has been taken into alternative care (CRC Article 21). In these cases, the child’s best interests should clearly take automatic precedence but it is still vital to remember that **the two other core elements of CRC Article 3.1 (decision-making responsibility and the rights-compliant nature of the chosen solution) remain intact**.

While the responsibility for deciding on best interests is thus established by the CRC, it leaves a vital question unanswered: what information, factors and criteria should constitute the basis for that decision? In other words, how are best interests to be determined?

To date, the most comprehensive attempt to respond to that question at international level is undoubtedly the ‘Guidelines on Determining the Best Interests of the Child’ drawn up by the UNHCR (2008). Although the **Best Interests Determination (BID)** model it proposes was largely designed with unaccompanied and separated refugee children in mind, it is a prime source of inspiration when any significant decisions are to be made about a child and his/her future.

With children for whom alternative care is, or may be, a reality, BID should be grounded in **an assessment undertaken by qualified professionals, and should cover at least the following issues:**

1. The child’s own freely expressed opinions and wishes (on the basis of the fullest possible information), taking into account the child’s maturity and ability to evaluate the possible consequences of each option presented.
2. The situation, attitudes, capacities, opinions and wishes of the child’s family members (parents, siblings, adult relatives, close ‘others’), and the nature of their emotional relationship with the child.
3. The level of stability and security provided by the child’s day-to-day living environment (whether with parents, in kinship or other informal care, or in a formal care setting):
 - a) Currently (immediate risk assessment)
 - b) Previously in that same environment (overall risk assessment)
 - c) Potentially in that same environment (e.g. with any necessary support and/or supervision)
 - d) Potentially in any of the other care settings that could be considered.
4. Where relevant, the likely effects of separation and the potential for family reintegration.
5. The child’s special developmental needs:
 - a) Related to a physical or mental disability
 - b) Related to other particular characteristics or circumstances.
6. Other issues as appropriate. For example:
 - a) The child’s ethnic, religious, cultural and/or linguistic background, so that efforts can be made, as far as possible, to ensure continuity in upbringing and, in principle, maintenance of links with the child’s community
 - b) Preparation for transition to independent living.
7. A review of the suitability of each possible care option for meeting the child’s needs, in light of all the above considerations.

The results of such an assessment should form the basis of BID by the competent bodies, who will also consider all other factors (including the availability of options in practice, and the interests and rights of others) before coming to a decision. The reason for their decision should be explained to the child, especially if it does not correspond to the opinion s/he expressed. A BID assessment should also be carried out each time a placement comes up for review (see CRC Article 25, *Guidelines § 67*).

In certain egregious situations, the danger facing a child will require **immediate protective action**. Here, it is vital to ensure that the full BID process is launched as soon as practicable after the initial emergency response – ideally with an agreed protocol for doing so. In particular, no definitive and durable solution must ever be arranged before the assessment process has been completed, and its findings have been taken into account by a competent authority.