Care Standards

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

Heard on 2, 3, 4, 5 and 6 March 2020 at Bridlington Magistrates Court

[2019] 3765.EA

BEFORE
Mr Clive Dow (Tribunal Judge)
Ms Patricia McLoughlin (Specialist Member)
Mr John Hutchinson (Specialist Member)

Bleak House Limited
Appellant

V

Care Quality Commission
Respondent

DECISION AND REASONS

Representation:

Appellant: Mr Mark Ruffell, Counsel, instructed by Ridouts PLC
Respondent: Ms Anna Wilkinson, Counsel, instructed by CQC Legal Services

The Appeal

1. This is an appeal by Bleak House Limited (Bleak House) brought under Section 32 of the Health and Social Care Act 2008 (the Act) against the decision of the Care Quality Commission (CQC), made on 21 June 2019.

2. The Appellant is registered as a provider of regulated activities at Bleak House, High Street, Patrington, Humberside, HU12 0RE for the accommodation of persons who require nursing or personal care. The CQC refused Bleak House's application to vary a condition of their existing registration so as to permit a

further five places at Bleak House, so increasing the maximum number of service users from 19 to 24.

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 direction, and meaning no disrespect to them, this decision avoids using the names of service users at Bleak House.

Background

5. Bleak House is a large building in the centre of the village of Patrington. Formerly a large private home, Bleak House was opened by Mrs Sheila Turley as a home of adults with learning disabilities in 1985, following the provisions of the Care in the Community Act. Mrs Turley passed away in 2012. Bleak House's directors now include Mrs Turley's son, Mr Steven Turley and daughter Mrs Susan Harris. Ms Sara Turley, Mrs Turley's granddaughter, is the manager of Bleak House.

6. In late 2014 the directors applied for outline planning permission to build a substantial extension to Bleak House, including a further 10 rooms with en-suite shower facilities, some adapted with hoists and other equipment for the most physically disabled service users, and additional bathroom facilities also adapted for use by physically disabled service users. Outline planning permission was subsequently granted in October 2015. Detailed building regulation plans were drawn up in December 2016. Building work commenced in August 2017.

7. Mr Turley and Mrs Harris are also the directors of another, smaller home for adults with learning disabilities on a separate self-contained site next door to Bleak House. Mr Turley is the manager of that home, which has capacity for 8 service users.

The Chronology

8. Bleak House Ltd was registered as a Provider with the CQC for the regulated activity of 'accommodation for persons who require nursing or personal care' from Bleak House, on 1 October 2010. The registration was granted subject to conditions stating that: (i) the Registered Provider… may accommodate a maximum of 19 service users at Bleak House; and (ii) the Registered Provider must not provide nursing care under "accommodation for persons who require nursing or personal care" at Bleak House.

9. The Appellant applied to vary a condition of registration relating to Bleak House on 21 May 2018. The Appellant sought to vary the first condition of its registration to read: "The Registered Provider may accommodate a maximum

of 24 service users at Bleak House".

10. On 19 July 2018 the Respondent's inspector, Anita Adams, conducted a site visit to Bleak House in the company of Ms Alison Westwood, the Respondent's registration manager.

11. On 1 November 2018 the Respondent issued a Notice of Proposal to refuse the Appellant's application. Representations were invited and submitted by the Appellant on 29 November 2018. The representations were considered by Clare Robbie, the Respondent's head of representations. On 9 January 2019 she sent a letter to the Appellants entitled "Letter to confirm the Commission will not be adopting the proposal to refuse your application to vary conditions of registration as a service provider in respect of a regulated activity". The letter said that the matter had now been passed back to the registration team for further investigation and that the decision to refer it back to them did not pre-determine the outcome of any further assessment.

12. By letter dated 17 April 2019 the Respondent issued a further Notice of Proposal to refuse the application.

13. The Appellant submitted representations in response to that Notice of Proposal on 16 May 2019.

14. The Respondent issued a Notice of Decision on 21 June 2019. The Notice of Decision adopted the Notice of Proposal to refuse the Appellant's application to vary the condition of their registration.

The Notice of Proposal

15. In her letter of 17 April 2019, Ms Westwood proposed to refuse the application for reasons including:

    - ***"B1.14.*** *From consideration of the information you have presented in your application and provided to us to form our assessment, you have failed to demonstrate that you have had regard to the guidance issued by the Commission which under Regulation 21 of the Act states providers "must have regard to". Our assessment found that the service model you are proposing does not align with published best practice guidance as outlined above. You have not provided any compelling reasons why the Commission should depart from such guidance.*

      …

    - ***B2.5.*** *We note that the most recent inspection of Bleak House found that the service was able to deliver person-centred care and was found to be compliant with Regulation 9. Our assessment has taken into consideration the potential impact of additional people on the potential future outcomes for existing and additional service users.*

      …

- ***B2.10.*** *The increase of extra people to the home and their associated health, social care and wellbeing needs would reduce the degree of person-centred and personalised care that could be provided by the staff team. This would in turn impact on the outcomes for those individuals in terms of social inclusion, wellbeing, social relationships and quality of life.*

  …

- ***B2.17.*** *The meetings used to communicate the plans about the proposed increase did not demonstrate that service users and their advocates where these were used to support people with important decision-making, were given a full opportunity to explore how the changes may impact upon their individual care and treatment.*

- ***B2.18****. The Commission considers that taking into account the addition of five more service users extra to the nineteen service users who currently live at Bleak House would make it more difficult to provide individualised, person-centred care to meet the service users' needs and preferences. Most service users at the home require support in multiple areas of their life, for example going into the community, support with personal care and taking their medication. Your plans to accommodate the increase do not include any significant change of resources or service provision which would facilitate people being supported to pursue their own interests, including those in the community. As such, your proposal does not support a model whereby individual service users would be able to have maximum independence, choice and opportunity to determine their own care."*

The Decision under Appeal

16. Ms Westwood adopted the Notice of Proposal 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 (the 2014 Regulations) in terms of:

    a. Regulation 9: person-centred care; and

    b. Regulation 21: registered providers must have regard to the guidance issued by the Commission under Section 23 of the Act, for the purposes of compliance with the requirements set out in the Regulations.

The Issues

17. The Appellant's original grounds of claim set out a range of procedural objections to the way in which the Respondent had arrived at its decision. These were not withdrawn, but equally they were not pursued at the final hearing. The overarching issue was identified by the parties as whether the CQC as Respondent was correct in its decision of 19 June 2019 to refuse the Bleak House Directors' (as Appellant) application to vary the condition of its

registration limiting it to 19 service users. The following overlapping sub-issues were also identified:

a. To what extent do the recommendations contained in Transforming Care (2012), Building the Right Support (2015), Registering the Right Support (2017) and in other relevant publications apply to this application and the service users affected?
b. Is the Appellant's proposal to increase the number of service users from 19 to 24 contrary to the recommendations contained in Transforming Care, Building the Right Support and Registering the Right Support;
c. If the Appellants' proposal is not contrary to the relevant recommendations and guidance, should it be granted?
d. If the Appellant's proposal is contrary to the relevant recommendations and guidance, are there compelling reasons to depart from the relevant regulations so that the application should be granted?
e. In either case, has the Appellant demonstrated that it would provide 'person centred care' 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)?

The Parties' Positions

18. These were set out in the skeleton arguments provided by both parties before the hearing. Since these are matters of record we need only set out a summary of the main points.

<u>The Appellant</u>

a. The recommendations in Transforming Care, Building the Right Support and the guidance in Registering the Right Support are not directed at the type of service user that the Appellant cares for and who would be included within the Proposal. To the extent that Transforming Care, Building the Right Support and Registering the Right Support apply to the application, it is compliant or at least consistent with the guidance, which the CQC has applied too rigidly in respect of the service size.

b. Even if the guidance does apply more directly to the proposal and/or it is not being applied too rigidly by the Respondent, there are compelling reasons to depart from the national policy and guidance including:

    i. The Appellant's current inspection rating and the comments of inspectors about the delivery of care consistent with Registering the Right Support;
    ii. The Appellant's capacity and willingness to increase staffing to ensure it can continue to deliver person-centred care with 24 service users;
    iii. The Appellant's capacity and willingness (subject to approval of

its Proposal and the additional income that will generate) to further improve its communal facilities at Bleak House;
    iv. The support of the current service users for the Proposal;
    v. The Appellant's focus upon elderly service users with learning disabilities, whose needs are otherwise not being met within the sector, resulting in them being placed in much larger care homes for the elderly; and
    vi. Other care homes who provide services for adults with learning disabilities have more than 24 service users.

The Respondent

a. The application to increase the maximum number of service users at Bleak House from 19 to 24 fails to comply with the requirements of Regulation 21 of the 2014 Regulations and the relevant nationally recognised guidance made under Section 23 of the Act. The proposal is a clear departure from the evidence-based best practice and there is no compelling reason to set aside that evidence-based best practice and grant the application.

b. The proposal to increase the number of service users was itself a failure to comply with Regulation 9 of the 2014 Regulations because it did not sufficiently engage existing service users in a key decision affecting their treatment and care. Increasing the maximum number of service users from 19 to 24 will preclude or substantially risk the delivery of 'person-centred care' to service users. The Appellant cannot, or has not, demonstrated how they can mitigate that risk so as to continue to deliver person-centred care to a larger number of service users.

The Hearing

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

20. The Tribunal carried out a site visit on 2 March 2020.

21. The only preliminary issues related to minor bundle errors and the Tribunal's request for a plan of Bleak House, including the new extension, showing the layout and number of rooms and the communal facilities, which was provided by the Appellants on 3 March.

22. Late evidence was limited to the Appellant's request to rely on a single page schedule describing the needs of each of the 19 service users at Bleak House. There was no objection to that document's admission by the Respondent. Considering that document to be relevant and potentially helpful to us in reaching a fair decision, we decided to admit it.

23. During his cross examination of Ms Westwood, Mr Ruffell also sought to rely on a press release by Professor Martin Green OBE, Chair of Care England (the representative body for independent care providers in England), dated 17

February 2020, responding to the Care Quality Commission's recently announced consultation on a proposed revision to Registering the Right Support. Although Mr Ruffell had referred to and quoted from that document in his skeleton argument, Ms Wilkinson objected to the late admission of the press release itself on the basis that it was neither particularly relevant to the issues in the appeal nor was it fair to admit it because although the Appellant was clearly aware of the document from the date of its production, they had not then sought to adduce it as late evidence as they had done with other documents. The Respondent and their witnesses had not had sufficient opportunity to consider and respond.

24. Noting that the Appellant's general point (that criticism of Registering the Right Support was a matter of public record) could be put to the Respondent's witnesses in any event, we agreed with Ms Wilkinson that it was neither necessary nor fair to admit one document at such an advanced stage of the proceedings. We refused to admit the document.

The Witnesses

25. It is convenient to record here the witnesses from whom we heard oral evidence:

For the Appellant:
Mr Steven Turley, Director of Bleak House Ltd
Ms Sara Turley, Registered Manager of Bleak House Ltd
Mrs Susan Harris, Director of Bleak House Ltd

For the Respondent:
Ms Anita Adams, Registration Inspector, CQC
Ms Alison Westwood, Registration Manager, CQC
Dr Theresa Joyce, National Adviser, Learning Disabilities, CQC,
Ms Helen Toker-Lester, Integrated Personalised Care Delivery Lead, NHS

26. Each witness adopted his or her statement(s) (where his/her background was set out in far more detail) gave further evidence, was cross-examined and answered questions from the Panel. We received written statements from Simon Richardson, Information Rights Manager at the CQC and Anna-Maria Lemmer, solicitor at Ridouts PLC, solicitors instructed by the Appellant, which we have taken into account.

27. The evidence was completed on 6 March 2020.

28. **Ms Adams** said that she had concerns as soon as she considered Bleak House's application for variation because she knew it was already a large setting and not a small-scale domestic setting, so would struggle to demonstrate compliance with national policy and guidance as described in Registering the Right Support. Ms Adams said that although the research suggested outcomes were likely to be poorer in settings of more than six residents, there was no set maximum number of service users in a small-scale domestic setting, it was about how service users were enabled to live independently so far as possible

and to make individual choices: essentially to live like everyone else in the community. Ms Adams said that she did not believe Bleak House’s current arrangement with 19 service users reflected policy or best practice but she accepted it had been assessed by the CQC’s own inspectors as delivering person-centred care to a good standard.

29. Her specific concerns about the arrangements at Bleak House centred on the communal areas and how busy the environment was likely to become with additional service users, particularly as the support needs of the ageing service users increased, including wheelchair use and more staff to support them on a 1:1 basis. Her other substantial concern was about lack of choice for service users in their everyday lives.

30. Ms Adams said that the CQC does not apply the Registering the Right Support guidance retrospectively but that it does apply to applications for new registration or variation. Ms Adams said that she believed the national policy and guidance applied to Bleak House because Registering the Right Support clearly states that it applies to all learning disability settings, whether or not the service users demonstrated challenging behaviour. In any case, Mr Turley’s email responses to her queries (C/294) reflected that at least two residents did demonstrate challenging behaviour.

31. Ms Adams did not accept that the net effect of Registering the Right Support was to restrict a service user’s choice but if it did so in time by excluding large congregate settings, that was justified to ensure the best outcomes for service users.

32. Ms Adams said that she was not satisfied that the service users were helped to properly understand the implications of the changes proposed, so the views expressed in the consultation were not balanced or complete. The consultation had been superficial, done in a group setting and based on the premise that life would automatically be better with the extension. The consultation ought to have been personalised for each service user, encouraged or even required the views of their family or other advocates and focussed on the impact of having additional service users at Bleak House. Ms Adams accepted that some families had expressed views and the names and addresses of other service users’ family members had been provided. She did not agree it was the CQC’s role to undertake consultation, either with residents or their families. It was for the Appellant as applicant to show that its service users had understood so far as possible the impact of the variation upon them and make an informed choice about whether to support it.

33. Aside from not reflecting policy and best practice, Ms Adams summarised her main concerns about the prospect of additional service users in the Bleak House setting. Her main concerns related to the communal spaces, which are part of the pre-existing building. She considered that with both an uplift in service users and more staff to support them, the communal environment would become substantially busier, particularly in the dining area, further denying the service users privacy and choice. It hadn’t been demonstrated how the impact of these additional people would be managed and her concerns remained that

with up to five additional service users and additional staff, some of whom might have mobility issues, the space is insufficient.

34. Reflecting on her concerns about staffing, Ms Adams accepted that Bleak House were responsive to service users' needs, had never employed agency staff and could recruit more staff. That achievement, however, did not allay her concerns about how additional staff would impact an already busy and congregate environment.

35. Ms Adams accepted that the changes made by Bleak House, including the extension, were of considerable benefit to the current service users. Additional communal spaces had been created, including the 'activities room' and the 'visitors' room' in addition to the 'oak room' lounge and the dining room, which was available all day. She did not consider these were sufficient because service users didn't appear to use all of these spaces independently and some would be difficult to access for wheelchair users. Although she was aware that the directors have further plans to develop the dining room area, among other improvements, she said she could not consider future plans in her assessment.

36. Ms Adams said that as the research underlying the national policy set out, choice in everyday matters is particularly important, including things like what to eat and drink and when. Bleak House had set meal hours and a limited menu choice, albeit with some flexibility. There appeared to be limited opportunity for service users to access the kitchen themselves, which she would expect to see, not least to encourage independent living skills. Ms Adams said that compared with other learning disability settings, Bleak House service users accessed the community less frequently. In other settings, service users were supported individually and could pursue more individual interests. Ms Adams said she believed that an increase in service users would further restrict choice and independence for the service users, some of whom were under 55 and remained fit and active. At the time of her inspection, all but two service users required support from staff to leave the house, which amounted to a substantial burden on staff, which would only increase as they aged. She did not believe that Bleak House could deliver person-centred care if the number of service users increased at all. Considering the CQC's own conclusions in its 2018 inspection [A/335] that Bleak House service users could live like any other person, she said that she had not carried out that inspection and she did not agree.

37. Ms Adams said it had been unhelpful that the Appellant's application for variation had ticked various boxes about the category of service users it proposed to accommodate, including adult social care and elderly care bands. The learning disabilities band reflected CQC's understanding that learning disability was likely to be a service user's primary need throughout their life.

38. Ms Adams accepted that Bleak House was careful about who they had as residents to ensure compatibility but rejected the suggestion that they could screen out those with challenging behaviour. Ms Adams said that challenging behaviour could arise at any stage of life, including for service users with dementia, for whom Bleak House was adapting its service.

39. Ms Adams accepted that the Local Authority, East Riding of Yorkshire (ERYC), were the commissioners of local services and at least two individual staff members appeared to support the Appellant's application, including one considering that Bleak House lent itself to the description 'a smaller group setting'. Ms Adams said that she did not agree with that description and in expressing support, she did not believe that ERYC had properly considered the Transforming Care agenda. In any event, she said, the CQC had a different remit: its role, as set out in the Act, is to consider the needs of the people using those services and to promote choice and independence.

40. **Ms Westwood** explained the relationship between commissioners, service providers and the CQC. She said that the CQC's role included shaping the market by approving only those applications for registration or varying of conditions that could show either consistency with the guidance or compelling reasons to diverge from the guidance. In her view, neither was the case here.

41. Ms Westwood said the CQC are still developing their role in advising providers before and during the application process. Although she could only respond to the Appellant's criticisms about the poor advice they had been given by reference to the records the CQC had kept, she conceded that the organisation was not as forthcoming with advice as it might have been. However, she asserted that it was the provider's duty to familiarise themselves with the guidance issued under Section 23 of the Act. Registering the Right Support had not come from nowhere, as set out extensively in both parties' evidence, and there were already clear indications from other documents as to 'what good looks like'.

42. Ms Westwood said there was no specific size for a 'small, domestic setting', although six was a starting point suggested by the evidence base and adopted in the guidance, including Registering the Right Support. Ms Westwood said she had registered settings accommodating more than six service users and could recall approving a variation to allow an increase from six to eight service users in a learning disability setting, but she had only done so with compelling evidence, provided by the local commissioners, that there was a critical need and the identified prospective additional service users would suffer significantly poorer outcomes if the application were not approved. In that case, she had been satisfied that the provider understood and was prepared to mitigate for the impact on the existing service users. In her view, Bleak House's application was far removed from those circumstances both because of the size of the setting, the lack of compelling evidence about the circumstances of prospective service users and because the Directors had not demonstrated any understanding of the impact of any additional service users on their capacity to provide person-centred care.

43. Ms Westwood confirmed that Registering the Right Support is not applied retrospectively. Although it would be harder for a larger setting to fulfil Regulation 9, it was not impossible for it do so. However, in the present circumstances, she did not believe that Bleak House could continue to offer person-centred care with a greater number of users. Ms Westwood said that

the national policy and best practice, derived from a rights-based approach to foster the greatest level of independence for every service user and supported by a strong evidence-base, requires smaller, domestic settings. She rejected as baseless any suggestion that there were ‘shared characteristics’ of adults with learning disability, such as childlike responses, that meant that in the absence of challenging behaviour, they would enjoy better outcomes in a congregate setting.

44. Ms Westwood accepted that the CQC continued to register large settings for some categories of service user, including the elderly. However, she said, there was not yet a similar body of evidence about outcomes for elderly people in small or large setting to support a national policy similar to that for adults with learning disability. She did not accept that the imperative for adults with learning disabilities to be accommodated in smaller domestic settings diminished as they became older because learning disability was always likely to be their primary need. Ms Westwood readily accepted that the best outcome for older adults with learning disability was likely to be for them to be able to stay in their long-term home and she welcomed the additional facilities for disability offered by the extension at Bleak House. However, she did not accept that those improvements depended on or justified an increase in the number of service users.

45. Ms Westwood said that Building the Right Support was an attempt to secure community based services for a category of people with learning disabilities, i.e. those with challenging behaviour, who were not being moved out of hospital settings into community settings. That did not mean that the same community-based services were not required for other adults with learning disabilities, just that those with challenging behaviour should also be able to live within the community too. Ms Westwood said that the CQC was not acting on its own initiative in seeking to drive down numbers of adults with learning disabilities in residential care settings. It was entirely consistent with the Transforming Care agenda.

46. Ms Westwood said she could not understand how the inspector who had carried out the most recent visit to Bleak House had concluded that Bleak House ‘lends itself to smaller group living’. In her view, Bleak House is a large-scale, congregate setting, predicated on shared care and in which the service users’ individual choice and community relationships are necessarily limited. Ms Westwood said that her inspector colleagues were not as familiar with Registering the Right Support and she did not agree with the comments in the inspection. Although she accepted the inspectors’ finding that Bleak House did provide care to a ‘good’ standard, she would not necessarily have made the same finding, based on her visits to the site.

47. Ms Westwood reflected on the site visit the Panel and parties had undertaken. She observed that there had been only three staff on duty, as well as the manager, cook and handy-man. One member of staff had accompanied one service user to the village, leaving two other staff supervising 18 service users. Many required assistance with basic tasks including toileting and as such the limited number of supporting staff would inevitably require prioritisation between

the service users and limit choice because not all could be satisfied simultaneously. Ms Westwood said the shared care model would also limit the service users' ability to access the wider community, limiting their social contact and relationships.

48. Ms Westwood said that Bleak House's 'good' inspection rating in 2018 was a recognition that it had met the standard required by law and was not a compelling reason to vary its conditions to enable it to become larger. Rather, the fact that it was 'good' rather than 'outstanding' with 19 service users was further evidence that it would struggle to maintain the required standard if the number of service users was further increased.

49. Ms Westwood said that on the basis of their application, consultation and her inspection, she did not believe the Directors of Bleak House understood the impact of the potential increase in numbers of service users.

50. **Dr Joyce** adopted her statement and confirmed her credentials including specialism in support for adults with learning disability. Dr Joyce agreed with Ms Adams and Ms Westwood that Building the Right Support addressed a particular category of adults with learning disabilities and challenging behaviour but that the principles were derived from a national policy which already applied to all adults with learning disabilities. She confirmed her understanding that Registering the Right Support applied to all adults with learning disabilities and that Registering the Right Support was entirely consistent with the national policy that service users should be embedded within the community. She did not accept that Registering the Right Support was in any way less relevant or applicable to older adults with learning disabilities.

51. Dr Joyce explained the dis-benefits of larger settings, including a shared care model which limited choice as well as social contact outside the setting and low aspiration. Limited social relationships were both a self-fulfilment and a safety issue: it is important for service users' voices and concerns to be heard outside their residential setting. Dr Joyce referred to Professor Beadle-Brown's research included in our bundle and added that it was a matter of common sense that if the UK population lived overwhelmingly in households of four persons or fewer, then adults with learning disabilities should be similarly accommodated. Dr Joyce believed that the dis-benefits of communal living would be compounded for additional service users, particularly if they were already older and exhibiting behaviours associated with dementia. Dr Joyce said that she sat regularly on CQC panels considering registrations and variations. Following the national policy and guidance, a setting as large as Bleak House would not be registered if it were a new setting and she could not foresee circumstances in which an application to further increase the numbers in a setting for 19 service users would or should be approved.

52. Dr Joyce said she understood the tension between the CQC and local service commissioners, who were focussed on meeting demand and which she believed caused them to support inappropriate models of care, as appeared to be the case here. She accepted there was a role for the CQC to work with commissioners and providers but that the guidance was clear as to the models

of care that would be most likely to earn approval.

53. Dr Joyce said she had not visited Bleak House before the site visit at the start of the hearing but that visit had led her to conclude it was a large, traditional congregate setting, based on shared care, communal facilities, with limited choice and privacy and where few service users had genuine and long-lasting links with the community or access to education or employment. Although she accepted that Bleak House does provide good care for 19 service users, in her view it was difficult to do so in a setting of its size. She did not believe that the impact of additional service users could be mitigated by additional staff or further changes to the communal facilities so that Bleak House could continue to provide person-centred care for a greater number of users.

54. **Ms Toker-Lester** adopted her written statement and set out her credentials, including her involvement with the Transforming Care agenda, as a commissioner and as an expert adviser to the CQC.

55. Ms Toker-Lester said that she shared the concerns of the Respondent’s other witnesses about the impact of increasing the number of service users at Bleak House and added that she thought the broad range of needs of the existing service users would compound the challenge of mitigating the impact of additional service users on them.

56. Ms Toker-Lester said she had considered the Local Authority’s Market Position Statement and the indications of support for Bleak House’s application. She said that neither the Market Position Statement nor the communications included with the Appellant’s evidence indicated that Bleak House, or larger settings generally, were necessary in order to meet the undoubted and increasing demand for support to adults with learning disabilities. There appeared to be a good foundation to meet identified need through other options including ‘shared lives’ and ‘supported living’ arrangements. Nor did she accept that older adults with learning difficulties would benefit from residential care arrangements at all. Ms Toker-Lester referred to NICE guidance on care for people getting older included in our bundle, highlighting that guidance’s focus on enabling older adults to stay in their own homes wherever possible.

57. Ms Toker-Lester expressed concern about the Local Authority’s over-reliance on Bleak House, which would, if the appeal was successful, account for twenty percent of the care capacity for adults with learning disabilities in the Holderness area, such that if it were closed for any reason, it would create a very significant crisis. However, under cross-examination she accepted that an increase of five additional service users at Bleak House was a small proportion in the overall expected increase in demand across the Holderness area. Although she accepted that Bleak House was providing person-centred care to 19 service users to a good standard, she was concerned by the impact of additional service users and what would happen if the business changed hands or if funding declined.

58. While accepting that there should be no ‘one size fits all’ approach, Ms Toker-Lester said that there was no evidence that increasing the size of Bleak House

would provide better outcomes for service users.

59. Although she sympathised with the position of providers who had to make services work as a business on a limited income, Ms Toker-Lester did not accept that smaller settings were less financially viable to operate or more expensive to the public purse. In her experience, the options for care were broadly cost-neutral to the public purse. She said that any belief the Directors had that the financial position at Bleak House would be improved by additional service users was likely to be offset by additional staffing costs and, in any event, did not amount to a compelling reason to set aside the national policy.

60. **Mrs Harris** described her position as a director of Bleak House and adopted her written statements. She described that the setting had changed as the service users, many of whom had been resident for many years, had grown older. For example, some parts of the grounds, on which they had once kept animals, were now overgrown because the residents no longer interested or able to look after them.

61. Mrs Harris said that the application was about allowing the service users to stay in their home for life if possible. The Directors had seen at first hand that service users who were removed to care homes for the elderly experienced comparatively poor outcomes. That vision had been the purpose of the extension and the additional service users were important to help maintain the financial viability of Bleak House because the service users were all publicly funded and the income for each was very low compared, for example, with those who also exhibited challenging behaviour. The additional service users would be those adults with learning disabilities and enhanced or age-related needs. She accepted that the prospective service users might exhibit challenging behaviour, either as a result of dementia or for other reasons.

62. Mrs Harris said that Bleak House is unique because of the quality of its care and the happy relationship between staff and service users. Mrs Harris said that it was a source of pride that Bleak House never relied on agency staff and paid significantly above the minimum wage. Mrs Harris explained that some of its service users had come from much smaller settings where they had been isolated and had poor experiences. Those service users had thrived in the Bleak House environment, she said.

63. Mrs Harris said she believed service users at Bleak House led full lives with plenty of choice, for example in their wish lists and in the choices of activities. She believed that the current and prospective service users at Bleak House were of a character and age that they would not thrive in substantially smaller settings, and that they would be socially isolated without the network of support and companionship within the setting. It was unrealistic, she said, to expect many of the Bleak House service users to access education or do their own cooking and laundry.

64. Mrs Harris agreed with the proposition that the crux of the application was that they could provide equally well for 24 service users as 19. She believed that was the maximum number that could comfortably use the communal areas and

to maintain the current feel and dynamic among the service users.

65. Mrs Harris said that she did not believe that Transforming Care or Building the Right Support applied directly to Bleak House because they concerned only those adults with a learning disability who also had autism or challenging behaviour. Mrs Harris said she and Mr Turley had been aware of both documents at the time the extension was planned and believed what they were doing was consistent with both documents, even though neither applied directly.

66. Mrs Harris said that she had not been aware of Registering the Right Support at the time the decision was taken to proceed with building the extension. However, Mrs Harris said that since becoming aware of that guidance, she had learned that many providers were critical of it because it was too prescriptive and would not be responsive enough to changes in the market, particularly the expected increase in demand. Having become aware of Registering the Right Support, Mrs Harris said she didn’t really believe it applied. However, she believed that Bleak House’s application was consistent with the guidance and in particularly the nine questions pertaining to applications to increase the numbers of places as set out at page 22 of the guidance. She also believed Registering the Right Support and the State of Care report (D/63) encouraged innovation of the type that the Directors were aiming for at Bleak House. She did not believe that the application would be compromised by an arbitrary six-bed limit.

67. Mrs Harris accepted that financial viability had been a key driver of the application for more service users because it enabled the improvements that were desirable for all. She said it was not viable to provide small domestic settings for adults with learning disabilities unless they had additional or complex needs because the fees were simply too low. Mrs Harris had calculated that two adults with learning disabilities and challenging behaviour might attract funding of £14000 per month whereas the income for 19 service users at Bleak House was around £9500 per month in total. Although she accepted that the Appellants had not submitted any evidence about financial viability, Mrs Harris said the Directors of Bleak House had experienced first-hand, as directors of Coates Garden House, how difficult it was to make a small setting financially viable. They could do so only with additional discretionary financial support from the Local Authority.

68. Mrs Harris said that consultations had been carried out by the previous manager, her sister Christine, who had assured her that the consultations had been full and carried out on a one-to-one basis where necessary. Mrs Harris thought the consultations were appropriate for the current service users to access. Mrs Harris accepted that the decision to proceed with the extension had already been made at the time the consultations were carried out. Mrs Harris said that if any service user subsequently objected to the arrival of the additional service users, they would always have the right to move to a different setting. She could not say whether or to what extent the consultations had focussed on the impact of additional service users rather than the benefits of the planned improvements, the extension and the temporary disruption that building and decorating work would bring.

69. Mrs Harris said that if the appeal was refused and no variation was allowed, Bleak House would continue to operate with 19 residents. However, plans to improve the gardens, install a lift and improve access and to purchase a new vehicle would all have to be put on hold for at least two years to allow the business to consolidate, given the increased costs it now faced given the extension.

70. **Mr Turley** adopted his written statements and described his role as manager of Coates Garden House as well as director of Bleak House. He described the service users at Coates Garden House as more able and independent than those at Bleak House. Each environment was entirely appropriate for its residents.

71. Mr Turley said he had oversight of the planning application in respect of the extension at Bleak House as well as the subsequent application to the CQC to increase the number of service users. He described the project as an attempt to get on the front foot to ensure Bleak House could meet the needs of existing service users and help meet the increase in demand foreseen by successive Market Position Statements and as seen in the requests from prospective service users for technology to help meet mobility and other age-related needs. Bleak House had not previously been able to meet those needs and existing service users who developed such needs were being moved to much larger care homes for the elderly where they had not thrived.

72. Mr Turley said he had consulted with the Local Authority and the CQC at Care Home Association meetings held locally and had pieced together a picture of the local demand and how Bleak House could best be adapted to meet it. He believed the clear message was that services needed to diversify to provide a range of models. He had never gained the impression that any changes must necessarily result in smaller or more domestic-feeling services. However, he accepted that his conversations with the Local Authority had not necessarily focussed on providing a niche service for older adults with learning disabilities.

73. Mr Turley said that providers face a ‘minefield’ of policy. Like Mrs Harris, Mr Turley had formed a belief that Building the Right Support did not apply directly but that document and others had given the Directors the confidence to proceed because they believed their changes represented a genuinely innovative model which would meet a demand for support to older adults with learning disabilities with enhanced or age-related needs. Other options including turning older buildings into self-contained flats or buying additional self-contained properties in the local area had been discounted as not viable or unlikely to be approved.

74. Mr Turley said that although the site allowed for a much larger two-storey extension which could have accommodated more service users, five had been settled on as the maximum additional number that could be accommodated without changing the ‘feel’ of Bleak House. Mr Turley accepted that even one more service user added potential risk to the capacity to deliver good, person-centred care.

75. Calls with the CQC to obtain advice about the application were as described in his written statement and had been unsatisfactory. He had been discouraged from sending plans and told that business decisions must simply be in-line with policy. Registering the Right Support had not been mentioned and he had not found it on the CQC website until after it had come up at Ms Turley's 'fit person' interview in January 2018, well after work on the extension had begun. Having become aware of Registering the Right Support, Mr Turley said he accepted that the application did not entirely reflect the guidance but he remained confident that the model being proposed was innovative and should either be supported as such or else there were many compelling reasons to depart from the guidance in their case. In any event, Mr Turley said, the Directors of Bleak House had demonstrated 'regard for' the guidance.

76. Mr Turley said he believed Bleak House and its service users were at the heart of the Patrington community. He described it as a unique environment, both physically and in its philosophy. Mr Turley said that had not been recognised in the inspection, nor had the directors' commitment to make further changes to meet any concerns about wheelchair access or the size of the communal dining space, provided the application was approved. Mr Turley said he himself did not foresee that additional service users, whether wheelchair users or otherwise, would impact on the use of communal areas or the flow of people through the house.

77. Mr Turley described Ms Adams and Ms Westwood's inspection visit in July 2018. He said it had left him feeling alarmed about the future of Bleak House because it had been said they would not be able to achieve a good inspection rating in future because of the size of the business. He felt that both inspectors were focussed only on the number of service users and had been unable to look beyond that factor to evaluate the many benefits of the service.

78. **Ms Turley** adopted her written statements and described her credentials and role as manager of Bleak House. She described person-centred care as being at the heart of Bleak House, which she accepted was a larger setting, albeit with the feel of a smaller setting. She said that service users were treated as individuals but also as part of a family. Individuals were always encouraged to build skills, engage with each other and in the community and achieve goals. Individual wishes were met so far as possible, as demonstrated by their 'wish list', which she tried her utmost to fulfil. She described each of the current service users, demonstrating detailed knowledge of each individual's background, needs, aspirations and achievements. She also described the comprehensive training programme for staff so that they could meet every individual's needs.

79. Ms Turley said Bleak House's reputation was built in part on advocacy for service users' needs. She described an elderly resident with dementia who had developed cataracts. Ms Turley had resisted the medical opinion that he should have no more medical interventions, had advocated for him with neurologists and had personally supported that service user through the subsequent operation to restore his sight.

80. Ms Turley described various activities undertaken within Bleak House including variety performances, theme nights, treat nights and holidays. Choices for activities and holidays were led by the service users, she said. She reminded us that a group had been planning this year's holiday during the Panel's site visit. Ms Turley said that all these activities would be equally possible with five more service users and she would ensure that each service user continued to receive person-centred care as their needs required.

81. Ms Turley described the mealtime arrangements, emphasising that although there was a daily menu with two choices for lunch and dinner, individual choices could be catered for. Ms Turley said that although the kitchen was routinely locked between meals, service users could participate in shopping and cooking if they chose, particularly now that Bleak House had withdrawn from its previous contract catering arrangement. Ms Turley said some service users had been involved in flipping pancakes on the most recent Shrove Tuesday but not all were capable of participating safely. That was why they were not routinely offered the opportunity to cook their own meals or to have the facility to make hot drinks in their rooms.

82. Ms Turley accepted that individual choice was important. She did not accept that Bleak House narrowed individual choice, Although she accepted that the limited number of staff meant it would not be practical for each person to do all the things that they might be capable of doing, Ms Turley said that the constraint was that as they got older, people wanted to do less. It was, she said, much better than any care home for the elderly in terms of supporting and encouraging individuals. Although some of the residents weren't elderly in the strict sense, their disabilities tended to mean they aged prematurely and could develop age-related needs well before their 55th birthday.

83. Ms Turley acknowledged that few service users had social relationships outside the home. She didn't necessarily accept that was a result of the shared care arrangement and communal living. Rather, social relationships outside Bleak House were encouraged, but not forced. Not many chose to look for relationships outside Bleak House.

84. Ms Turley said that she had become aware of Registering the Right Support during her 'fit person' interview with the CQC on taking up the role of manager at Bleak House. The application to increase the number of service users had been discussed and Ms Turley recalled being told that the application would not be approved because of Registering the Right Support. Ms Turley said she had then read Registering the Right Support and had felt that Bleak House met all the requirements except for the 'six-bed' requirement, which she felt was aimed at a different set of needs to the service users at Bleak House. The element of Registering the Right Support which addressed the size of setting was aimed, she thought, at younger and more capable adults.

85. Ms Turley said that she was aware of the consultations about the extension in 2017. Although she could not be sure that consultation had included references to additional service users, it was now a common topic of discussion. Ms Turley said that service users often asked about the extension and when other

residents would be arriving. They were looking forward to it. Ms Turley said it would have been counter-productive to involve advocates because in most instances, the advocate would not have a close relationship with the individual service user. As a result, the service user would normally shut down and not speak with the advocate. Ms Turley said it was unrealistic to write down and submit every conversation with service users about the additional service users, some of which relied on Makaton.

86. Ms Turley described the process for accepting new service users, emphasising the need to ensure a 'good fit' in which Ms Turley would not be afraid to decide that Bleak House could not meet an individual's needs or was otherwise unsuitable. In one instance, a prospective service user had been turned down because it was clear that he was capable of living at home with support. Bleak House was a place for those who could not be well supported in small, domestic settings. She did not believe that any of the current service users at Bleak House demonstrated challenging behaviour, although she had witnessed some potentially challenging behaviour from previous service users who were distressed through pain.

Submissions

87. The parties provided written copies of their final submissions and they are not reproduced here. The parties' final submissions are consistent with their positions as set out above.

The Legislative Framework

88. 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….*

89. 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.*

90. 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

91. 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);*

92. 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…*

93. 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.*

94. 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)).

Policies and Guidance

95. 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

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 is 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 Registering the Right Support 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*:* 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 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:

- *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?*

- *How will they maintain appropriate staffing for the additional occupants?*

- *How will the provider make sure that care remains person centred with the additional places?*

- *Will plans for the additional places reduce room size or impact on general living space?*

- *How will the plans make sure that people can maintain and increase their independence?*

- *How will the plans affect other people who use the service?*

We quote further specific passages from Registering the Right Support in the reasons for our findings below.

d) NICE guideline *Learning disabilities and behaviour that challenges: service design and delivery*

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

96. The overarching issue to be addressed by the Tribunal is whether as at today's date the decision to refuse to vary the Bleak House registration should be confirmed or directed to be of no effect.

97. We are required to determine the matter *de novo* and make our own decision on the merits and the evidence as at today's date. Subject to relevance and fairness, this can include new information that was not available or presented when the decision under appeal was made. The Appellant bears the burden of persuading us that the variation to the existing registration should be granted including by proving, on balance, either that the application complies (to the extent that is required) with the relevant Regulations including by 'having regard to' guidance issued under Section 23 of the Act.

98. The redetermination in this appeal includes consideration of the detailed evidence provided by both parties as well as the oral evidence which was tested over the five-day hearing. We have considered all the evidence and submissions before us, even if we do not mention every part of it in our decision. We refer only to those parts of the evidence which were particularly important in making our findings.

Finding and Reasons

99. For the reasons explained below, the Tribunal concludes that the appeal must be dismissed because the Appellant has failed to prove, on the balance of probabilities, that the application complies with Regulations 9 and 21.

100. The redetermination approach answers the procedural objections raised by the Appellant about the way the Respondent made its original decision, except that in considering whether it is proportionate to dismiss the appeal, we have taken into account the apparent defects in:

   a. the Respondent's very limited advice and assistance to the Appellant in framing their application;
   b. the original decision makers' very narrow interpretation of the national

policy and guidance; and

c. the length of time it took for the Respondent to reach a decision

For the reasons we set out below, we take the view that the procedural defects in the Respondent's approach were not so substantial that we should set aside the original decision.

101. Our reasons are set out under the same headings we had agreed with the parties and which formed the basis of their closing submissions. However, we also kept in mind the nine questions set out in Registering the Right Support under the heading 'adding new beds or places' and set out at paragraph 95(c) above.

102. Although it is unavoidable that our decision will come as a considerable disappointment to the Bleak House Directors and Ms Turley as manager, we emphasise at the outset that nothing in our reasons should be taken as a criticism of the quality of care Bleak House delivers for its current service users, with which we were wholly satisfied. Our decision was made purely on the merits of the proposal to increase the number of service users within the applicable legal framework, including the national policy and guidance to the extent that should be applied as part of the legal framework.

Has the Appellant demonstrated that they 'had regard to' guidance issued by the Commission under Section 23 of the Act?

To what extent do the recommendations contained in (among others) Transforming Care (2012), Building the Right Support (2015) and Registering the Right Support (2017) apply to the present application?

103. Although the key document issued by the Commission under Section 23 of the Act is Registering the Right Support, the parties agreed that document could not be read in isolation. Under Section 23(3) of the Act, guidance *"may operate by reference to provisions of other documents specified in it (whether published by the Commission or otherwise."* Registering the Right Support refers to national policy and guidance including (among others) Transforming Care and Building the Right Support.

104. We conclude that the relevant guidance, informed by the national policy, does apply to all types of service for adults with learning disability, including those adults currently and prospectively to be accommodated at Bleak House. The Appellant's position on this point: in essence that Bleak House could be distinguished from other types of services for adults with learning difficulties because Bleak House service users do not exhibit challenging behaviour or because many of them are older, was simply unsustainable.

105. Although we accepted that it was at least arguable that Transforming Care and Building the Right Support were intended to address the particular disadvantage suffered by adults with learning difficulties and autism or challenging behaviour, we accepted the evidence of the Respondent's witnesses, and in particular the compelling explanations by Dr Joyce and Ms

Toker-Lester, that it could not be right that the only category of adults with learning disabilities whose outcomes will be improved by being supported to live independently or in the community are those who also exhibit challenging behaviour.

106. However, any doubt over the application of Transforming Care or Building the Right Support, to Bleak House is eradicated in the case of Registering the Right Support. Addressing points of concern and ambiguity identified in the consultation. At page 6, Registering the Right Support states:

> *"The service model within Building the Right Support refers specifically to "people with a learning disability and/or autism who display behaviour that challenges, including those with a mental health condition". We do, however, believe 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."*

Registering the Right Support also makes clear, at page 7, that it applies to any application to vary the provider's conditions of registration by increasing the number of places provided at a location.

107. Even if it were correct that Registering the Right Support does not apply to adults with learning difficulties generally and only applies to those with challenging behaviour, it was impossible to distinguish Bleak House on the basis of its current or prospective service users. Even if it were true that none of the current service users at Bleak House are exhibiting challenging behaviour now, that does not mean they or any future service users will not develop such challenging behaviour, either as a component of dementia or for some other reason. In any case, Mr Turley accepted in evidence that service users at Bleak House had exhibited challenging behaviour and even if service users were screened so that they were not admitted if they showed challenging behaviour at the time, the service user might later develop challenging behaviour, either as a consequence of dementia or for some other reason.

Is the Appellant's proposal to increase the number of service users from 19 to 24 contrary to the national policy and guidance?

108. The Respondent's Notice of Proposal states: "*Our assessment found that the service model you are proposing does not align with published best practice guidance..."* citing both Transforming Care and Building the Right Support to underpin the first of nine questions to be addressed when considering any application to increase the number of beds or places in a setting: *"how does this* [the proposal] *fit in with national policy? In particular, that smaller units are likely to be preferable for people with a learning disability"*.

109. In evidence, the parties focussed to a significant extent on the number of service users at Bleak House now and in its Proposal. This was understandable

because Registering the Right Support explicitly adopts the same position set out in Building the Right Support: that smaller units are likely to be preferable for people with a learning disability and that smaller services are those *“usually accommodating six or less”*.

110. In their evidence, which we accepted, Dr Joyce and Ms Toker-Lester took us persuasively through the research and policy development which underpinned the national policy and guidance. To the extent that Mr Ruffell invited us to wholly disapply the national policy and/or guidance for being too narrow in its scope, favouring a ‘one size fits all’ model and discounting the good care provided at Bleak House and similar settings, we readily accept that Bleak House does provide good care. However, neither the example of Bleak House itself nor the general acknowledgement that other care homes of similar or larger scale than Bleak House continue to achieve good or outstanding ratings on inspection was sufficient to displace the compelling evidence that smaller settings are *more likely* to produce better outcomes for adults with learning disabilities (or indeed any vulnerable person requiring support to live). In any event, he was unable to take us to any evidence – beyond the anecdotal evidence of the Bleak House witnesses themselves - which rebutted the point. As such, we were not at all persuaded that the national policy or guidance is wrong or that we should treat it with any particular caution.

111. We also carefully noted that having set out its general presumption in favour of smaller settings, Registering the Right Support describes a degree of flexibility in its application:

> *“We will not adopt six as a rigid rule for providers of any service for people with a learning disability and/or autism. We may register providers who have services that are small scale but accommodate more than six people…”*

Registering the Right Support appears to offer two distinct but overlapping considerations in considering applications from larger settings:

> *“We…do not consider the size of service in isolation from other considerations, which include, but are not limited to: skills of staff, effectiveness of management; and evidence base for the proposed care model.”*
>
> and:
>
> *“We do not wish to be overly prospective, and it is not our intention to create a ‘one size fits all’ approach. We will support genuine innovation where providers are able to demonstrate that their model aligns with the national model and is underpinned by evidence based best practice.”*

112. The Appellant relied on both of these potential routes to approval. Mr Ruffell submitted, and we agreed, that as part of a very narrow interpretation of the national policy and guidance, the Respondent had only cursorily considered the potential flexibility available in Registering the Right Support as part of the decision under appeal. As part of our *de novo* consideration, we considered

each of them in turn.

Do 'other considerations' mean that Bleak House fits within the national policy and guidance?

113. On a purely arithmetical level, it is clear to us that Bleak House as it operates now or with the proposed additional service users, is incapable of meeting the description of a smaller service. In both their written and oral evidence, the Respondent's witnesses consistently described Bleak House as it currently operates as both a large and 'congregate' setting. Congregate settings are defined within the footnotes of Registering the Right Support as *"…separate from communities and without access to the options, choices, dignity and independence that most people take for granted in their lives."* We heard at length the concerns held by the Respondent's witnesses about the arrangements at Bleak House. We do not reproduce that evidence here and the extent to which we accepted or adopted those concerns is set out in the paragraphs below.

114. The Appellant's case is that Bleak House is not a 'congregate setting' both because of its 'unique' organisation, approach, staffing arrangements and training, and also because of its physical location and cultural importance within its small local community, where both the home and the service users are well-known and accepted. We heard extensively from the Appellant's witnesses about all of these factors.

115. There were two potentially important planks of objective support for the Appellant's position. The first was that in correspondence put before us, representatives of the Local Authority had offered support for the provision at Bleak House. In her letter of 25 June 2018, the Acting Senior Day Services Officer, Angela Withers, supports the application and describes Bleak House's excellent reputation. In her email of 22 November 2018, the Adult Social Care Services Manager, Julia Dalton, goes to the heart of the issue: *"Whilst I appreciate that there is a view that all homes for people with learning disability should be small i.e. no larger than 6 beds, I believe that the quality of care and accommodation is more important than the size of the home."* While this statement from a commissioner with a primary role in shaping the market was a potentially powerful counterbalance to the much narrower view taken by the Respondent on the importance of the size of the setting, and we did place weight on it, that weight was necessarily limited because we could not test exactly what the maker had meant by it nor whether they would modify that statement in light of the evidence of the Respondent's witnesses.

116. The other plank was the findings of the Respondent's most recent inspection on 23 May 2018 which stated:

> *"The service [is] operated in line with the values that underpin Registering the Right Support and other best practice guidance. These values include choice, promotion of independence and inclusion. People with learning disabilities using the service can live as ordinary a life as any citizen."*

We found the Respondent's attempts to distance itself from this statement both in evidence and submissions, on the basis that its inspector(s) who had made such statements must be less enlightened or in-touch with the national policy than the witnesses before us, to be both surprising and largely unpersuasive. However, the central difficulty with the Appellant's reliance on this potentially powerful endorsement from the Respondent itself was its limited application to the 19 service users at Bleak House in May 2018. It could not act as a surety that the same conclusion would be made in the case of a substantial uplift in the number of service users, either now or at some unspecified time in the future.

117. Having conducted a site visit, hearing extensively from each party's witnesses their views of the same arrangements that we had witnessed for ourselves, and applying our own specialist knowledge and experience, we were in a strong position to come to our own views about the nature of the setting and the extent to which 'other considerations' should be balanced against the size of the proposed setting.

118. We accepted all the evidence of all the Bleak House witnesses about the management, organisation, training, staffing arrangements and care ethos which was reflected in the most recent inspection reports rating the service as 'good' and as was evident to us in our site visit. We placed substantial weight on these arrangements as considerations which might offset the potential dis-benefits of the increased size of the service at 24 users.

119. Ultimately, however, and on a relatively narrow balance, they were not sufficient to completely offset those dis-benefits of a larger sized setting, some of which are apparent with 19 users, and for which we could not be confident would not be compounded or added to if we allowed the proposal for a substantial increase in the number of service users.

120. We found that Bleak House is a large, congregate setting based on an effective but relatively traditional model of communal living. Service users live with dignity and are happy with both their environment and the care they receive but in our finding they are living largely separately from the community and without many of the options, choices and independence that most people take for granted in their everyday lives. That is not to say that service users cannot access the community at all, or that there are no choices and options. We read, heard and accepted the many examples whereby Bleak House residents access their local community and interact with local people, as well as the broad range of activities and trips that are arranged by the staff, either for individuals or groups. We acknowledged that there was a degree of integration in the community that was beneficial to the residents, in that they were well-known and welcomed into local shops and cafes.

121. However we also found, based on the same evidence, that choices on a day-to-day basis, including meals, activities and entertainments (rather than for example in wish lists) are very much based on, or at least influenced by, group preference. The extent to which service users can access the community is limited by the numbers of available staff, as well as the competing preferences

of the service users themselves. That limit in choice could not be discounted as being the product only of the diminishing enthusiasm of some of the service users as they age and their physical needs become more complex. Similarly, in the general arrangements for making day-to-day choices, for example in relation education or employment, hobbies or entertainment or even in meal choices, it was clear to us that most service user lack the same degree of day-to-day choice as any other member of society or even the same degree of day-to-day choice as a service user with the same needs living in their own home or a smaller, domestic setting.

122. We also noted the physical features of the site, including its central and prominent position within the village of Patrington and the relatively large size of the main building and extension. A former family home, there were no obvious external indicators that Bleak House is a residential care home except that the overall proportions of the building, now including the large single-storey extension, were not typically domestic in scale or appearance. However, the extent to which Bleak House could pass for a smaller-scale or domestic residential setting to the stranger's eye was somewhat undermined by the Appellant's own evidence that Bleak House is very well known within the community as a residential care home for adults with learning disabilities. As such, some of the benefits that accrue with service users being able to live 'in the community' in the same way as any other person are diminished.

123. The central and fatal omission, however, was the lack of objective evidence in support of the proposed model of care as the guidance, rightly in our view, demands if larger settings are to show they are as capable of delivering best-practice as smaller settings. The Appellant's position was a simple one: in place of an evidence base showing how a model of care for 24 users could be successful, they sought to assure us only that they would be able to achieve the same good outcomes with 24 users as with 19. That was not a persuasive argument. We could not be sure, on balance, that the many excellent features of Bleak House's management, staff skill, training and general ethos were sufficiently robust that we could be sure the same model would work for 24 users. In this finding, there is considerable overlap with our findings in relation to compliance with Regulation 9, which we discuss further below.

Does the Proposal amount to a 'genuinely innovative model of care'?

124. We were not persuaded on this point. At the conclusion of the evidence and despite several attempts to clarify during the hearing, we were unclear what novel or niche service Bleak House intended to provide, except to be better equipped to be a home for life for adults with learning disabilities and age-related needs including dementia and physical disability.

125. On the basis that it is meeting this combination of learning disability and age-related needs that is asserted as innovative, we accepted and carefully weighed the evidence of Mr Turley and Ms Harris about their own experience in having to move older service users into elderly care homes, turning away enquiries about placing adults with learning disabilities and additional or complex age-related needs and their experiences in consulting informally with the local

commissioners. We also took into account the correspondence from the Local Authority referred to above, and particularly the statement by Ms Dalton that there is a general demand for places for adults with both a learning disability and a physical disability in the area and the risk that individuals meeting that description might have to move away from their home unless new places are made available. We also carefully considered the considerable weight of written commentary relied on by the Appellant, as well as the anecdotal evidence from the Appellant's witnesses that older adults with learning disabilities would, without appropriate facilities, suffer poorer outcomes by being moved on to general residential care homes for the elderly. However, even taken at its highest, we concluded that the totality of that evidence fell some distance short of a sound body of 'evidence-based best practice' which aligned with the national policy model.

Are there compelling reasons to depart from national policy and guidance?

126. Registering the Right Support provides:

> *"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…to people with a learning disability and/or autism."*

On balance, we were not satisfied that the Appellant set out compelling reasons to depart from or disapply the national policy or guidance.

127. The Appellant's argument that there were compelling reasons to depart from the national model crystallised around the assertion that there is a growing demand for places for adults with enhanced needs, including age-related needs and physical disability in addition to learning disability. We were persuaded by the written commentary and by both Mrs Harris and Mr Turley's evidence based on their own experience that there is a growing demand in the sector. The Respondent's witnesses also recognised that the investment by Bleak House in improvements to accommodate physical disability in dementia were welcome and likely to help meet demand in the sector.

128. We took into account the Local Authority's Market Position Statement and written correspondence from the Local Authority representatives, particularly that of Ms Dalton. Mrs Dalton wrote:

> *"In the Holderness locality there are a number of people where learning disability is their primary need. However, in addition to this there are a number who have physical disabilities which means that they need level access living with rooms appropriately equipped for moving and handling (i.e. hoists) as well as wet rooms. In this locality there is very limited provision of this kind of accommodation. As a result, people with this level of need are having to be moved wither out of county or out of his locality, which means they are moving away from their families."*

129. There were two central weaknesses in the Appellant's assertions. First, for the same reasons we set out above, the weight we could place on the evidence from the Local Authority was very limited. The correspondence was relatively brief and general in nature. We were not able to question the Local Authority representatives so that we could learn more, understand the authority with which they had made their statements or test the extent to which the makers of the statements stood by or modified them in the face of the evidence of the Respondent's witnesses. In particular, the correspondence did not explain (and Mr Ruffell could not otherwise help us) why adults with learning disabilities and additional physical or age-related needs should be placed in larger residential care settings rather than in smaller, more domestic settings or why it was impractical to place them in smaller settings. The Respondent's witnesses, and particularly Dr Joyce and Ms Toker-Lester, were clear that the national policy promoted smaller, more domestic settings for every adult with learning disabilities, regardless of age or physical disability. In their view, which we found persuasive, there ought to be no bar to those with learning disabilities and physical disabilities being placed in smaller or more domestic settings more closely aligned to the national policy and guidance and it was the commissioner's role to promote and secure such places or else explain why they could not do so.

130. The second weakness was whether the additional places would really go to meeting external demand from those adults with enhanced physical needs, rather than to meet the developing needs of the ageing service users already at Bleak House. We found Mr Turley and Mrs Harris's evidence on this point was completely frank but somewhat equivocal: they simply didn't know who additional places might go to and they were reluctant to rule out the likelihood that they might allocate additional places to those who were yet to show any enhanced needs. As Mrs Harris explained in her oral evidence, the need to fill additional places was in part at least motivated by financial viability: the business could ill afford to improve its facilities in the way it had done unless it increased its income by taking in additional service users. While that was a perfectly respectable business position to take, in our finding, the inability or unwillingness to target the additional places for those with enhanced needs significantly undermined any argument that those places were needed to meet a specific demand.

131. We do not rule out the possibility that in the future, Bleak House may be able to show compelling reasons why it should be allowed to accommodate one (or potentially more) additional service users, despite that being contrary to the direction of travel set out in the national policy. To do so, however, we foresee would require compelling evidence, backed by the local authority commissioners, showing a critical local need, a lack of other more suitable options and that identifiable individual service users would, on balance, experience significantly poorer outcomes unless placed at Bleak House.

Regulation 9: Person-Centred Care

132. We spent a substantial proportion of the Appellants' evidence trying to

understand the likely impact of an additional five service users at Bleak House. No formal impact assessment had been carried out. We accepted that Regulation 9 does not specifically require documentary evidence of an impact assessment but there was no convincing evidence revealed in oral evidence, (including through our questioning), that the Directors or Ms Turley had carefully considered the risks to person-centred care that will increase with any additional service users. Consequently, we could not be assured that the risks would be mitigated if we allowed the appeal. A general undertaking by the Bleak House witnesses to make further increases in staff numbers was not, in our view, a complete or satisfactory answer. Nor was the likelihood that the increase in the number of service users would be gradual. Equally, the more detailed plans to further improve the facilities (including by improving step-free access, adding a conservatory or re-cultivating the orchard), impressive as those plans were, did not amount to a robust, convincing or timely plan to mitigate the impact of up to five additional service users on the model of care in place.

133. Regulation 9(3) specifically requires service providers to consult with service users in decisions which affect their care. In relation to service users who lack capacity, Regulation 9(5) imposes a duty to act in accordance with the Mental Capacity Act 2005. That duty, in our view, required the directors to seek the assistance of each service user’s advocate or family to try and assess their best interests. At Bleak House, many of the service users lack capacity. The Directors conceded that they did not consult with all families or advocates or, if they did so, they did so only informally and they did not record the responses in all cases.

134. The consultation was retrospective to the decision to proceed with the extension as planned and appears to have been done largely for the purposes of validating that decision for the purposes of the application. Had the consultation revealed any serious objection to the proposed extension or additional service users, we were not persuaded that would have given the Directors pause for thought about the impact of their proposal or instead, as Mrs Harris put it, simply trigger the objecting service user’s right to leave the setting. That position as expressed by one of the Directors was not, in our view, in any way consistent with the requirements of person-centred care within the meaning of Regulation 9.

135. The Appellant’s own evidence demonstrated that the consultation was superficial at best. No potential risks or dis-benefits were identified to the service users or their families or advocates, for example by reference to the in the increased numbers using the communal spaces, the impact on choice or potentially how access to the community might be diluted by a lower ratio of staff to service users at certain times during the day.

136. In summary, we do not accept that the Appellant had sufficient regard to the views of the service users or has consulted with them on the changes to the extent that the proposal can be said to be person-centred and that service users’ needs are not prejudiced.

<u>Conditions</u>.

137. Neither party proposed any conditions or amendment to the proposed variation (i.e. by proposing fewer than five additional service users) that might make it (more) appropriate to allow the appeal and permit a variation to be made to increase the number of service users at Bleak House. However, we decided that it was not practical to do so because although the risks of non-compliance with Regulation 9 would be reduced with fewer additional service users, they would not be eliminated and we could not conclude with confidence that the additional risk to person-centred care with even one more service user would be acceptable. As Mr Turley himself conceded: *"even one additional service user could be the straw to break the camel's back."*

138. For the same reasons explained above, we also concluded that any increase in the number of service users was a departure from applicable national policy and guidance and so would be inconsistent with Regulation 23.

Proportionality

139. We do take into account the impact of our decision on Bleak House, particularly on the viability of the business and the possibility that if our decision were to adversely impact on the viability of the business and therefore the security of the current service users. We noted that the extension had required substantial capital investment and our refusal would leave Bleak House with between three and five unoccupied rooms, dependent on the ongoing demand for double-occupation by existing service users.

140. However, Mr Turley and Mrs Harris made it clear in their answers that refusal would not threaten the viability of the business, the impact being limited to whether plans to further improve the communal facilities, as well as access to and bathroom facilities in the older part of the House, could go ahead. We therefore concluded that it would be proportionate to refuse the application on that basis.

Conclusion

141. Having balanced the impact of the decision on the Appellant and service users against the impact upon the public interest in the promotion of the health, safety and welfare of the 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 he application to vary the conditions of Bleak House's registration so as to increase the number of service users should be refused.

Decision

142. The appeal is dismissed.

Tribunal Judge C S Dow
First-tier Tribunal (Health Education and Social Care)

Date Issued:20 April 2020

Health Education and Social Care Chamber
First Tier Tribunal