Care Standards

The Tribunal Procedure Rules (First-tier Tribunal) (Health, Education and Social Care) Rules 2008

Heard on 13-16 June at the Birmingham Tribunal Centre

BEFORE
Mrs J Crisp (Judge)
Mrs L Jacobs (Specialist Member)
Ms M Adolphe (Specialist Member)

BETWEEN:

Oakview Estates Ltd

Appellant

v

Care Quality Commission

Respondent

[2016] 2896.EA

DECISION

1. The Appellant appeals the decision of the Care Quality Commission not to grant its application to vary the conditions of its registration by adding a location from which it would to be permitted to provide particular regulated activities.

2. The Appellant was represented by Paul Spencer of counsel and the Respondent by Zoe Leventhal of counsel. The single issue between the parties is "was the Respondent correct to refuse the Appellant's application to vary the certificate of registration to add a care home at the location "Wast Hills"?

3. The Appellant is part of the Danshell Group. The Appellant is registered as a provider of regulated activities in the following categories

3.1. accommodation for persons who require nursing or personal care
3.2. assessment or medical treatment for persons detained under the Mental Health Act 1983
3.3. treatment of disease, disorder or injury.

4. Wast Hills House, Wast Hills Lane, Kings Norton, West Midlands (Wast Hills) is a location from which the Appellant provides the regulated services above. Wast Hills operates as a rehabilitation hospital specifically for individuals with learning disabilities and autism with complex needs from 3 different sites namely

3.1 The Main House which is a 15 bedded provision into which individuals would be admitted when acutely unwell and requiring intensive assessment and treatment to support rehabilitation
3.2 The Lodge now operating to support two individuals with significant mobility needs
3.3 The Bungalow a 6 bedded provision for individuals with severe learning difficulties, autism and complex needs which require intensive nursing support.

5. The Appellant submitted an application dated 31st March 2016 to vary the conditions of its registration pursuant to S.19 of the Act by adding a location from which it would be permitted to provide (a) accommodation for persons who require nursing and personal care and (b) treatment of disease, disorder or injury. The location sought to be added was named as Wast Hills Bungalow and the address given as The Annex, Wast Hills Lane, Kings Norton B38 9ET. The service type to be provided was described as a 'Care home service with nursing', with 6 beds to be provided for adults aged 18 to 65 years. The 'service band user' was stated to be: Mental health; Learning difficulties or autistic spectrum disorder; Physical disability.

6. The purpose of the application as stated was to enable the Appellant to run The Bungalow as an independent care home with nursing in order to provide a 'step down' service from Wast Hills and other hospital settings for those with severe learning disabilities, autism and complex health needs.

7. On the 29th July 2016 two Notice of Proposals to refuse the application in relation to nursing and personal care and treatment of disease, disorder or injury were issued. Following representations from the Appellant, the Respondent proceeded to adopt the Notices of Proposal and refuse the application to vary in its Notice of Decision dated 30th November 2016.

8. It is a matter of fact that only one Notice of Decision was issued. The Appellant accepts that this can relate to both applications.

9. The Appellant lodged notice and grounds of appeal by email dated 20th December 2016. Their case is a proposal that the bungalow which is on site be registered as a care home to provide a transitional service which their experienced staff and multi-disciplinary team have set out. The best interests of the service users would be met and whilst the Appellant agrees with the philosophy underpinning the registering the Right Support the guidance remains discretionary and the Respondent has not understood the particular needs of the client group who it is proposed reside in the bungalow.

10. The Respondent's case is that it fully accepted that the Appellant provides an excellent service at Wast Hills. However the proposal to register the Bungalow as a care home does not comply with the 2014 Regulations interpreted with national and CQC policy as required under section 25 of the 2008 Act.

11. The Tribunal heard oral evidence over 4 days and undertook a site visit.

LEGAL FRAMEWORK

Section 1 of the Health and Social Care Act 2008 created the Care Quality Commission. Its functions include registration functions set out in Chapter 2 of the Act. The objectives of the Commission are contained in Section 3.

3 The Commission's objectives

(1) The main objective of the Commission in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services.

(2) The Commission is to perform its functions for the general purpose of encouraging–
(a) the improvement of health and social care services,
(b) the provision of health and social care services in a way that focuses on the needs and experiences of people who use those services, and
(c) the efficient and effective use of resources in the provision of health and social care services.

(2) In this Chapter "health and social care services" means the services to which the Commission's functions relate.

12. Section 4 sets out matters to which the Commission must have regard in exercising its functions:

4 Matters to which the Commission must have regard

(1) In performing its functions the Commission must have regard to–
(a) views expressed by or on behalf of members of the public about health and social care services,
(b) experiences of people who use health and social care services and their families and friends,

(c) views expressed by Local Healthwatch organisations or Local Healthwatch contractors about the provision of health and social care services.

(d) the need to protect and promote the rights of people who use health and social care services (including, in particular, the rights of children, of persons detained under the Mental Health Act 1983, of persons who are deprived of their liberty in accordance with the Mental Capacity Act 2005 (c. 9), and of other vulnerable adults),

(e) the need to ensure that action by the Commission in relation to health and social care services is proportionate to the risks against which it would afford safeguards and is targeted only where it is needed,

(f) any developments in approaches to regulatory action, and

(g) best practice among persons performing functions comparable to those of the Commission (including the principles under which regulatory action should be transparent, accountable and consistent).

(3) In performing its functions the Commission must also have regard to such aspects of government policy as the Secretary of State may direct.

(3) In subsection (1) (c), "Local Healthwatch contractor "has the meaning given by section 223 of the Local Government and Public Involvement in Health Act 2007.

13. A person seeking to be registered as a service provider must make an application to the Commission. Where such an application has been made, S.12 of the Act provides:

12 Grant or refusal of registration as a service provider

(1) Subsections (2) to (4) apply where an application under section 11 has been made in accordance
with the provisions of this Chapter with respect to a regulated activity.

(2) If the Commission is satisfied that–

(a) the requirements of regulations under section 20, and

(b) the requirements of any other enactment which appears to the Commission to be relevant, are being and will continue to be complied with (so far as applicable) in relation to the carrying on of the regulated activity, it must grant the application; otherwise it must refuse it.

(4) The application may be granted either unconditionally or subject to such conditions as the Commission thinks fit.

(5) On granting the application, the Commission must issue a certificate of registration to the Applicant.

(6) The Commission may at any time–

(a) vary or remove any condition for the time being in force in relation to a person's registration as a service provider, or

(b) impose any additional condition.

(6) Subsections (3) and (5) have effect subject to section 13.

14. Section 20(1) and (2) provide for the power to impose Regulations as follows
20 Regulation of regulated activities

(1) The Secretary of State must by regulations impose requirements that the Secretary of State considers necessary to secure that services provided in the carrying on of regulated activities cause no avoidable harm to the persons for whom the services are provided.

(2) The Secretary of State may by regulations impose any other requirements in relation to regulated activities that the Secretary of State thinks fit for the purposes of this Chapter, including in particular provision with a view to—

(a) securing that any service provided in the carrying on of a regulated activity is of appropriate quality, and

(b) securing the health, safety and welfare of persons for whom any such service is provided.

15. The relevant current Regulations are the Health and Social Care Act (Regulated Activities) Regulations 2014.

16. Regulation 15(1) sets out the requirements for the premises from which care services are provided as follows:
(1) All premises and equipment used by the service provider must be—

(a) clean,
(b) secure,
(c) suitable for the purpose for which they are being used,
(d) properly used
(e) properly maintained, and
(f) appropriately located for the purpose for which they are being used.

Regulation 17 sets out the requirements for good governance as follows:
(1)- Systems or processes must be established and operated effectively to ensure compliance with the requirements in this Part.
(2) Without limiting paragraph (1) such systems or processes must enable the registered person, in particular to --
(a) assess, monitor and improve the quality and safety of the services provided in the carrying on of the regulated activity (including the quality of the experience of service users in receiving those services);
(b) assess, monitor and mitigate the risks relating to the health, safety and welfare of service users and others who may be at risk which arise from the carrying on of the regulated activity;
(c) maintain securely an accurate, complete and contemporaneous record in respect of each service user, including a record of the care and treatment provided to the service user and of decisions taken in relation to the care and treatment provided;

(d) maintain securely such other records as are necessary to be kept in relation to –
(i) persons employed in the carrying on of the regulated activity, and
(ii) the management of the regulated activity;
(e) seek and act on feedback from relevant persons and other persons provided in the carrying on of the regulated activity, for the purposes of continually evaluating and improving such services;
(f) evaluate and improve their practice in respect of the processing of the information referred to in sub-paragraphs (a) to (e).
(3) The registered person must send to the Commission, when requested to do so and by no later than 28 days beginning on the day after receipt of the request-
(a) a written report setting out how, and the extent to which, in the opinion of the registered person, the requirements of paragraphs (2) (a) and (b) are being complied with, and
(b) any plans that the registered person has for improving the standard of the services provided to the service users with a view to ensuring their health and welfare.

17. Also relevant to this matter are Regulations 9 (person centred care), 10 (dignity and respect), 12 (safe care and treatment), 18 (staffing) and 19 (fit and proper persons employed).

18. Subject to certain exceptions, which are not applicable in this case, a person registered as a service provider may apply to the Commission for the variation of any condition in force in relation to the registration. Such application must be made in such form, and contain or be accompanied by such information, as the Commission requires. The Commission must give the applicant notice in writing of a proposal to refuse an application under S19 (1) (a). Such notice must give the Commissions reasons for its proposal.

19. Section 23 of the Act requires the Commission to issue guidance about compliance with the requirements of regulations under Section 20 and provides:

23 Guidance as to compliance with requirements

(1) The Commission must issue guidance about compliance with the requirements of regulations under section 20, other than requirements which relate to the prevention or control of health care associated infections.

(2) The guidance may, if the Commission thinks fit, also relate to compliance for the purposes of this Chapter with the requirements of any other enactments.

(3) The guidance may
(a) operate by reference to provisions of other documents specified in it (whether published by the Commission or otherwise);

(b) provide for any reference in it to such a document to take effect as a reference to that document as revised from time to time;

(c) make different provision for different cases or circumstances.

(4) The Commission may from time to time revise guidance issued by it under this section and issue the revised guidance.

20. In accordance with its statutory duty the Commission has issued guidance pursuant to S.23. Annexed to that guidance is further service specific guidance, including 'Registering the right support', which provides guidance upon registration and variations to registration for providers supporting people with learning disabilities.

21. In October 2015, NHS England, the Association of Adult Social Services and the Local Government Association published 'Building the Right Support', a national plan to develop community services and close inpatient facilities for people with learning disabilities and/or autism who display behaviour that challenges, including those with a mental health condition.

22. In June 2017, 'Registering the right support' was updated following the new housing guidance document 'Building the right home' which was a supplement to 'Building the right support'. The policy incorporated supporting people with a learning disability and/or autism.

23. On an appeal under section 32 of the 2008 Act the Tribunal has the power to confirm the decision of the Respondent or to direct that it is not to have effect: s32(3). The Tribunal also has the power to vary any discretionary conditions in place: s32(6)

EVIDENCE

24. The Tribunal heard oral evidence from 7 witnesses. In addition the Tribunal had the benefit of written evidence including the relevant policy documents and reports referred to by the witnesses.

25. Dr. Jane McCarthy is the Medical Director of Oakview Estates Ltd. She has had over 20 years' experience as a Consultant Psychiatrist working with people with intellectual disabilities and autism spectrum disorders presenting with complex health needs. From 2009-2010 she was the national clinical advisor for adults with autism, was vice chair for the Psychiatry of intellectual disability faculty of the royal college of Psychiatrists from 2013-2016 and had been an expert witness for the GMC reviewing the practice at Winterbourne View hospital.

26. Her evidence was that transition was very challenging for people with autism and some service users would not make the transition from hospital to

residential setting without a robust service plan in place. The Bungalow as a care home would allow a group of people who were very difficult to place in community settings to take their first step in this transition. The change in registration was proposed following requests from both local commissioners and families of those they currently support. The key reason for failure to deliver under Transforming Care as recognised in Building the Right Support that one was trying to move a complex heterogeneous group out of hospital but using an approach of "one size fits all" model which was clearly not working. She accepted under cross examination that Building the Right Support stated that adults with a learning disability and/or autism had the right to the same opportunities as anyone else and that they should have a home within their community and get the support to lead healthy, safe and rewarding lives. Further she accepted that NHS England had committed to a programme of closing inappropriate and outmoded inpatient facilities and establishing stronger support in the community.

27. She did not agree that the proposed location was secluded and stated that the people the hospital were looking at needed a residential setting but that they would not be moving to a residential street. She advised that it would not work if they moved to a residential setting 10 miles away, they did not like change and they needed specialist support, which Wast Hill would provide as a residential care home.

28. She did not accept that the proposed care home did not have planned discharge procedures. She said they were clear and that the staff would only know over time if they were ready for discharge depending on their level of functioning. She also did not accept that they were removed from a community and stated that the staff would be the people who enabled them to get over barriers to integration into a community within the care home. There were 1400- 1500 patients who remained in hospital who could not be moved on.

29. Professor Green OBE is the Chief Executive for Care England and has significant experience and involvement in social care for many years. His evidence was that it was difficult to find appropriate placements to enable people to move along a care pathway towards a community based placement. He had subsequently after providing written evidence visited Wast Hills. His oral evidence was that responding to people's needs should outweigh policy and that every service user should maximise people's autonomy and independence and that would be best practice. He did not accept that a community was simply a town but said that people who live in care settings form their own community. It was not about geographical location, it was about provision of services. He supported the proposed plan on the basis that it was fit for purpose due to the outside space and the terms of complexity of needs of service users.

30. Amy Childs had been the hospital manager for Wast Hills but since providing her statement had been appointed as a consultant nurse for the NHS and covered Wast Hills three days a week amongst other locations run by the Danshell Group.

31. She advised that Wast Hills had reduced stays for individuals with learning difficulties and autism from 4.4 years to 1.8 years over a three year period utilising at time the Court of Protection amongst other means.

32. Individuals who had been assessed as no longer requiring assessment and treatment were at risk of facing significant deterioration in both their physical and mental wellbeing by the unpredictable changes in environment caused by repeat admissions to the hospital of individuals at the beginning of their care and treatment. Commissioners and families of those who were being supported were struggling to find suitable bespoke community facilities which would meet their complexity of needs.

33. If the application were granted the provision had the benefit of a rural setting but being within walking distance of the local town with strong links to the community. There would be a separate entrance and garden for the Bungalow with training packages for staff with regard to working within a care home as opposed to a hospital setting. There were plans to undertake a significant schedule of works. Although there would be no sharing of staff and medical assessment, if required the Bungalow could access rapid support.

34. She annexed to her statement letters from family members and from a specialist nurse Sandra Brickley.

35. A's parents confirmed that A had been admitted in November 2015 but was ready to move on. They lived in Shropshire and there were no provisions in the county for someone with A's complex needs. They supported the application and felt the Bungalow would be ideal for him, as it met his bespoke person centred-care needs.

36. J's parents advised that J had epilepsy and very complex needs. He had been at the Bungalow for 2 years and it was felt that this was the safest place for him. They were concerned that if he was forced to move it could lead to an increase in his self-injurious behaviour which had reduced since his admission. The environment suited him and met his needs.

37. Sandra Brickley refers to R. He had been resident at the Bungalow since 2016. He had demonstrated an improvement in all aspects of his needs. Building the Right Support makes suggestions in respect of terms of accommodation however these suggestions should be considered in the light of each person's needs. If he was forced to move again he would have to make new contacts which would be difficult for him due to his autism and need for predictability and routines. He was settled and since moving to the Bungalow he had gone out for a meal with his peers something which he had not done before. He had had multiple moves and that had unsettled him in the past. The environment was appropriate for him as was the location.

38. In oral evidence Miss Childs confirmed she believed that R would need a bespoke package of care and it would take a period of 2 years to arrange. J's

family would be happy for him to move on if a service could be found to meet his needs.

39. She was asked about discharge planning and said that they could not put a discharge plan in place as the commissioned services could not be found. She did not have an example of a discharge plan and accepted one was not within the paperwork submitted to the CQC. She confirmed that the patients had a discharge plan from the hospital and the staff would undertake 6 monthly CPA reviews.

40. She accepted that she had previously written a draft proposal which was provided to the CQC. She advised that whilst it had been part of that plan to de register the Lodge this was no longer part of their plans. The document had been written before Registering the Right Support had been published but no new proposal had been provided.

41. Staff training would be undertaken for 12 weeks. The ethos of the staff would change. There was no cultural training plan in existence. Doors would be altered to provide easier access to outdoor space and the bedrooms would be individualised.

42. She did not think the location was secluded, nor was it secluded from the community. The service would lose money if the application was granted and an estimate was £162k per annum.

43. Joseph O'Connor is the Registration Inspector and gave evidence for the Respondent. He had refused the application to vary registration. He advised that following a site visit a management review took place with Julie O'Neill, Registration Manager of CQC. The Notice of Proposal which was forwarded to the Appellant set out the basis of their decision which was- breach of regulation (15) premises and equipment; regulation (9) person centred care; regulation(10) dignity and respect; regulation (17) good governance. He also advised that he had received an email from Dr. Joyce, with comments she had received from Mr. Boran the commissioning manager for Birmingham City Council who advised that they did not have any plans to move people out of the bungalow into a community setting. He was supportive of the plans but they had not been discussed within the Transforming Care Partnership locally.

44. Mr. O'Connor in oral evidence said it was a major concern of the CQC that the service still looked like a hospital. During his inspection he noted that the interior did not promote a non-clinical atmosphere and that the overall environment appeared bare and lacked warmth. It had the feel of a hospital rather than a care home. In terms of discharge planning no paperwork was submitted, to give an indication of how service users would be monitored and demonstrate an effective service provision. He was working within guidelines. It was the commissions' conclusion that the application fell short, it was not just him. He said that CQC had no discretion.

45. Julie O'Neill is the Registration Manager for the CQC. Her written evidence set out the reasons for the refusal of the application. She confirmed the proposal breached both guidelines and policy guidance which the CQC was under an obligation to consider. Her statement set out verbatim sections of the Winterbourne View report and included the policy document Registering the Right Support as an exhibit. She re-iterated the comments of Mr. O'Connor and advised that there was no evidence that refusing the application people would result in people being placed out of the area. She visited the site on the first day of the hearing. She confirmed in oral evidence that the environment reaffirmed her concerns. She said the bungalow felt stark, clinical and it was lacking in representation of who the residents were. The separate rooms all looked fairly identical. She had in the past dealt with people with high needs but not recently. The model the Appellant was seeking to register did not fit with the Mansell view of a community. The decision was based not only on information and documents supplied, it was an inclusive decision and the CQC were reliant also on regulations and other parties i.e. Dr. Joyce.

46. When she was asked about the failure to provide discharge plans she accepted that Oakview did have an excellent recent CQC report from the hospital but confirmed that, in her view that did not mean it would be replicated as an appropriate discharge plan for a Care home. The CQC were looking for reassurances that Wast Hill would comply with the regulation and have evidence to back that up.

47. Helen Toker-Lester had been the joint planning and commissioning manager for learning disabled in Devon but since her statement she had been appointed as Transforming Care lead on the National Programme ADDAS. Her evidence was that, in Devon, they had moved many people into the community with a high complexity of needs. There were alternatives to more institutional types of provision. She stated that it was not surprising that, after years of turmoil, families settle for what appears to be safe. This was an uninformed choice however, if they did not have the understanding of the alternatives.

48. Fundamentally Building the Right Support states that people should have a choice about where and with whom they live.

49. In oral evidence she said that the model proposed was not one they would support. One should not expect people with severe learning disabilities to go through several steps to a suitable home. It should be one move from hospital to a residential setting and even if it took time to arrange that was a better outcome i.e. move once and well.

50. Dr. Joyce is the National Professional Advisor for learning disabilities at the CQC.She had attended the site visit with Mr. O'Connor. Her conclusion was that the proposal was not in line with policy and good practice and was specifically considered as an option to be avoided in the report from Sir Stephen Bubb- "We must not close down one set of institutions only for another to appear. Small residential care homes and group homes could be

institutions in that there was no choice as to with whom to live and they do not feel like home"

51. She said in oral evidence that congregate settings prevented access to the community and it should be about enhancing choice. There was research showing that people did better in the community. Transforming Care had been specifically designed for people like the ones currently placed in the bungalow. People are inappropriately placed in hospital and there was a lot of evidence that people with severe autism managed to live within a community. She did not accept those people could not be placed and it was starting to be proved wrong time after time.

52. Dr. Joyce, Helen Toker-Lester and Mr. O'Connor gave oral evidence as to people who had been placed in the community with severe learning disabilities. One was with 2.1 support and on a similar level of need to the proposed service users at Wast Hills. One was in his 40s and had lived in various hospitals with severe autism and physically aggressive. One had been on 5.1 support and a service had been built around that person's needs allowing them to live in the community with 1.1 support. The initial evidence from Helen Toker-Lester of about 2k per week was later clarified as being £4116.59 per week but a significant reduction on the hospital costs which had been £8975.68 prior to discharge.

FINDINGS

53. During the course of the hearing we identified three key areas. Regulation (15) - location and community (and have also incorporated dignity and respect and person centred care); regulation (17) -good governance and policy.

54. Location and Community- Amy Childs and Dr. McCarthy disagreed that the location was secluded or that service users were prevented from accessing the community. Dr. McCarthy stated that the people who work with service users enable them to get over barriers and research evidence showed that they need support from staff and not a geographical location. Amy Childs supported this view and gave an example of R who had not stepped outside a hospital for 15 years and was now going out 3 times per week. The staff would help service users integrate into the community.

55. Professor Green suggested the proposed service users formed their own community and it was not about a "community" as such.

56. Julie O'Neill said that by going to a park and engaging with other people service users become more integrated into the community. She had recently returned to an area where service users had been placed. She recognised them because they were out and about and part of the community.

57. The tribunal had the opportunity of a site visit, so that we were able to form our own views. We find that the bungalow setting is not in a community. It is estimated that to gain access to the nearest public house would require a walk

of about 15 minutes for an able bodied person along a road which has no footpath or lights. The nearest shops are be about 20 minutes' walk away

58. We accept the evidence that it will create a barrier to service users being able to access a community. The service users could access it by car but this prevents open access as would be expected if one were working towards integration into a community.

59. The site itself is secluded but does have the benefits of a rural setting. We find that the setting would hinder service users' ability to improve their independence and to feel part of a community which we believe is an integral part of a service users person-centred care package.

60. The bungalow is adjacent to a hospital within 20 yards or so. It did have its own garden and wide outdoor space entirely for the use of the bungalow. The bungalow is stark and bare. It is recognised that some patients (as currently resident) cannot tolerate a high stimulus environment and cannot cope with curtains, pictures, bedding etc.

61. There was an action plan provided but that dealt with some redecoration and change of doors. This was to provide the potential service users with the ability to open a door and go outside. What had not been considered however was how the same service users would regain access to the bungalow as it was accepted that there would need to be a secure door to enable anyone to gain access. No redecoration had been undertaken. The bungalow felt clinical in nature and appearance and the Tribunal accepted the evidence from Julie O'Neill who had visited the site that there was no sense of the identity of individuals living there and this encapsulates the lack of personalisation within the Bungalow.

62. The Tribunal felt that the environment internally was very clinical. It is accepted that from the outside, the bungalow does resemble a home. The concern however is that even with redecoration (which had not been undertaken) it is unlikely that this would have substantially altered the internal environment which at present was accommodating the patients who had a need for a low stimulus environment.

63. The staff has a high knowledge of the constraints under which they have to operate and how to adapt to each individual's needs. There is no criticism of the staff who clearly provide high quality of care and understanding. However a 6 bed setting must be adapted to the least able person which may potentially impact upon more able service users. This is one of the criticisms of the Winterbourne report. If those individuals were placed in their own accommodation their specific needs would be catered for.

64. Consequently the Tribunal find there is a breach of regulation 15 (1) (c) and (f)

65. Good Governance – to include person centred care. The most recent report from CQC for Wast Hills hospital rates as outstanding for "care" and outstanding for "effective services". The tribunal were impressed by the evidence of Amy Childs who advised that they identify the individuals preferences to the activities undertaken by their behavioural responses and act upon these preferences. There is no criticism of the provider in relation to person centred care save as recorded above regarding individualisation of the internal areas. In particular the Tribunal do not find there is any breach of regulation (10) dignity and respect as suggested by Mr. O'Connor. The Tribunal commend the staff for the activities which they offer in a person specific approach.

66. There is no evidence before the Tribunal in either written or oral evidence at the hearing that a discharge plan was available. It is accepted that there are discharge plans in relation to the patients at the hospital; however this has not been replicated in the care home setting. There was no procedure in place, documented or otherwise upon which the Tribunal could be satisfied that the proposed service users would have regular reviews and that the discharge and care plans appropriate to a care home setting would be monitored and reviewed.

67. The Tribunal is concerned that having raised this in the Notice of Proposal this omission has not been rectified which is a safeguarding concern. The hospital has an excellent record in this area of discharge planning and therefore it is more surprising that it was not evidenced for the proposed care home.

68. The evidence that the average patient's stay within the hospital has been reduced from 4.4 to 1.8 years is to be commended. Further the evidence of Miss Childs in pursuing applications through the Court of Protection is also accepted as evidence of a proactive stance. However this is again within the hospital setting and there is no documentary evidence as to how this would operate within the care home setting.

69. Assessing the quality of services to be provided in a different setting was also lacking. Evidence from Amy Childs was that a 12 week training programme would be implemented to achieve cultural change. This training plan had not been written up, nor was Amy Childs able to provide evidence of what the training would incorporate and how it was to be delivered.

70. A draft proposal was submitted in July, which had actually been written before the recent Registering the Right Support policy was released. This document confirms in line with the oral evidence that the same staff would be utilised in the Bungalow as are currently working there the knowledge and training identified for staff at the Bungalow on that document was mainly medical, with no reference to the different culture within a care home This document has not been modified since the publication of "Registering the Right Support" nor since the feedback on the application.

71. The tribunal are concerned that whilst the staff has been split across the 2 buildings to facilitate easier access to the community for the service users in the bungalow, the fundamental culture change for the staff may not be achievable, as there is limited recognition of the significant change which would be required. The Tribunal find that the lack of a detailed training plan shows a lack of perception and comprehension of the change required. Regrettably due to the lack of such a plan the Tribunal were unable to properly assess how this would be achieved. There was no evidence of outside consultation which may have been commissioned to retrain the staff appropriately.

72. There was no evidence of policy change or how that would be achieved. The Tribunal does not accept as Dr. Joyce suggested, that it would be impossible to achieve the necessary culture change from medical to a care environment. However it might require an external consultant with care home experience rather than utilising existing staff members whose training is predominantly medical rather than care.

73. The Tribunal therefore find there is a breach of regulation 17 (1) relating to paragraph (2) (a)

74. Policy - Registering the Right Support " We will expect providers to demonstrate in their applications that their proposals comply with the principles of this guidance and accompany service model, or explain why they consider there are compelling reasons to grant an application despite it departing from best practice guidance".

75. This clearly provides that a discretion can be given to an application which does not meet the proposed guidance. In that Mr. O'Connor was clearly incorrect.

76. The Transforming Care Programme has shown that care in institutional settings is rarely person-centred. Building the Right Support looks at the services which need to be in place for the community to support people with a learning disability and/or autism who display behaviour challenges, including those with a mental health condition. The principles set out quality of life, keeping people safe and choice and control which are consistent with the fund.

77. "We understand that some people will decide that that their individual interests may be served by remaining in their current service or home, even though this does not meet the standards of this guidance. However where people's needs are not being met and the care does not promote choice, inclusion, control and independence, we will always take appropriate regulatory action to improve the quality and safety of these services."

78. The guidance identifies that new services should not be developed as part of a campus style development or congregate setting.

79. Examples are given of questions to be addressed- What is the location? Is it on hospital grounds? - will the environment resemble a clinical environment or

a home? What will be done differently reflecting the change in regulated activity? will the support for those living there feel different, and if so, how?, how will the provider make sure the culture of the location changes?, how will staff be supported to manage the change?.

80. "The fundamental principle is that changes in the regulated activities being delivered should make a difference to the people receiving the services".

81. Dr. McCarthy said in her evidence that, for existing service users, the care would not change at the moment. The designated team will be more focussed on independence. When asked by the Tribunal on more than one occasion "what would change on a day to day basis?" she was unable to answer. No specific examples were given by either Dr. McCarthy or Amy Childs but just a generalised view as to how they would move forward. The tribunal were unable to ascertain what would be done differently and conclude that the service would remain essentially the same.

82. Within the policy guidance is an example of what would not meet the guidelines when considering an application to change a regulated activity to provide registered home services or personal care. The example given mirrors some of the findings we have made

a) There were no plans to redevelop, redesign or refurbish the building beyond minor cosmetic redecoration
b) There was no evidence of culture change through new policies or training plans and procedures
c) During inspection the care provided would remain institutional in feel.

83. The findings made above indicate that the policy guidance has not been followed. The Appellant has chosen to utilise the bungalow which is on hospital grounds; it is clinical in nature; it is not possible to see what would be done differently and the culture of the location is unlikely to change from a hospital setting.

84. If the fundamental principle of the guidance is that changes in the regulated activities being delivered should make a difference to the people receiving services, the evidence from the Appellant's own staff was that it would not. The Tribunal find in any event that it would not. The Tribunal further find that the Appellant has failed to take into account the relevant policy and best practice when considering the proposal.

CONCLUSION

85. The bungalow is not suitable for its proposed purpose as a care home or appropriately located for the purpose for which it would be used.

86. The Appellant, on the balance of probabilities, has failed to demonstrate that the proposal complies with the regulations identified above.

87. The Tribunal accept the evidence of the family members and the RGN in relation to the proposed service users but the Tribunal consider these views are not informed by best practice nor with an appreciation of the bespoke packages that can be put together and the progress individuals can make with this provision. If individuals were to be discharged to the Bungalow as a care home they would be removed from the Transforming Care Programme. They would no longer be a priority for commissioners and they would not have access to Transforming Care funding to enable them to move to independent living. This could result in a much longer period of time before a bespoke package was commissioned for them, a process which the Tribunal accepts can be slow, but would be even slower without the Transforming Care priority.

88. It it is accepted that patients may suffer some short term disruption and a deterioration in the mental health and wellbeing if new patients are being admitted. It is also accepted that proposed service users may have to wait longer than 6 months for a care package to be put together for them so that they can be discharged into the community. However it is not in their best long term interests to be deprived of access to the Transforming Care Agenda

89. There is evidence that people with highly complex needs can and have moved in to the community and the research is that the outcomes are better for them. “People in small –scale community based residences or supported living arrangements have a better objective quality of life than do people in large congregate settings. Particularly they have more choice-making opportunities and participate more in community life and are more satisfied with their living arrangements.” In particular there was evidence before the Tribunal that three individuals with severe learning disabilities and complex needs had been moved in the community where their needs were met one of whom had previously required 5:1 support.

90. The Tribunal accept that policy guidance is discretionary but do not accept that any compelling reasons have been provided to depart from best practice. The Tribunal believe that the best interests of service users will not be met by adopting the Appellant’s proposal and thus do not accept the submission that the CQC has acted outside of its powers.

91. The Appellant’s case was brought with the interests of the proposed service users at the forefront and not for any financial reasons.

92. The Tribunal accept that conditions which may have been imposed would not address the breaches of the regulations and would be difficult if not impossible to fulfil the legal test of certainty.

93. The Tribunal therefore conclude that the Respondent in accordance with the Requirements under section 12 (2) of the Act was correct to refuse the application.

DECISION

The Appeal is dismissed

Tribunal Judge J Crisp
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date Issued: 26 June 2017