Legal basis for processing personal data and consent under the General Data Protection Regulations (GDPR)

To process personal data you must find at least one ground from Article 6(2) below. It is important that we know upon what 'legal basis' we are processing data, and document it in our Record of Processing Activity. In addition there is 'special category data' which is explained below.

Lawfulness of processing conditions Article 6(1)

6(1)(a) Consent of the data subject. This is the weakest 'lawful basis' because consent can be withdrawn and you should inform parents that they can withdraw consent. Parents have consented to allow you to process some data about their child, for example to take photographs to illustrate a child's learning.
6(1)(b) Contractual necessity. This is very strong. The processing is necessary for the performance of a contract with the data subject, or to take steps to enter into a contract. For example, you are required by the local authority to ask parents to complete a parental declaration for the FEEE and you cannot receive the funding unless all the form is completed.
6(1)(c) Legal obligation. Very strong. Processing is necessary for compliance with a legal obligation. For example you are required to have this information about a child according to the EYFS, or the Requirements of the Childcare Register.
6(1)(d) Vital interests. This must be justifiable. Processing is necessary to protect the vital interests of a data subject or another person. This 'lawful basis' could be the one you use for requesting a child's religion or medical history in the case of an urgent medical care. You are required to have emergency contacts by the EYFS so you would use 'legal obligation' as the basis for emergency contacts.
6(1)(e) Public Interest. This is unlikely to be relevant to childminders. Processing is necessary for the performance of a task carried out in the public interest, or in the exercise of official authority vested in the controller
6(1)(f) Legitimate Interest. Necessary for the purposes of legitimate interests pursued by the controller or third party, unless overridden by the interests of the data subject.

Definition of special category data: "revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade-union membership, and the processing of genetic data, biometric data for the purpose uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation."

If you record special category data then you need to identify a lawful basis PLUS an additional special category lawful basis, the only one of which is consent, as below

Conditions for special categories of data under Article 9(2)

9(2)(a) – Explicit consent of the data subject, unless reliance on consent is prohibited by EU or Member State law

Where no ground for the processing of special category data can be found in Article 9(2) we will be relying on explicit consent Article 9(2)(a). This presents us with a challenge as data subjects have enhanced rights in particular where consent or contract is the legal basis for processing.

Challenges with using consent:

- The GDPR adds a presumption that consent is *not* freely given if there is "a clear imbalance between the data subject and the controller, in particular where the controller is a public authority." Importantly, a controller may not make a service conditional upon consent, unless the processing is necessary for the service.

- The GDPR gives data subjects the right to withdraw consent at any time and "it shall be as easy to withdraw consent as to give it." Controllers must inform data subjects of the right to withdraw before consent is given. Once consent is withdrawn, data subjects have the right to have their personal data erased and no longer used for processing.

- Article 17, the data subject has the right to have the controller erase the data if the data subject withdraws consent and the processing had been based on consent. Under Article 18, where the data subject exercises the right to restrict data processing, the controller may only continue to process the data if it obtains the data subject's consent or if processing is necessary for a legal claim. Article 20 grants the data subject the right to receive all the personal data in the controller's possession that relates where the processing is based on consent.

- Whenever a controller relies on consent as a basis for processing, under Article 7(1), the controller bears the burden of demonstrating that consent was obtained lawfully. We are required to maintain a record of consent detailing when and how consent was given, that data subjects know how to withdraw consent

- Controllers must obtain the consent of a parent or guardian when processing the personal data of a child under the age of 16. They also must make "reasonable efforts" to verify that a parent or guardian has provided the appropriate consent. The UK, has vowed to lower its age of consent to 13.

- Violation of the rules around consent generally subject controllers to the higher level of fines.