Care Standards

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

Heard on 11, 12, 13, 14, 15, 18 June and 6 July 2018

[2017] 3163.EA

BEFORE
Ms Siobhan Goodrich (Judge)
Dr David Cochran (Specialist Member)
Mr Mike Flynn (Specialist Member)

B E T W E E N:

CARE MANAGEMENT GROUP LTD

Appellant

and

CARE QUALITY COMMISSION

Respondent

AMENDED DECISION AND REASONS

Representation:
The Appellant: Mr David Lawson, counsel, instructed by Bevan Brittan
The Respondent: Ms Zoe Leventhal, counsel, instructed by CQC Legal Services

The Appeal

1. This is an appeal by the Care Management Group Ltd (CMG) brought under section 32 of the Health and Social Care Act 2008 (the Act) against the decision made by the Care Quality Commission (CQC) on 2 October 2017.

2. The Appellant is registered as a provider of regulated activities at The Cherry Tree at 272 Wingletye Lane, Hornchurch, Essex, for the accommodation of persons who require nursing or personal care. In short the CQC refused CMG's application to vary a condition of the Appellant's existing registration so as to permit 3 further places at "The Cherry Tree" (referred to hereafter Cherry Tree) so increasing the maximum number of service users from 7 to 10.

Restricted Reporting Order

3. The tribunal makes a restricted reporting order under Rule 14(1) (a) and (b) of the 2008 Rules, prohibiting the disclosure or publication of any documents or matter likely to lead members of the public to identify the service users in this case, so as to protect confidentiality and privacy.

4. Consistent with this, the names of service users and their family members and some other details have been anonymised in this decision.

The Background

5. The basic background is as follows. Cherry Tree is situated on a site known as Lilliputs. Lilliputs was originally a farm. It was established as a home for children with learning disabilities some years ago. The site was later adopted by CMG in 2002. Over the ensuing years it has been converted to provide residential provision for adults with autism, learning difficulties and behaviour that challenges. There is now one remaining service for children (Gulliver's) which is registered with Ofsted for 4 children. The other services are:
   - The Farmhouse (registered by CQC for 7 service users)
   - The Paddocks (registered by CQC for 8 service users).
   - Cherry Tree (registered with CQC - originally for 5 services users and, from 2015, for up to 7 adults.

   Everyone currently supported at Lilliputs is funded for at least 1:1 support throughout their waking hours, generally for 15 hours a day. Two people receive 2:1 funding during waking hours. On top of that several people receive a limited amount of 2:1 funding to enable them to access the community safely. Staff are available 24 hours a day just as they are in any other residential care home.

6. Cherry Tree is bungalow accommodation to which there are two parts. The building as a whole has, (and has always had), 10 bedrooms, and there are corresponding facilities in each side such as the kitchen, lounge, bathroom and laundry facilities etc. There is a resource centre on the Lilliputs site which provides a swimming pool, sensory rooms, sports hall, an activity area, therapy rooms, a home entertainment room and an area for learning (for example life skills and ASDAN courses). At present 26 people live within the different services on the site. The site lies within 20 acres in the greenbelt on the edge of Hornchurch, Essex i.e. with easy access to fields and woodland. There are bus stops within a few hundred yards of the entrance to the Lilliputs site. It is possible to walk to Emerson Park train station or Hornchurch and Upminster Bridge tube stations. Hornchurch is relatively near the M25 orbital motorway so enabling access of family members if placement is not local.

7. The chart re current service users shows the bodies who have commissioned/fund the places for current service users at Lilliputs include: Havering (5), Bromley, Lambeth, Surrey Downs/Spelthorne Borough Council, Kent County Council (3), Ealing, Redbridge, Lewisham, Tower Hamlets, Wandsworth, Newham, Brent and Essex. In terms of the distance from the family place of residence to Lilliputs the furthest away are Thornton Heath in Croydon, Faversham in Kent, Northolt in Middlesex, Sittingbourne in Kent, Sydenham in Lewisham, Whitstable in Kent, Morden in Surrey, Hunsdon in Hertfordshire and Edgware in Barnet.

The Chronology

8. Cherry Tree was registered with CQC in November 2013. In 2015 CMG successfully applied to vary the registration so that the maximum number of service users permitted was 7. Later in 2015 CQC Inspectors considered that the service at Cherry Tree required improvement. At the next inspection on 29 March 2017 the service at Cherry Tree was as "Good" in all 5 domains (safe, effective, caring, responsive and well led) and "Good" overall. Once CMG had received the draft inspection report it applied to vary the conditions of registration so that the service at Cherry Tree could accommodate 10 people overall.

9. The main dates and events relevant to the application/decision process are as follows:
   - 5 April 2017: Application to vary a condition.
   - 10 May 2017: CQC assessment visit
   - 11 July 2017: Notice of proposal
   - 10 August 2017: Representations
   - 2 October 2017 Notice of decision

The Notice of Proposal

10. In his letter Mr Lelliott, CQC Inspector, proposed to refuse the application for reasons which included the following:

"**C1.1** The evidence above demonstrates that Care Management Group Limited have been unable to identify how they would provide a service in a manner that is compliant with the Health and Social Care Act 2008 (Regulated Activity) Regulations 2014.Care Management Group Limited have failed to evidence that they have taken into account all pertinent service specific national recognised guidance when proposing to expand the service user capacity at the location, including current best practice as stated in Supporting people with a learning disability and / or autism who have a mental health condition or display behaviour that challenges - Association of Directors of Adult Social Services (ADASS), Local Government Association (LGA) and NHS England).

C1.2 Lilliput's Farm is a secluded congregate setting with 3 other locations and a day centre in addition to The Cherry Trees situated there. It is approximately 10-15 minutes' walk from the nearest housing community and public transport stops. National guidance states that new services should not be developed as part of a campus style development or congregate setting. The geographically isolated location will present clear barriers to person centred care / dignity and respect for residents of a care home.

C1.3 The Commission is not assured that the increase in capacity at Cherry Tree is in accordance with nationally recognised good practice guidance. Strategic local commissioners have confirmed they had no knowledge of the variation application prior to being informed by Care Management Group Limited's e-mail on 28 April 2017 that they had applied to CQC for the variation. Evidence from the Havering Commissioning & Programming Manager that the proposed increase is not due to demand for the service in the local area and that Care Management Group Limited has not engaged in any provider events and forums to hear Havering's intentions or needs profile. Therefore, the variation application has failed to evidence that the increase in numbers is required by and in response to local need.

C1.4 Your lack of consultation around local need and failure to provide us with sufficient evidence to demonstrate how the service meets the transforming care agenda, leads us to believe that individuals would be admitted to the location regardless of their originating locality, which is not in line with current best practice as stated in A national response to Winterbourne View Hospital: Department of Health Review Final Report.

C1.5 Whilst the CQC's 'Registering the Right Support' policy is not prescriptive you have failed to evidence, explain or demonstrate any compelling reasons for CQC to depart from best practice guidance and grant the variation applied for. Care Management Group Limited has failed to demonstrate compliance with national and CQC policy as required by regulation 21…"

The Decision under Appeal

11. Mr ~~Astall Martin~~ Assall-Marsden considered the representations made by Bevan Brittan in response to the NOP. Amongst other matters he considered that the representations made included that:
    - "Lilliputs has none of the negative characteristics of large congregate settings.
    - Lilliputs is a community based setting with local services nearby.
    - Your application has been made in line with contemporary national guidance.
    - Service user's needs will be best met in a semi-rural location and service users who live at Cherry Tree have indicated they would be happy to live with more people and their families have said it is important for other service users to live with their relatives.
    - Local commissioners have indicated there is a demand for the service."

12. Mr ~~Astall-Martin~~ Assall-Marsden adopted the NOP and refused the application on the basis that the manner in which the regulated activity would be provided, were it to be approved, would not be compliant with the requirements of the Health and Social Care Act 2008 (Regulated Activity) Regulations 2014 in terms of:

    i) Regulation 9, person-centred care, and

    ii) Regulation 10, dignity and respect

    iii) Regulation 21- registered providers must have regard to the guidance issued by the Commission under section 23 of the Act, for the purpose of compliance with the requirements set out in regulations.

The Issues

13. Pursuant to directions the overarching issue was identified by the parties to be whether the CQC was correct in its decision of 2 October 2017 to refuse CMG's application to vary a condition of the Cherry Tree registration. The following three overlapping sub-issues were also identified:

    (1) Has the Appellant demonstrated that its application would comply with the relevant statutory guidance issued pursuant to s 23 of the Act in accordance with Regulation 21 including, in particular
        i) the CQC guidance *Registering the Right Support* (June 2017),
        ii) the national guidance *Building the Right Support* and the national service model (*Supporting People with a learning disability and/or autism*) by ADASS, LGA and NHS England (October 2015);
        iii) the DoH guidance *Transforming Care* (December 2012);
        iv) NICE (National Institute for Clinical Excellence) guideline *Autism spectrum disorder in adults: diagnosis and management* (June 2012) and NICE guideline *Learning disabilities and behaviour that challenges: service design and delivery* (March 2018);

(2) Has the Appellant demonstrated that it would provide "person-centred" care at Cherry Tree if the application were approved, within the meaning of regulation 9(1)(a), (b), (c) (appropriate, meet service users' needs and reflects their preferences), and also within the meaning of Regulation 9(3)(a) and (f) (carrying out collaboratively, with the relevant person, an assessment of needs and preferences for care and treatment of the service user; involving relevant persons in decisions in relation to care and treatment of the relevant service user) of the Regulations, taking into account the statutory guidance (at (1)).

(3) Has the Appellant demonstrated that the care it would be providing would involve treating service users with "dignity and respect", including supporting their autonomy, independence and involvement in their community, within the meaning of Regulation 10(1) and 10(2)(b) of the Regulations, taking into account the statutory guidance (at (1)).

<u>The Parties' Respective Positions</u>

14. These were set out in the skeleton arguments provided before the hearing. Since these are matters of record we need only set out a brief summary of the main points:

The Appellant:

a. The CQC policy *Registering the Right Support* (RTRS) does not indicate this application should be refused. That policy should be interpreted in the light of the evidence underlying it and flexibly.

b. Lilliputs is not a congregate community setting or a campus style setting. It does not meet those definitions.

c. The Cherry Tree Annexe is not institutional and there is ready access to community resources. The reality of the situation does not engage the purpose of *Registering the Right Support* even if, (contrary to CMG's submissions), the application is held to engage the terms of the policy, narrowly interpreted.

d. Alternatively, the application of that policy:
   i. Is a matter of discretion and needs to be carried out proportionately, balancing interests.
   ii. Has to recognise in practice that it is not a rule or regulation but a policy which must be subject to exceptions. It is submitted that this particular service ought to be allowed to have an additional 3 beds. If that is refused it must be on a basis which envisages the possibility of practical exceptions to the policy.

e. On the facts of this case the additional beds should be approved because:
   i. The evidence underlying the policy does not support an understanding of the policy which applies it to applications such as this one. Indeed CQC's own inspection regime evidences that services well in excess of 6 beds can achieve the highest possible rating because they deliver outstanding outcomes for service users.

   ii. Consideration of the quality of the property, the site and the provider show that approving this application is in the interests of service users.

The Respondent:

In short, the application to increase the maximum number of service users at Cherry Tree from 7 to 10 fails to comply with the requirements of the 2014 Regulations and the relevant statutory and nationally recognised guidance. There is no compelling reason to grant the application despite its departure from best practice.

a. Compliance with Statutory Guidance.

The Appellant has not demonstrated that if the application were approved the service provision at Cherry Tree would comply with the statutory/relevant guidance. In particular, CMG seeks to extend what is already a large campus and congregate setting, which would be out of line with best practice in service provision for people with autism and/or learning disabilities. The site already constitutes a campus because it groups a number of residential units together and provides shared on-site services. It is situated away from and is not part of a local community. It therefore also constitutes a congregate setting. Applying to increase the maximum number of service users at what is already a large campus and congregate setting fails to demonstrate regard for, and compliance with, the statutory guidance made under s. 23 of the 2008 Act in respect of service provision for people with autism and/or learning disabilities.

b. Person-centred care.

The Appellant has failed to demonstrate that the service provision at Cherry Tree would provide person-centred care if the application were approved. In particular, neither service users, their families, nor local authorities were adequately consulted about the proposal to apply to vary the registration relating to Cherry Tree. Limited consultation has taken place in the context of regulation 9. There was no evidence that there had been any consultation with service users themselves. The Appellant was unable to provide any evidence of consultation with any local authority in the vicinity of Cherry Tree prior to making the application. The emails were sent to neighbouring authorities after the application was made did not provide sufficient evidence of consultation with nearby local authorities and that the Appellant could not demonstrate any local need for additional numbers at Cherry Tree.

c. Dignity and Respect.

Increasing the maximum number of service users at the Cherry Tree would mean more people living away from the local community, which fails to demonstrate treatment with appropriate dignity and respect. Further the lack of consultation in respect of the application means that the Appellant has not complied with the statutory guidelines on treatment with dignity and respect. As the Site is situated in a rural area which is not part of a local community, increasing the maximum number of service users in line with the application would result in more service users housed in a campus and congregate setting outside of the local community. This arrangement makes it more difficult for service users to become, or to remain, involved in their local community, compared to those who are accommodated within the local community.

<u>The Hearing</u>

15. We had received and read three large indexed and paginated bundles which included a number of witness statements, supported by documents.

16. The tribunal carried out a site visit on 11 June 2018.

17. At the start of the formal hearing on 12 June, and following opening statements, we heard submissions regarding the reception of further documents on which the Appellant sought to rely in support of its case regarding inconsistency. The tribunal delivered an interlocutory decision on 13 June. In summary we decided to admit a limited amount of evidence for reasons then given upon which we need not expand.

18. We received further documents which were provided in a fourth bundle.

The Witnesses

19. It is convenient at this stage to provide a very brief sketch as to the witnesses from whom we heard oral evidence:

    For the Appellant:
    Mrs B, mother of RB, a service user living at Cherry Tree
    Mr Peter Kinsey, Chief Executive of CMG
    Ms Morgan, Regional Director at CMG
    Ms Dodgson, CMG Operations Director for England
    Ms Molineux, Manager of Cherry Tree and Cherry Tree Annexe
    Mr Mike Tutt, a Registered Mental Nurse with experience as a practitioner with people with learning disabilities.

    For the Respondent:
    Dr Joyce, clinical psychologist and the respondent's National Professional Advisor for Learning Disabilities.
    Mr ~~Astall Martin~~ Assall-Marsden, Head of Inspection, Adult Social Care Inspection Directorate.
    Mr ~~Lelliot~~ Lelliott, Inspector.
    Mrs Toker-Lester, Learning Disability and Transforming Care Lead of ADASS and Joint Commissioner at Devon County Council and Northern, Eastern and Western Devon Clinical Commissioning Group.

20. Each witness adopted his or her statement (s), (where his/her background and experience were set out in far more detail), gave further evidence and was cross examined. We received written statements from Susan Mitchell, Registration Manager at the CQC, as well as statement from parents of service users which we have taken into account.

21. The evidence was completed on 18 June 2018, and later than the planned timetable. The hearing was then adjourned part heard for submissions. Written closing submissions were provided by each party. The Appellant relied on the (earlier) 2016 version of Registering the Right Support (RTRS) with which we were then provided. At the resumed hearing on 6 July 2018 we heard oral submissions in response to the points taken by each party.

Submissions

22. The extensive written closing submissions are a matter of record and we do not rehearse them. We summarise below the main points made in oral submissions on response to the closing submissions on each side.

23. Ms Leventhal submitted:

a) The Act, the Regulations and the policies set out the relevant considerations. In order to demonstrate compliance the applicant has to grapple with compliance with the National Service Model (NSM) and RTRS. If the application does not accord with the policies the applicant needs to show exceptional reasons as to why the application should be nonetheless granted. The phrases "compelling reasons" and "exceptional reasons" are interchangeable.

b) Contrary to the Appellant's submissions, the respondent had not accepted that RTRS 2017 is not statutory guidance under section 23. It had been accepted only that it is not stated on the face of that policy that it is section 23 statutory guidance. Reference had been made to the 2017 policy in the NOP. There is nothing in section 23 that requires that guidance has to be approved by the Secretary of State or go through any other process for it to be treated as statutory guidance. In line with the requirements for statutory guidance envisaged in the Regulations, consultation had taken place (and the Appellant was a contributor). In so far as any point on fairness was now taken, the question was what more did the Appellant need to be told?

c) Article 1 of Protocol 1 (A1P1) did not apply as there was no interference. To the extent that the Appellant can demonstrate interference the proportionality balance was clear.

d) The CQC's role in transforming care was clear.

e) A theme of the Appellant's case was that the evidence base for the policies was unsafe. The policies on which the CQH rely are national policy and it was not the tribunal's role to go behind or to rewrite the policy.

24. Mr Lawson submitted that:

a) The application relates to three beds in one home. The service and the location already exist. It existed before either version of RTRS. A decision to vary the registration accords with the wishes of service users. That can be seen in the assessment of the needs of the service users by Dr Way. The location has been chosen by commissioners.

b) The service was in the process of being developed when RTRS 2016 was published. CMG was not arguing legitimate expectation but rather that there were particular factors about this application which set it apart.

c) The approach of CQC was to set up particular hurdles which the Appellant did not have to jump. The change to RTRS is a significant factor. The provisions on which the CQC rely were not in the 2016 policy. At the time the application was made it should have been granted. That the application was permissible under the 2016 policy was a factor relevant to exceptionality.

d) The term "statutory guidance" has a particular meaning. It was originally said by Ms Leventhal that RTRS 2017 was not statutory guidance. (Ms Leventhal intervened at this stage to state that she had said at the outset that on the face of the document it did not look as if it was formally adopted but she would take instructions. When she had taken instructions, she had then explained that RTRS 2017 is treated as statutory

guidance. All the indications are that it is statutory guidance). Mr Lawson submitted that the guidance was not set out in Annex B to the Guidance for Providers on meeting the regulations (as had been said in the decision in ~~**Oakenfield**~~ **Oakview Estates Limited v CQC** ~~**[2017] 513 UKFTT (HESC**~~) **[2016] 2896.EA**. He confirmed that he was not saying that the RTRS 2017 guidance was immaterial. The judge asked Mr Lawson if he accepted that RTRS 2017 is a weighty consideration. He said that it was a consideration but he did not accept that it was particularly weighty. It was a matter for the tribunal as to how it weighed the policy. The key point was that the policy had changed in the course of the application. There was also the danger of treating the policy as a rule. The policy itself did not say that it was statutory guidance. The alleged breach of regulation 21 is entirely dependent on the status of the guidance.

e) Ms Leventhal had referred in her submissions to the difference between informed choice and “Hobsons Choice” but here the CQC were taking away choice from people who might choose to live in this setting. The provisions of the Care Act were such that best interests of service users were protected by the local authority and local commissioning decisions.

f) The rationale of RTRS 2017 was to ban extension despite the fact that the service had been assessed on inspection as meeting the needs of service users. This feeds into proportionality. RTRS referred to consistency across regulation and inspections.

g) There is a significant and ongoing problem regarding supported living which also feeds into proportionality. The impact of the decision was to deny future users the opportunity to choose to live in the service provided by a regulated provider who provides good care in this venue.

h) Article 19 of the UN Convention on the Rights of Persons with Disabilities supports the Appellant’s case in that it refers to choice and cannot be taken as setting out any principle which tells against the application. In any event the service represents living in the community. It is a short walk away. People living there have been assessed as wishing to live in a rural area.

i) This is not a “new” service. The last bullet point on page 12 of RTRS 2017 *(“New services should not be developed as part of campus style or congregate setting”)* does not apply.

j) An institutional ethos is not present. The facility as a whole operates as houses within a street with gardens. There is no usual sharing of staff. There was cogent and compelling evidence that there was a real commitment to individual person-centred care.

k) The word “congregate” implies being without options. This service meets needs and reflects preferences. Autonomy and individuality are furthered and achieved. In what way is it said that this service creates barriers? If it is because it is a number of minutes walk away that would be a surprising reason. The reality was that the site was just off a London suburban street. There are always going to be barriers but it can be understood why someone would choose this placement.

l) If there are barriers they can be overcome. This is not a new service which is what RTRS 2017 deals with. Mr Tutt’s evidence was that the longer he spent there the more

he saw that care was individualised and that this service did not fall within the definition of a campus and/or congregate setting. The OED definition of "secluded" is "shut up, withheld from view". This is not applicable here.

m) Article 8 applied because of the rights of existing and future service users. The decision interferes with their autonomy. It deprives people who wish to move to such a setting the opportunity to do so. The underlying rationale is that this sort of provision should not be available. It cannot be said that the policy was unlawful but people's health would have to be harmed to a sufficient degree, (i.e. despite the Care Act 2014 and the best interests principles in commissioning/needs assessment) to justify the decision.

n) As to consistency, he referred to aspects regarding other services. The Reeds had a number of factors which applied here. Two inspections post-dated RTRS 2017 (the Reeds and the Oaks). The evidence showed an extensive list of shared facilities. They were large services at the edge of a village. The existence of these services required the tribunal to identify which barriers were considered to be insurmountable in the Appellant's case.

o) As to A1P1, he agreed with Ms Leventhal that a careful breakdown of authorities regarding future income and goodwill was unlikely to be helpful in this appeal. The guidance referred to proportionality in any event and there were limited additional points that flowed from A1P1.

p) As to which policy applied the chronology was that RTRS 2017 did not exist when the application was made. The 2017 policy introduced the points regarding campus, congregate settings and the examples regarding new applications. The Appellant's point was that the service was created before RTRS (either version) came into being. The Appellant could not argue legitimate expectation but in terms of proportionality it was a factor that the application process began before the 2017 policy existed. The campus and congregate aspects of the policy were not the obvious and inevitable result of any research or domestic policy trend.

q) The Appellant's case regarding the limitations of research was that social sciences research is different to empiric studies. The CQC introduced the literature to show that there are reasons behind the policy. The Appellant had shown that the research does not entirely go one way. It may be that the point better made by looking at the two policies. The congregrate/campus point was not so compelling that it was even mentioned in RTRS 2016. NICE did not mention campus or congregate settings but had called for a range of options. It is difficult to see why this setting is not community-based other than it is set back. Inspections are a fairly detailed snapshot and the Inspectors were complimentary about community involvement.

r) As to exceptionality and conditions, the application is consistent with the principles and the application is not for a new setting. There are two parts to the definition of "campus" and the second part of the definition has a purpose. Whether something is a "congregate setting" is an intrinsic /holistic value judgement about access to the same choices as other members of the community.

s) The Article 8 rights of JT and RB were in play.

t) The decision can be supported by the imposition of conditions, for example, regarding: the location (i.e. the geographical origin) of future service users; one manager for each service; a requirement for an application for separate registration (although it was acknowledged that this posed difficulties as to how this would work effectively); fencing.

u) The decision should be approached in light of the following. Living with others is not contrary to policy. This is not a new service. There is no criticism of the standard of care. There is no challenge to the individual packages of care. The Appellant is a market leading provider who provides good care.

The Legislative Framework

25. Amongst other matters Section 2 of the Health and Social Care Act 2008 (the Act) invests in the CQC:

(a) registration functions under Chapter 2,

(b) review and investigation functions….

26. Section 3 provides that:

(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.

27. Section 4 sets out:

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).

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

The Regulated Activity Regulations

28. Under section 20 of the Act the Secretary of State is empowered to make regulations in relation to the regulated activities. The regulations made under this section are the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936 (the Regulations). Part 3 contains various provisions under the heading “Fundamental Standards” which include:

9 Person-centred care

(1) The care and treatment of service users must-

(a) be appropriate,

(b) meet their needs, and

(c) reflect their preferences.

….

(3) Without limiting paragraph (1), the things which a registered person must do to comply with that paragraph include-

(a) carrying out, collaboratively with the relevant person, an assessment of the needs and preferences for care and treatment of the service user;

….

(f) involving relevant persons in decisions relating to the way in which the regulated activity is carried on in so far as it relates to the service user's care or treatment;

(g) providing relevant persons with the information they would reasonably need for the purposes of sub-paragraphs (c) to (f);

10 Dignity and respect

(1) Service users must be treated with dignity and respect.

(2) Without limiting paragraph (1), the things which a registered person is required to do to comply with paragraph (1) include in particular-

….

(b) supporting the autonomy, independence and involvement in the community of the service user;

29. Part 4 of the Regulations deals with "Compliance and Offences" and provides:

21 Guidance and Code

For the purposes of compliance with the requirements set out in these Regulations, the registered person must have regard to-

(a) guidance issued by the Commission under section 23 of the Act in relation to the requirements set out in Part 3…..

30. Section 23 provides as follows:

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.

31. Section 24 deals with:

Consultation in relation to guidance under s. 23

(1) Where the Commission proposes to issue guidance under section 23, it must—

(a) prepare a draft of the guidance, and

(b) consult such persons as the Commission considers appropriate about the draft.

(2) Where the Commission proposes to issue under section 23 revised guidance which in its opinion would result in a substantial change in the guidance, the Commission must—

(a) prepare a draft of the revised guidance, and

(b) consult such persons as the Commission considers appropriate about the change.

(3) Where, following consultation under subsection (1) or (2), the Commission issues the guidance or revised guidance (whether in the form of the draft or with such

modifications as the Commission thinks fit), it comes into force at the time when it is issued by the Commission.

(4) Where—

> *(a) any document by reference to whose provisions the guidance operates as mentioned in section 23(3)(a) and (b) is a document published by the Commission,*
>
> *(b) the Commission proposes to revise the document, and*
>
> *(c) in the opinion of the Commission, the revision would result in a substantial change in the guidance,*

the Commission must, before revising the document, consult such persons as the Commission considers appropriate about the change.

(5) Where—

> *(a) any document by reference to whose provisions the guidance operates as mentioned in section 23(3)(a) and (b) is not one to which subsection (4)(a) of this section applies,*
>
> *(b) the document is revised, and*
>
> *(c) in the opinion of the Commission, the revision results in a substantial change in the guidance,*

the Commission must consult such persons as the Commission considers appropriate about whether the guidance should be revised in connection with the change.

(6) Consultation undertaken by the Commission before the commencement of this section is as effective for the purposes of this section as consultation undertaken after that time.

32. The appeal against the decision lies under section 32(1)(a) of the 2008 Act. On consideration of the appeal the Tribunal may confirm the decision or direct that it is not to have effect (section 32(3)). Under section 32 (6) the Tribunal also has power to vary any discretionary condition for the time being in force in respect of the regulated activity to which the appeal relates. "A "discretionary condition" means any condition other than a registered manager condition required by section 13(1)).

<u>Policies and Guidance</u>

33. There are a number of policy guidance documents but we set out passages from the key documents below:

    a) **Transforming Care: A National response to Winterbourne View Hospital, 2012.**
    The events at Winterbourne View triggered a wide review of care across England for people with challenging behaviour. The interim report of the Department of Health review published in June 2012 included the findings people were experiencing a model of care which went against published Government guidance that people should have access to the support and services they need locally, near to family and friends.

    In addition, the interim report summarised published good practice guidance including the 1993 Mansell report, updated and revised in 2007, which emphasised amongst other matters the responsibility of commissioners to ensure that services meet the needs of individuals, their families and carers and that services/support should be provided locally where possible.

    Key passages are:

"3.7 In summary, the norm should always be that children young people and adults live in their own homes with the support they need for independent living within a safe environment. Evidence shows that community-based housing enables greater independence, inclusion and choice, and that challenging behaviour lessens with the right support. People with challenging behaviour benefit from personalised care, not large congregate settings (13). Best practice is for children, young people and adults to live in small local community-based settings."

The footnote at (13) states: "*NICE Clinical guidelines for autism recommend that if residential care is needed for adults with autism it should usually be provided in small, local community based units (of no more than six people and with well-supported single person accommodation)."*

The passage at 3.8 emphasises that where children, young people and adults need specialist support the default position should be to put this support into the person's home through specialist community teams and services; the individual and her/his family must be at the centre of all support - services designed around them and with their involvement; and that people's homes should be in the community, supported by local services.

The section at 3.11 emphasises that:

"Sending people out of area into hospital or large residential settings can cause real harm to individuals by weakening relationships with family and friends and taking them away from familiar places and community. It can damage continuity of care. It can also mean putting people into settings which they find stressful or frightening. This can damage mental health or increase the likelihood of challenging behaviour. There should always be clear and compelling reasons for sending any individual out of area…"

This section of the report concluded: *"This model is achievable. It has been tried and tested and it works."* The report annexed the model of care. This is the national service model (NSM) developed and formalised in *Building the Right Support* (see below).

Part 6 is headed "*Tightening the regulation and inspection of providers"*. This emphasises the CQC 's role (see para 6.3) *"to take action to ensure this model of care is considered as part of inspection and registration of relevant services…[and] CQC will also include reference to the model of care in their revised guidance about compliance.."*

b) Building the Right Support: NHSE, ADASS, LGA, October 2015 (BTRS)

The key passage is in the service model for commissioners. This sets out 9 core principles, the fifth of which is "*I have a choice about where I live and who I live with."*

The rationale to that principle s that:
"the right home and the right environment can improve independence and quality of life and can help reduce behaviours that challenge. People may often experience a lack of control over where they live, who they live with and their environment. These factors can have a major impact on an individual's well-being and their behaviour.

Further detail:

- *People should be supported to live as independently as possible, rather than living in institutionalised settings (which, for instance, housing with occupancy of six or more, or which does not have a small, domestic feel, can quickly become). This could mean 'mainstream' housing either provided by a housing association, private landlord, family or ownership schemes such as HOLD (Home Ownership for people with Long-term Disabilities). Housing should not create new campus sites, hence commissioners should be cautious of contracting with providers keen to create schemes of multiple units within close proximity.*
- *It has been shown that people who present with behaviour that challenges can be effectively supported in ordinary housing in the community. Decisions should be based on what is right for each individual, but for most people, supporting them in a home near their families and friends, and enabling them to be part of their community will be the right decision. This is in accordance with the Valuing People principles of rights, independence, choice and inclusion.*
- *People should not be placed in voids in existing services or group living arrangements if it is not based on individual need and based on a person centred approach to planning. Where people live, the location, the community and the built environment need to be understood from the individual perspective at the outset of planning. Environments that are poorly organised or unable to respond to the needs of the person can increase the likelihood of behaviour that challenges.*
- *It should not be assumed that individuals want to live with others, nor should it be assumed that they want to live alone. It should be about what the person wants and needs. Where a person actively chooses to live with others, careful planning and consideration of compatibility, risk and sustainability needs to take place."*

c) Registering the Right Support, June 2017, CQC

The first version of the CQC's service-specific guidance was issued in February 2016. It was not the subject of public consultation. A further draft policy, replacing its earlier guidance, was the subject of a formal 3-month public consultation from February-May 2017. In June 2017 the further version was issued.

The Background and Scope and Purpose sections in RTRS 2017 set out the principles by reference to *Transforming Care* and *Building the Right Support* (above). This includes (by reference to paragraph numbers that we have inserted)

- Para 2: long recognition that long-term institutional care is not a successful approach to supporting people with a learning disability. Care in institutional settings is rarely person centred and can lead to abusive practices.
- Para 5: CQC will support the national model by ensuring that applications for registration and changes / variations to registration are in line with this model.
- Para 6: CQC has committed to taking a *"firmer approach"* to registration and variation, noting its concerns that providers were and are continuing to apply to register non-compliant models of care.
- Para 9: strategic role of the CQC under s 3 of the 2008 Act in *"encouraging the development of new services… that comply with Building the Right Support and other key national policy and good practice guidance."*

- Para 10 and 11: clarifying factors which will be more likely to mean registration and demonstrating *"best practice"* are more likely to comply with requirements of regulations.
- Para 12: recognition of challenges for providers and commissioners, and acknowledgement of need to encourage the right investment decisions;
- Para 14: encourage consultation prior to application.

In the "Scope and purpose" section, clearly explains that CQC's view that:

"…the underpinning principles of choice, promotion of independence and inclusion for individuals are fundamental to what a good service looks like for every person with a learning disability. This position has the support of the national Transforming Care Delivery Board and is aligned with current national policy and the long held expectation that people with a learning disability are as entitled to live an 'ordinary' life as any other citizen…

We will expect providers to demonstrate in their application that their proposals comply with the principles of this guidance and the accompanying service model, or to explain why they consider there are compelling reasons to grant an application despite it departing from best practice guidance. This applies to any service that provides care, or that might intend to provide care in the future, to people with a learning disability and/or autism.

Providers of services for people with a learning disability and/or autism are more likely to have their application granted if they can demonstrate how their model of support is:

• is in line with Building the Right Support and the accompanying service model;

• built on evidence-based care; and

• in line with national policy, for example, Department of Health, Association of Directors of Adult Social Services (ADASS), Local Government Association (LGA) and NHS England guidance.

Providers who demonstrate that services for people with a learning disability and/or autism comply with Building the Right Support and the accompanying service model when designing or redesigning their service are more likely to be able to demonstrate that the development satisfies the criteria set out in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. Compliance with nationally recognised evidence-based guidance when developing and delivering care will enable providers to show that their services meet the needs and experiences of people with a learning disability and/or autism."

The policy contains a number of worked through examples relevant to new applications and variation applications. A section entitled "Adding beds or places" poses a number of questions which include:

• *If the application is to increase the number of people who live there, how does this fit in with national policy? In particular, that smaller units are likely to be preferable for people with a learning disability.*

• *If the home will be in close proximity to other premises that are being used to provide accommodation and services to people with a learning disability, how does this fit in with the policy on campus style settings?*

d) **NICE guideline *Learning disabilities and behaviour that challenges: service design and delivery* (March 2018)**
This states that if adults prefer not to live alone "*small number of people in shared housing that has a small-scale domestic feel"* is appropriate. The guideline's overall aim is to *"enable children, young people and adults to live in their communities."*

The Burden and Standard of Proof

34. The overarching issue to be addressed by the tribunal is whether as at today's date the decision to refuse to vary the Cherry Tree registration should be confirmed or directed to be of no effect.

35. We are required to determine the matter de novo and make our own decision on merits and on the evidence as at today's date. Subject to relevance and fairness, this can include new information or material that was not available (or presented) when the decisions under appeal were made. The Appellant bears the burden of persuading us that the variation to the existing registration should be granted.

Our Consideration and Findings of Fact

36. The redetermination in this appeal includes consideration of the detailed evidence provided by both sides in this appeal as well as the oral evidence which the subject of cross examination over five days. We have considered all the evidence and submissions before us. If we do not refer to any particular aspect of the evidence/submissions it should not be assumed that we have not taken them into account. We will not rehearse all the evidence in this decision. We will focus our attention on the main points made to enable the parties to know what we made of the key parts of the evidence and how our findings inform our decision.

37. We find that the basic facts in terms of the background and overall chronology of events concerning the application are as set out in [5] to [9] above. We would add that it seems to us that the google time estimates for travel for some of the furthest locations are somewhat optimistic but we need not dwell on this. The Appellant says that (in the alternative to its primary case) it would abide by a condition to limit new service users to the locality.

38. We find that when the application was made on 5 April 2017 no evidence of consultation with service users or their families was provided. On 5 May 2017 an email was sent to the family members of JT and RB, by Jon Nicolson, as Floating Manager, enclosing the draft Inspection Report. The email effectively informed parents that an application has been made and gave a time scale of 6-8 months *"to fill the voids"* if the application was successful. The email continued "*I will of course, keep you up to date with our plans however I wanted to give the opportunity to raise any thoughts and concerns you may have, we all think this will benefit [JT/RB] in terms of social skills and friendship."*

39. The day before a similar email was sent to Kent and Ealing commissioning bodies. Ms Dodgson said in her evidence that there had been minimal consultation before the

application with commissioning bodies (local or otherwise). We find that, in fact, at the date of the application there had been no consultation with any commissioning bodies so as to demonstrate local need. There is, of course, further evidence as to some consultation since then to which we will return as necessary.

40. Care Management Group Limited (CMG) has operated in the care sector for over 20 years and has 147 services supporting 843 people in a wide variety of models including supported living, residential care, outreach and day services. In short CMG enjoys an enviable reputation as a leading provider of care in the UK. It is common ground that the outcome of the last inspection at Cherry Tree in March 2017 was that the service was good across all five domains. By way of brief overview, the Appellant's case is that all that is sought is the registration of three further places in an existing service where: the physical accommodation is present, good quality person-centred care will be delivered and the model of care accords with the best interests principles, as well as and wishes of service users and their families. Further, the Appellant would comply with any conditions deemed necessary to protect the public interest.

41. At first blush it might seem surprising that an application to increase the number of places for service users at Cherry Tree by 3 places would generate the dispute that we now have to resolve. Suffice to say that the appeal is a very important one to both parties. It involves important points of principle regarding the status and/or meaning and/or application of a raft of national policy guidance. In brief summary, the Appellant in this appeal contends that: the guidance in RTRS 2016 (or even in 2017) does not bite on this application; the 2017 guidance should not, in fairness, be applied; to the extent that it is applicable, there are exceptional reasons why the appeal should succeed on its merits. In contrast, the respondent contends that this was a reasoned decision made in accordance with a clear policy, the public interest objectives of which are clear. The decision was correct and the matters put forward do not amount to exceptional or compelling reasons justifying a departure from policy. The respondent contends that to allow the appeal would seriously undermine the policy aims and objectives of national policy. It would seriously undermine the role of the CQC in transforming the model of care available for those with autism and disability/behaviour that challenges.

42. It is clear that RTRS (either version) cannot be read in isolation. We noted that under section 23 (3) CQC *statutory* guidance *"may operate by reference to provisions of other documents specified in it (whether published by the Commission or otherwise).* Both versions of RTRS refer to national guidance, including Transforming Care. RTRS 2016 came into existence because of the national guidance referred to therein regarding the appropriate model of care for adults with autism/learning disabilities and behaviour that challenges. Mr Lawson submitted that it was not until June 2017 that RTRS defined the meaning of congregate and/or campus settings by way of footnotes. This is the case so far as definitions go. However, in RTRS 2016 under the section "Adding New Beds" are posed a series of questions designed to provide guidance one of which was:

"If the home will be caring for a larger number of people, how does this fit in with Department of Health policy on small settings (21)?"

Footnote (21) refers to Transforming Care at para 3.7 therein (set out at 32 (a) above). Para 3.7, in itself, refers to (but does not seek to define) congregate settings. It does, however, set out the principles and also refers by way of footnote to the NICE guidance at that time. In our view although there are differences between RTRS 2016 and 2017 which reflect the further working through of the principles of Transforming Care and BTRS, the key and underpinning principles and the NSM have always been clear.

43. The NOP made specific reference to non-compliance with statutory and national guidance on which the respondent relies. In the letter dated 10 August 2017 the Appellant's solicitor, Bevan Brittan, enclosed the representations in response. It was acknowledged that the essence of the NOP was that the application did not comply with "*current policy guidance*" identified as: RTRS 2016 and 2017 (the latter issued after consultation); Supporting people with a learning disability and/or autism (ADASS, LGA and NHSE); and Transforming Care. It was also said then on CMG's behalf that the application *"was made in full knowledge of the applicable guidance."* In summary, the Appellant's position was that the application should be granted either on the basis that it is in line with current policy, or because *"the application represents a "specialist service" not properly dealt with by the guidance."*

44. Is RTRS 2017 *statutory* guidance? We recognise that RTRS 2017 does not actually state that it is issued as statutory guidance under section 23 (c.f. the 2015 Guidance on the Regulations). That may well be regrettable but we do not consider that this is, in and of itself, decisive regarding the status of the policy. We noted that there is nothing in the Act or regulations that requires any procedure for parliamentary or ministerial approval or any other process for adoption by the CQC. We do not consider that the decision in ~~**Oakenfield**~~ **Oakview Estates Limited** helps one way or the other because the point was not argued in that case. There is a requirement under regulation 24 that public consultation must take place concerning revisions, which we find did occur. We consider the version of RTRS published in June 2017 is service specific *statutory* guidance.

45. Even if we are wrong in this, it is common ground that RTRS 2017 is nonetheless a material consideration. We agree with the respondent that there can be no doubt as to its centrality in this application. Mr Lawson submitted that RTRS was not a weighty consideration. In our view, leaving aside, for one moment, the Appellant's case as to the overarching merits of this particular application, there are, in principle, a number of matters that potentially impact upon the weight we attach to the 2017 policy. In our view, anyone with any understanding of the developments regarding the provision of care to people with autism/ learning disability and behaviour that challenges would appreciate that the principles that underpin RTRS 2017 (and RTRS 2016) did not suddenly appear. The overall direction of travel is the result of continued efforts in effect change in the delivery of care for people with autism, learning disability and behaviour that challenges that began some time ago – and even before Transforming Care. For present purposes it is sufficient to identify Transforming Care - the DoH response to the Winterbourne Inquiry in 2012 - as a key event which led to the further development of policy by the various partners involved. We consider that the version of RTRS published in June 2017 is properly to be taken to represent the statements of principle as to how registration would be made in applications that fell to be considered after the date of publication (12 June 2017).

46. We agree that, *in principle,* the extent (if any) to which policy has altered during the course of an application might have a bearing on fairness, exceptionality and proportionality. There was no disagreement with the information provided by the CQC that CMG had contributed to the formal consultation which ended in May 2017. We note here that although the application was made on 5 April 2017 CMG's representations in response to the NOP were submitted nearly two months after RTRS 2017 was published and it was acknowledged then that CMG was aware that RTRS was applicable current guidance - see [43] above. The representations made were not that RTRS was not relevant/applicable but rather that, on the facts, this was not a congregate setting. We do not consider that any differences between the two policies had any material effect on how the application

was initially presented to the CQC. In any event the Appellant has had the opportunity to "plug" the admitted deficiencies in the application that was made (see MrTutt's report).

47. We turn to make findings regarding factual issues which are relevant to our consideration of the agreed statement of issues.

48. We find that the service at Cherry Tree lies within a setting which has the following features. The overall site at Lilliputs is set back from Wingletye Lane. There is a sign outside the setting itself that refers to Lilliputs and the Care Management Group Limited, but this gives little indication that people live beyond the entrance. The buildings/facilities are not visible from Wingletye Lane. To reach the service one has to walk or drive along a long lane. This is effectively a private driveway and is lined by bushes and trees at the Wingletye Lane end. There is no lighting provision along this access lane. It has been said that it takes about five minutes to access Cherry Tree on foot. Two tribunal members walked the route from the main office to the end of the lane at a leisurely, but not an unduly slow, pace. It took just under seven minutes. There is also the further distance between the main office and Cherry Tree. In the reverse direction, and if the intention is to use public transport, there a further walk of a few hundred yards to reach either bus stop which serve local bus routes to the centre of Hornchurch or Upminster.

49. There are a number of features about the general setting at Lilliputs that are of note. At the end of the driveway/access road is the main office where visitors are required to sign in and out. Between the main office and the buildings is a car park which, on the day we visited, was relatively full with cars. Within the setting generally are some hallmarks that are in keeping with an institution: for example, no smoking signs.

50. There is a large children's playground area. The main residential buildings have an outside garden area with a fence. The fences are very much higher than one would see in any domestic setting. In one part of the Cherry Tree building the fence is made of wire (criss-cross) fencing and is very high. It struck us as more in keeping with a young offenders' institution than a domestic setting. We agree with Dr Joyce that the fencing generally would make any outside observer wonder who lives there and why such fencing was required. We were informed by Mr Kinsey that the height of the fence was due to the propensity of one service user to seek to climb over. It was not entirely clear to us why this is necessary given that a minimum of one to one care is in place within the setting on a 24 hour basis but this was not explored so we take this on board. We were also informed that another part of the high wooden fencing nearby was required due to Ofsted requirements so as to screen off the children's service at Gullivers. Whilst we can understand why this was required by Ofsted this, (and the generally high and somewhat forbidding fencing surrounding the buildings elsewhere), underlines the point about the appropriateness of a setting where the needs of some service users who live there are effectively dictated by the needs of one or more other service users. Lilliputs as a whole currently provides residential care for 26 service users.

51. We find that there are a number of features within the Cherry Tree building itself that have an institutional feel. There are, inevitably, shared facilities in relation to laundry, bathrooms and cooking within each part of the Cherry Tree building. We recognise, of course, that this will always arise where a number of service users live together. The lounges on each side of the Cherry Tree building are extremely large and impersonal. We can understand the needs of some service users may well limit the degree of personalisation desirable in communal areas. We consider that this is not the only factor. The size of each lounge alone is such as to preclude any feeling of a small scale domestic setting. Overall the

accommodation at Cherry Tree, even if viewed as two units for five people in each as per the Appellant's case, does not have a small scale and domestic feel.

52. Lilliputs has a recreational centre which has a number of facilities as set out above. Inevitably use of the recreational centre involves timetables for use by individuals from the different user groups from within the setting and some external use by those with disabilities. The facilities are not used by the community at large.

53. The evidence was that few people come onto the site (unless providing services or accessing the facilities) apart from occasional dog walkers or "courting couples" as per the evidence of Mr Kinsey. In our view the fact that courting couples have used the site is a clear indication that it is a setting that provides privacy and is secluded.

54. Having conducted a site visit we find that the setting as a whole has a distinctly institutional feel. That feeling was based on the look and impression created by the physical aspects of the buildings as described above. The institutional feel was also apparent from the evidence as to how the different services operate within the setting. The activity timetables provided to us as examples show a tightly packed and somewhat regimented schedule. Whilst we appreciate the need to plan and, further, that the existence of a plan does not preclude a service user deciding not to do x, y or z activity, the overwhelming impression is that how life is experienced by service users is very far removed from that which can be enjoyed in a small domestic scale setting within a community. We find that the site is physically separate from the local community. It is set back from the community in the way we have described.

55. We accept that service users do access the community as described by Ms Morgan, Ms Dodson and Ms Molineux but the extent to which they can do so is constrained given that some Cherry Tree service users currently require 2: 1 support outside of the setting, the funding for which is inevitably limited. Ms Dodgson said in her first witness statement that the amount of 2:1 funding available does have an impact on how frequently people can access the local community. We recognise that the same would be true even if service users were living within a street setting and within the ordinary community, but less of the limited support available would be taken up in gaining access to the community outside of the setting.

56. The definitions of "campus" setting and "congregate" setting within the footnotes in RTRS 2017 are as follows:

Campuses: *"group homes clustered together on the same site and usually sharing staff and some facilities."*

"Congregate settings are separate from communities and with access to the options, choices, dignity and independence that most people take for granted in their lives."

The concepts underpinning the words "campus" and "congregate" are not new in this field.

57. The Appellant's case, supported by Mr Kinsey and Mr Tutt, is that the appropriate description for Lilliputs is that services are "co-located". In our view this is a fine, but meaningless, distinction. We find that Lilliputs is accurately described as a campus setting. Cherry Tree service users use the same recreational facilities as some of the service users of the Farmhouse or the Paddocks. We noted that the access to the facilities by Cherry Tree service users at the recreational centre are organised so that use is kept deliberately separate from the other groups of service users but this does not mean that these are not campus facilities. Service users have dedicated slots in much the same way that a school,

college or university might set a timetable for use of a facility by different users at different times to accommodate differing needs on campus. We consider that the presence of the on-site recreational centre at Lilliputs compounds issues of separation, or living apart from the local community, because it is far easier to access than facilities such as a gym or swimming pool in the community outside of the setting.

58. The Appellant's case is that that sharing of staff is a key feature to the definition of a campus setting within RTRS, the implication being that unless present the definition is not met. The definition in the footnote in RTRS 2017 refers to "usually sharing staff". That means that it is not the case that shared staffing must always/invariably be a feature. In our view the distinction that the Appellant seeks to draw by emphasis on the separate provision of staffing for each "unit" does not change the reality of the setting. In any event we find that there is shared staffing in that the manager for both "units", (to use the Appellant's terminology), is shared. We consider it likely that bank staff between Cherry Tree and the Cherry Tree Annex are also shared on occasion.

59. We find also that the setting in which Cherry Tree exists is congregate. The buildings are grouped together in reasonably close proximity. Service users live separately from the community outside the setting and without access to the options, choices, dignity and independence that most people take for granted in their lives. That is not to say that there is no access to options and choices. We quite accept that service users do access the community. Slots of one hour are built into the activity planners for visits such as shopping etc. We accept there are also other outings such as meals out or other activities. The point is that the separation from the community that is involved in this setting means that the options and choices and freedoms enjoyed by service users compared to those that live *within* the community, are undoubtedly constrained. In our view there is a very large difference between the experience of living outside the community and going into it on occasion, and actually living within and being part of the community.

60. It is clear that the Appellant wished to develop the service at Cherry Tree and approached the CQC regarding the creation of a new unit: "Orchard House". The end result was that the registration was varied in 2015 to allow registration of places for 2 specific further service users (JT and RB) in the part of the building that the Appellant refers to as the Cherry Tree Annex. The registration granted was by the CQC was for Cherry Tree as a whole entity. The reality is that the registration that the Appellant seeks to vary relates to a registered service that already accommodates seven service users. Realistically, it is accepted that it cannot be argued that the 2015 variation of the conditions attached to registration, i.e. permitting an increase to seven service users at "The Cherry Tree", created any legitimate expectation that the number of service users would be further extended.

61. We consider that the distinction that the Appellant seeks to draw between Cherry Tree and the Cherry Tree Annex is illusory. The building was constructed as one entity, albeit designed and constructed on a repeat pattern. The two sides of the building were connected by a (locked) internal door until the Appellant closed the connection more permanently when the appeal was underway. The registration concerns Cherry Tree as a whole and not the two units on which the Appellant seeks to rely. That said, we take fully into account the extent to which the two halves of the building were built so as to operate as different units (i.e. the separate entrances and repeat provision re facilities, layout etc). We also take fully into account that two parts of the building function separately.

62. The Appellant's case is that it was always expected by the families of JT and RB that other service users would move into Cherry Tree. We do not doubt this is the case. However, real consultation is about more than simply telling people that an application has been made and seeking a response in that context.

63. So far as the impact is concerned, we take into account the written evidence of other parents, TF, VO and GF. We heard live evidence from the mother of RB and give more weight to this because her evidence was tested. We consider that there are obvious difficulties regarding the evidence of the parent of an existing service user. It is inevitable that the view of any parent in a similar situation may be affected given the context that she is being asked to support the body that delivers her son's day to day care. We accept that Mrs B was a straightforward witness but bear in mind that there is a relationship of dependence which may affect objectivity. Our overall impression of her oral evidence that she was a witness who wanted to do her best to support the Appellant's case as she understood it. We accept that she has considerable experience and knowledge of autism: apart from her role as mother to RB, she has studied autism and works as a teaching assistant in this context.

64. Mrs B considered some 16 or so providers before she chose CMG and Cherry Tree. She was looking for a 4-6 bedded service because this was what R was used to. R had been at his last placement (L) for 6 weeks. That placement was very successful. In the six weeks there they had worked on his challenging behaviour and he was a different person. However, he had to leave because he reached the age of 19.

65. We did not gain the impression that Mrs B felt she had a great deal of help from the commissioning body regarding placement generally. She spoke of other residential options in the list she was given that she felt were wholly unsuitable. There is no indication in her evidence that any other model of residential care was proposed or considered by her and this may well be understandable given R's age and background at that time. The setting at Lilliputs was attractive to her because she thought that this would suit R because he likes being outdoors.

66. One aspect of Mrs B's account emerged in the course of her evidence. She told us that R had enjoyed being part of a rambling group at his previous placement. She had hoped that the setting at Cherry Tree would provide similar opportunities such as participation in a ramblers' club. When this was probed by the tribunal it emerged that she had made enquiries with a specific local ramblers' club and had communicated the positive outcome to the Appellant. When she asked about this Ms Molineux said that she was aware of emails and this would now be followed up. The overwhelming impression created by this part of her evidence was that Ms Molineux was vague and appeared uncomfortable. We recognise that she has only been in post since 2017. In our view it is notable that some two years plus after R's arrival at Cherry Tree one of the desirable benefits to the semi-rural setting perceived by his mother, in the context of RB's past positive experience of the benefits of rambling in his previous setting, has not yet been actively been pursued by the Appellant's managers.

67. Mrs B said RB is very settled. He uses the gym at the centre quite a lot and the pool. He does not go to the local pool. That would be a new experience.

68. Mrs B said that she would welcome the opportunity for R to live with others as she believes that he would benefit from this. On the evidence before us it is evident that there were difficulties between RB and JT when they moved into Cherry Tree within a week or so of each other in 2015. On the evidence these difficulties endured for about six months. We

find that the difficulties in the relationship raised safeguarding issues and were part and parcel of why the service was assessed as requiring improvement in 2015. We accept also that safeguarding incidents are only to be expected and the Appellant's practice in reporting all incidents is commendable. There has, of course, been a subsequent inspection in 2017 with positive outcome. We asked Mrs B how R and JT got along now: she said in effect that they will sometimes acknowledge each other by touching when passing. The evidence of Ms Dodgson and Ms Molineux that RB and JT go out together a fair bit (with their carers). We consider it likely that Mrs B, a dedicated mother, has a fair idea of how important interaction with JT is to her son. That is not to say, of course, that R would not derive benefit from interaction with others. We readily accept that he would. However, Dr Joyce's overarching point was that it is not normal to have to live with others in order to enjoy the benefits of relationships/interaction. We agree. The opportunities for social interaction are obviously increased if people with autism and behaviour that challenges live within and are part of ordinary communities where, if they choose, the benefits of a diverse range of social interaction can be more easily enjoyed.

69. It is an odd feature of the evidence that much emphasis was placed by Ms Dodgson and Ms Molineux upon the fact that the service users in the different buildings are effectively kept separate, except for occasional social events such as barbeques. This is odd in the context that one part of the Appellant's case is that RB and JT would benefit from socialisation with others. It was also odd because the evidence as to why the different groups of service users are effectively kept apart was different. Ms Dodgson said it was because of compatibility issues. Mr Molineux said it was because of training needs: i.e. the carers assigned to each service users may not be able to cope with the needs of another service user. If the latter is accurate, it reflects a very narrow approach to person-centred care. We found that both explanations were unsatisfactory and inconsistent with the Appellant's case that JT and RB would benefit from socialisation that, on any basis, the provider has sought to limit across the setting as a whole. Both JT and RB had been at Cherry Tree for approaching 2 years before the application was made. Overall the evidence about the different groups of service users being kept apart or separate in the setting we find exists, illuminates the clear risks of isolation: both from the community outside and even within the community within the setting.

70. We are conscious that the fact that some our findings regarding the evidence regarding RB and/or JT might be taken to indicate that these aspects of the evidence are decisive. We stress that this is not the case. We agree that a holistic evaluation is required. So far as individual interests are concerned the point is a simple one: on the evidence before us we are not persuaded as to the cogency of the points taken regarding the individual interests of existing service users that have been placed before us.

71. There was one other aspect of Mrs B's evidence with which we should deal. There is somewhat of a chasm in the submissions of the parties as to how her evidence came across: effectively the Appellant contended that she was an enthusiastic witness and the respondent contended that her evidence was limited and guarded. In our view the overall effect of her evidence about the extent to which her wishes (on behalf of her son) would be taken into account was that she thought she would be consulted about the introduction of any new service user but she did not consider that she would be able to veto the decision made by the Appellant. In our view that is entirely realistic. The reality for any parent in this situation is that he or she will hope for the best but will also recognise the obvious limitations on his/her input on behalf of his/her son regarding decisions made by the service provider. However, one of the core principles of the NSM is choice about whom one lives with.

72. The Appellant contends that, given that the quality of care was judged to be good at the last inspection, and the evidence as to the ongoing quality of the provision, it is inconsistent and/or difficult for the CQC to now say that the Appellant will not be able to deliver the same level of good care in the relevant domains to an additional three users. In our view a number of issues arise for consideration. Anyone with any experience in this jurisdiction is aware that the situation regarding the quality of provision can change rapidly. There is a very delicate balance involved in the provision of day to day care which has the clear potential to change, for example: if and when the status quo is changed; if service users and/or their needs change; if there is a change in management of leadership and/or in staff. Good leadership and management can, of course, be effective to mitigate the effects of these variables. One does not have to look too far back on the history of Cherry Tree to see this: prior to March 2017 the previous inspection judgement was "requires improvement." On the evidence before us this was partly because of the challenges faced when JT and RB began to live side by side, with a gap of about a week or so between their separate reception to a new home and environment. CMG have since improved the service so that the judgement as at 2017 was good in all domains. The point is that the judgements on inspection deal with the "here and now". Registration decisions however are concerned with overarching decisions about the promotion of the appropriate model of service in the context of wider national policy and looking forward. What is clear from the national policies is that outcomes are usually better if those with autism, learning disability and behaviour that challenges are able to live within ordinary communities with the free choice to participate as much or as little as they wish. We agree that the policies as a whole reflect important rights issues regarding the facilitation of maximum choice and the freedom and opportunity to live an ordinary life as any other citizen.

73. The effect of Mr Tutt's evidence was that if this was an application for a new service he could not support it. Without any prompting he referred to the site as a campus setting on a number of occasions. In his opinion it was the fact that the service already existed and is providing good person-centred care that made the difference. He accepted in his oral evidence that the barriers or constraints to inclusion existed in the setting but considered that the fact that good care was provided made the case for an exception to be applied. The weight we attach to his opinion is affected by his limited recent/relevant experience in assessing settings within the context of learning disability. It came across clearly that his approach to the issues in this appeal was that his effective yardstick was that his assessment of the setting was nothing like his experience of the harms seen in the context of institutional hospital settings some time ago. In our view this is a rather narrow perspective.

74. Reliance is also placed by the Appellant on the assessment of Mr Michael Fullerton, clinical director at CMG and Lynsey Way, the Positive Behaviour Support Team Leader and Manager at CMG. These were written after the application and in response to the Notice of Proposal. Mr Fullerton refers amongst other matters to the circumstances re JT and RB that supported the original placement. We have considered the contents of both documents carefully. In summary Mr Fullerton considers that in line with Transforming Care "*the majority" of* people can be supported in the heart of their local community. He continued:

"However there is a population of people those with the most complex needs and behaviour (including severe learning disability with or without autism and severe challenging behaviour) who may need "adapted" community support. Cherry Tree Annexe is an example of "adapted" community support."

75. Ms Way considers that the Lilliputs site offers an outstanding opportunity for some people that have autism and challenging behaviour. We noted in particular that she considers that the service users in the Annexe are both quite sociable and would benefit from living with more people. She continues *"this would mean that they would be able to have more staffing flexibility, shared resources and activities."* She does not comment on any other measures that could be taken to promote socialisation. She speaks in terms of the Annexe offering *"the best of both worlds for a group of people that sometimes find it hard to be living in busy cities or in small flats."* She refers to the Annexe being a viable, positive and safe environment which can offer "*reduced restrictions*". The implication is that she considers that "*restrictions*" to living within the community are appropriate for some.

76. Neither Mr Fullerton or Ms Way were called to give evidence so the basis for their opinions and their objectivity has not been tested or explored.

77. Dr Joyce is a clinical psychologist of many years' experience in this field. She has significant clinical and research experience over a considerable period as befitting her role as National Professional Adviser for Learning Disabilities at the CQC. In her witness statement she explained why she had concluded that the application seeks to place an additional three people in a service setting which does not conform with good practice, or with policy; and is likely to deliver poorer outcomes for those placed there.

78. She explained in her oral evidence in clear terms the rationale that underpins the development of the national policies which in turn inform CQC's service specific policy. It is a rights issue, in accordance with Article 19 of the UNCRPD, for people with learning disabilities to be entitled to, and encouraged and supported to, live as others do in the community and be integrated into the ordinary community. It is also about outcomes, and, from her own experience, she gave examples of the positive outcomes she has seen of the national model of care working within the community.

79. Dr Joyce came across as someone with extensive relevant clinical experience and a sound knowledge and thorough understanding of the complexity of the issues surrounding the delivery of care to vulnerable service users. She explained in memorable terms her own experiences of the transformative difference that can be achieved when the model for care is in the community and is truly patient centred. The overarching point is that experience shows that if people with autism/leaning disability and behaviour that challenges live, as others do, within and as part of the community, the quality of life can be high and challenging behaviour can lessen. Quality of life improves with inclusion and when rights are fully respected. She does not recognise that there is a separate group of people (as suggested in the Appellant's case) that is not catered for in the national guidance and who cannot live within the community. The approach that represents good practice is to consider ways in which issues can be managed appropriately in the best interests of the individual, and what the behaviour might be indicating about the individual. Experience shows that challenging behaviour is often reduced in the community, as opposed to increasing or becoming more problematic. The more a person became used to, for example, having to cross a road or dealing with interactions with others, the more this could become manageable.

80. As to the issue of there being children on site who had grown up there and remained on site, Dr Joyce referred to the principles of planning the transition into adulthood, which normally starts at the age of around 14, and the desirability of a plan looking at different options and trying different things to see if there is an alternative, so to give best opportunities. As to the service user who had been at Lilliputs since he was 7 and was now into early twenties she explained moving someone from a child to adult service across

the setting will restrict experience: *"It is not a model which is very favoured and is not what we want to do now*."

81. In cross examination it was suggested that people with learning disabilities might choose to live at Lilliputs and should be given that choice. Her view was that bearing in mind that the service users in question were unlikely to have capacity to decide on where they could live, it seemed contrary to their best interests to "*choose and encourage people with learning disability to do something you know is likely to be worse for them, rather than something you know is likely to be better*. "She also made clear that the rationale of the policy was about more than transport, access or location: the *"policy and plan is about being present in the community and being able to participate in it with as few barriers as possible*."

82. In our view Dr Joyce's evidence was measured, consistent, reasonable and very well-informed. We prefer her evidence to that of Mr Tutt and the Appellant's witnesses.

83. We accept that the fact that at the 2017 inspection the services were rated as good across all five domains is a factor to be taken into account but in our view there are far wider issues at stake that need to be considered in overall context, and to which we will return.

84. A further point made by the Appellant is that the policy guidance prevents the exercise of choice by service users and their families. In short Mr Kinsey's overarching point is that there is room for a different service model and, further, that good care is provided in the model used by the Appellant that has been, and, (if given the choice), will continue to be chosen by families and commissioners in the best interests of service users. He points to the fact that some larger settings have been judged by the CQC Inspectors to provide outstanding care. Our view is that the overall impression created by Mr Kinsey's evidence was that, although he says he is fully supportive of the principles that underpin the national policy guidance and RTRS, he considers that the approach is flawed and/or based on incomplete analysis/research and/or unrealistic because it requires an *"re-engineering of the system".* Ms Dodgson also said in her first witness statement in terms that *"the policy of 'no more than 6 people' is flawed, as a wide range of data shows that services that support 6 people or just as likely, if not likely to be rated outstanding."*

85. It is, of course, open to the Appellant to seek to address the perceived flaw(s) in national policy via usual channels. It is not our task to say the national guidance before us is right or wrong. Our task is to consider the Act and the regulations and to apply the guidance/policies in the context of all of the evidence and to make a decision whether to confirm the respondent's decision or not. That decision is, of course, subject to proportionality considerations. In our view Dr Joyce explained very clearly the reasons that underpin her own opinion that the circumstances in this appeal did not provide exceptional reasons justifying approval of an application that is not in line with the policy guidance. That said, that is a discretionary decision which falls to us to make in the light of all the circumstances.

86. A point is also made that the respondent does not have statutory market shaping powers. These are vested in the local authorities who perform the commissioning role. We do not consider that this advances the Appellant's case in any material way. The statutory functions and duties vested in the CQC are very clear – see section 2 and 3 of the Act. The many matters to which the CQC must have regard in terms of how it must carry out its functions are also clear – see section 4 of the Act.

87. The Appellant submits that the tribunal can trust that places for future service users will not be commissioned unless placement at Cherry Tree meets their needs because the best interest principles which guide the local authority will inevitably guide future individual placement. In our view this is simplistic. It seeks to downgrade the registration function of the CQC to a subsidiary role. It fails to recognise that which the national policy recognises - see Transforming Care and BTRS - that each body has an important role in driving the change that is judged to be necessary to improve outcomes and respect the rights of this vulnerable user group. The rationale of the raft of guidance set out above is to respect rights. The professional consensus is that better outcomes are usually achieved if those with autism/learning disability, and behaviour which challenges, are supported to live in small scale domestic settings within communities. The purpose and aim of the policies when read as a whole is to drive change and *transform* care so that options for care within the community are developed locally and different models of care are actively considered, pursued and developed. The clear aim of national policy is to seek ensure that best interests decisions are made by starting with the needs of the individual service user and building around those, rather than the service user being "slotted" into an available space.

88. One element of the Appellant's case is that the unintended consequence of the application of the policy is that providers have now focussed their efforts in providing facilities for supported living which (at least as matters stand) is not subject to the same rigor in the sense of individual inspection of each and every supported living placement. The CQC recognise that this is an area that needs attention. We do not consider that any deficits in the current inspection practice regarding supported living placements are overly material to the decision we have to make.

89. Time has been spent in this appeal in considering the Appellant's contention that the respondent's decision is inconsistent with other decisions on registration. The overarching problem with issues regarding consistency in decision making is that the Appellant would have to satisfy us that we are truly comparing like with like. It is obvious, however, that there are, and will always be, a very large number of variables involved in a holistic judgement regarding the merits of any registration application. The tribunal gave leave to adduce evidence on a limited number of settings said to involve similar features and the Appellant chose those it wished to present. Context is all and, as pointed out by Dr Joyce, it is not just a question of simply transport, access or location: the *"policy and plan is about being present in the community and able to participate in it with as few barriers as possible.*" The Appellant has not persuaded us that there is any or any material inconsistency between the respondent's decision on CMG's application and others. We state our findings regarding the main points advanced.

    a) Roxby House was first registered prior to RTRS. The recent variation application (to reduce maximum numbers from 30 to 29) was made in 2014 and before RTRS. The inspection report relied upon (18/06/2015) pre-dates RTRS. The Oaks was first registered in October 2015, which was around the same time as BTRS was being issued and long before RTRS. It is a location for 8 people but is a mixed service user setting (LD, and also Young Adults, Physical Disabilities and Sensory Impairments). The recent "outstanding" inspection regarding both are noted, but we do not consider that the fact of any "outstanding" inspection report in these or any other settings shows any inconsistency in the CQC's approach to its policy regarding registration. There is nothing in the policy that suggests that the provision of good or outstanding care is, *in and of itself,* a compelling reason to grant registration when a campus or congregate setting is involved.

b) It is the case that in August 2016 registration was granted to The Reeds which concerned an 8 person care home on a site with other similar services and was a campus setting. In its reasons it was expressly said by the CQC that the service did not comply with good practice or comply with guidance. The CQC said clearly that although the care may be "good" as judged on inspection, The Reeds had been built in the wrong setting and wrong location. An exception was, however, made. We accept the evidence that this arose because places had been promised by the provider even though registration has not been granted. The accommodation had been built and designed around the bespoke needs of specific service users. The CQC considered it had little choice but to grant the application because the considerable distress likely to caused to service users and their families compelled an outcome in favour of registration.

c) At one stage the Appellant relied on Pennine House as evidence of inconsistency. This was an application to vary to add a new 8 person location and it was registered in August 2017 after RTRS 2017. In our view the decision record explained clearly and succinctly why it was considered that the application should be granted. Although this was an addition in what could be considered to a congregate setting, it was considered to be ordinary housing in an ordinary street with no barriers to access and the location was visible. In our view there is no material inconsistency. If anything, the decision shows a willingness on the part of the CQC to consider merits on an individual basis.

90. Ms Toker-Lester was called as an expert to give evidence from a commissioning perspective. The Appellant submits that her evidence did not add significantly to the issues we have to decide. We found her evidence to be very valuable indeed. Her evidence addressed Mr Kinsey's overarching point that the small domestic model of care advocated in the policies will require a *"re-engineering of services*". In our view her evidence, like that of Dr Joyce, showed that the re-engineering of services is, indeed, precisely what the national policy guidance in Transforming Care and subsequent policy guidance seeks to achieve in the public interest. Ms Toker-Lester was a very impressive witness who, like Dr Joyce, showed that the model is, despite the challenges involved, realistic, workable and achievable.

91. Reliance is placed by the Appellant on the current demand for the services at Cherry Tree. We heard evidence to the effect that:

a) The placement of a young 18/19 year old female at the Cherry Tree is in contemplation. She, along with her sister, has lived at Gullivers on a respite basis for a few days a week for some years. We have not been provided with any documentary evidence to support this potential placement, or to show why this placement, amongst any others that may have been considered, is considered to be in her best interests at her age and stage in life. It has also not been explained why the placement of a young female would fit within a service currently described in the CMG statement of purpose as for male service users only. (We accept, of course, that the statement of purpose could be changed (and this would require reassessment)).

b) A commissioning authority wishes to place a male service user at Cherry Tree. Again, we have not been provided with any evidence regarding the individual placement and needs.

We noted also that there is currently one vacancy in Cherry Tree and a further vacancy is likely in any event. We are prepared to assume that if variation was granted all the places (i.e. the vacancies within the current registration of 7 and also three further places) would

be filled at some stage as the result of decisions taken by commissioning bodies and families. We bear in mind also that once granted a variation in registration exists in perpetuity, (subject to enforcement action).

92. The Appellant submits that it is inappropriate to base regulatory decisions on "best practice." In our view this is a surprising submission. We can see how the quest for "best" (as opposed to "acceptable" practice) may be inappropriate in some cases: i.e. perhaps those concerning factual allegations regarding specific incidents in the social/health care context. That is not this case. This appeal is about the future and the extent to which the application to vary the conditions attached to the existing registered service is in line with, or is contrary to, policy aims and objectives in a much wider sense. In this context we consider that "best practice" principles are entirely appropriate given that the aim of the policy is to improve the quality of life enjoyed by those with autism/learning disability. The main objective of the CQC in performing its functions is to protect and *promote* the health, safety and welfare of people who use health and social care services. Section 3 of the Act could not be clearer. The statutory duty imposed on the CQC is to perform its functions for the general purpose of: *encouraging the improvement* of health and social care services; 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 *the efficient and effective use of resources* in the provision of health and social care services.

93. We return to the core issues regarding this application. We remind ourselves that this is an appeal against the refusal to vary the existing condition attached to registration regarding the maximum number of service users at Cherry Tree so as to increase from 7 to 10. In deciding whether the decision should be confirmed or effectively set aside, the core issue is the extent to which the application meets (i.e. viewed as at today) the requirements of the Regulations 21, 9 and 10.

94. We agree that no single factor or set of factors is determinative; the full context of the application has to be judged on all its merits and requires a holistic judgement. We have considered all of the evidence in the round. We do not consider that the application, even as now presented/further explained, demonstrates compliance with the national guidance of Transforming Care and the subsequent guidance in BTRS and RTRS. The Appellant, a market leader in care provision, was well aware of the direction of travel described in Transforming Care and thereafter in BTRS and RTRS. At the inspection Ms Dodgson was asked if the proposed changes to the service were in line with current guidelines. She candidly said that *'if we were building from scratch we probably wouldn't plan it as it is but now it's here we are building on what's already in place.'*

95. We agree that there is some force in the Appellant's submission that this is not a "new" application in the sense that Cherry Tree is not a new building. We are not, however, impressed by the argument that the service was in "the process of development". The reality is that the Appellant aspired to extend the number of service users in Cherry Tree and fill the empty bedrooms but could not begin to hope to do so until the "requires improvement" rating was reversed in March 2017. It is, however, true to say that the application seeks to expand on that which exists and the accommodation exists. In our view it is important to recognise that extension of the number of places will increase the number of service users in a setting that is, as we have found, a campus and congregate setting. In our view this is contrary to the principles that underpin the raft of guidance to which we have referred including RTRS 2016 and 2017. Reasonably and proportionately the respondent has not sought to disturb that which exists but does seeks to draw the line

on a variation which will increase and perpetuate a model of care which, for reasons explained in Transforming care, amongst others, is contrary to best practice.

96. Even if RTRS 2017 is not *statutory* guidance, the impact of non-compliance with the national guidance and the service specific policy is in any event demonstrated by reference to consideration of regulations 9 and 10. We find that if this application were to be granted the principles of person-centred care will not be met, on the balance of probabilities, because the nature of the congregate and campus setting which we find exists militates against the provision of person-centred care in the wider sense. The extended service would not be appropriate or meet the needs of future service users, objectively viewed. Further, we find that the principles of respect and dignity will not be met because the nature of the congregate and campus setting we have found to exist, involves a lack of respect for autonomy in the wider sense. The nature of the setting, the use of which the Appellant seeks to increase, is not such, on balance, that will support the autonomy, independence and involvement in the community of the service users who may live there in future, were the application to be granted. In this we prefer the evidence of Dr Joyce, Mr ~~Astall Martin~~ Assall-Marsden, Mr ~~Lelliot~~ Lelliott and Mrs Toker-Lester to that adduced by the Appellant.

97. As to "compelling circumstances" the Appellant argues that the respondent's policy cannot define a hurdle for the tribunal to apply. We do not consider that there is any substance in this point. It is quite usual for bodies to set out the criteria it will apply in the event that it considers that an application made does not comply with the legislation or regulations. We stand in the shoes of the decision maker. In any event it is agreed that if the Appellant fails on his primary case (as here), exceptional reasons to depart from the policy guidance would have to be shown. In our view, "exceptional" and "compelling" are interchangeable in this context.

98. Ultimately, the argument that Article 1 of Protocol 1 (A1PI) is engaged was not really pursued. For the avoidance of any doubt we state that the Appellant has not satisfied us that the impact of this decision represents an interference such as to engage A1P1. Even if we are wrong in this the real issue would be that of proportionality – to which we will return.

99. It is necessary to consider first of all the argument advanced regarding the Article 8 rights of JT and RB and/or potential future service users. We remind ourselves of the terms of Article 8.

100. We do not consider that the decision represents an interference with, or shows a lack of respect towards, the rights of JT and RB in relation to their family and/or private life interests. The decision does not amount to an *interference* with their enjoyment of their lives at Cherry Tree. JT and RB will each continue to enjoy their lives there for as long as those commissioning and funding the services and their families consider that this placement best meets their interests (subject only to any enforcement action). So far as lack of respect is concerned the decision does not mean that JT or RB will not be able to benefit from socialisation with others. There are a number of ways this can be maximised and/or achieved. Indeed, there were a number of ways in which this could have been maximised/achieved in the past.

101. In our view reliance on the potential rights of other future service users are too vague to engage any right to protection against any possible lack of respect under Article 8 (1).

102. We do not consider that Article 8(2) is engaged. Lest we are wrong in this we turn to the remaining issues. We have found that the decision was plainly in accordance with the law, including the regulations.

103. We also consider that the decision was necessary in pursuit of a legitimate public interest, namely, the protection and *promotion* of the health and well-being of future service users who, if this provision were to be extended would be placed there despite the national recognition that this model of care, in a campus and congregate setting, is not the appropriate model in terms of according adequate respect for the rights of those with autism to live as ordinary a life as any other citizen. We attach very considerable weight indeed to the principles that underpin the respondent's decision and to RTRS. In our view all three of the public interest objectives set out in section 3 of the Act are clearly engaged in this appeal.

104. The Appellant contends that there are exceptional reasons that justify a decision in its favour and that the impact of the decision is disproportionate. We have considered all of the arguments advanced and have considered these in the context of section 4 of the Act which sets out all of the matters to which we must have regard.

105. It is urged upon us that there is room for the extension of a service that provides the benefits of semi-rural living within the context of the overall quality of care that the Appellant is known to provide. In effect it is said the decision makers (i.e. the tribunal) should not sanction the deprivation of choice that has been, or may be made, by future service users whose interests are/will be protected by commissioners in the context of the Care Act 2014. We do not consider that this has any real substance. In our view there is nothing about the respondent's decision that would deprive future service users of the ability to live in another semi-rural setting - if that accords with a holistic assessment of their best interests based on an objective assessment of their needs and wishes. It is entirely possible to live in a setting that has ready access to the benefits of the countryside but which lies within an ordinary community providing ready access, if desired, to the enjoyment of the ordinary freedoms and choices available to all citizens. Transforming Care, BTRS and RTRS do not impose a requirement to live with others or to live alone. As Mrs Toker Lester's and Dr Joyce's evidence demonstrated, what is important is that planning is bespoke to an objective assessment of the needs of the individual.

106. It is submitted that the facility and the bed spaces already exist, good person centred care is provided by a market leading provider and it is therefore disproportionate to refuse the appeal. In our view, registration decisions by the CQC should not be about facilitating the filling of existing beds or spaces/voids. Indeed, that is one of the key harms to which the national guidance is directed. The proper focus of the CQC is on the protection and promotion of the welfare of service users. The legitimate aim of the direction of travel set out in the guidance and policies is to move away from care that is provided in campus and/or congregate settings because it is recognised that this is not the best service model for this vulnerable user group. We agree with Ms Toker-Lester's point, which chimed also with that of Dr Joyce, that there is also an opportunity cost to be considered. Put simply, care services are provided at very significant cost to the public purse. It is in the public interest that registration decisions are made paying full regard to need to ensure that public funds are expended on the model of care that is considered to provide the best potential for better outcomes. In our view the respondent's role in registration would be very seriously undermined indeed if an exception were to be made based the quality of the provider and/or the quality of provision and/or the fact that empty beds or voids exist which can easily be filled. This would send entirely the wrong message and would very seriously

undermine the legitimate public interest goal to transform care so that it accords with best practice principles in terms of the protection of the well-being, rights and freedoms of those with autism, learning disability and behaviour that challenges. In our view such a decision would have a very significant adverse impact indeed upon the CQC's ability to fulfil its important role in the national agenda to transform care.

107. We recognise that in some cases the imposition of conditions may have the clear potential to address the public interest so rendering refusal disproportionate. In our view the conditions that have been proposed (and/or any that we could devise) would not address the true substance of the public interest considerations in this appeal in any meaningful way. Conditions would, in our view, amount to "tinkering around the edges" and would utterly fail to recognise, or afford any or any adequate weight to, the public interest principles which underpin the national guidance and which are in line with statutory objectives of the respondent under section 3 of the Act.

Conclusion

108. Having balanced the impact of the decision upon the Appellant and service users against the impact upon the public interest in the promotion of the health, safety and welfare of people who use health and social care services, including the respondent's ability to fulfil its registration function and role in the national agenda to transform care, we find that the decision was (and remains) fair, reasonable and proportionate.

Decision

109. The decision to refuse to vary registration is confirmed and the appeal is dismissed.

Tribunal Judge Siobhan Goodrich
Care Standards
First-tier Tribunal (Health Education and Social Care)

Date: 8 August 2018
Amended Under Rule 44 date issued: 14 August 2018