

Item 3 Appendix C

Briefing for stakeholders

Nascot Lawn - outcome of judicial review

21 February 2018

The Herts Valleys Clinical Commissioning Group (CCG) finance and performance committee unanimously concluded at its meeting on 16 November that the CCG would not continue to fully fund the respite service at Nascot Lawn. This difficult decision was made in the context of a very challenging financial environment, and having to assess priorities in order to meet the financial requirements placed on us by statute.

Our decision was reached after a period of extensive engagement. We had these discussions with, for example: Hertfordshire County Council, Carers in Herts; Herts Parents Carers Involvement; Healthwatch; and of course the families of children using the service. We also conducted detailed assessments of children's needs, and a wider consideration of the CCG's challenging financial position was also important in our decision-making.

Three of the parents who use the Nascot Lawn service decided to pursue their case for continued CCG funding of the service and took this to a judicial review. The case was heard in the high court earlier this month and the judge has now delivered his conclusion.

The judicial review was presented on six grounds and the judge's ruling has agreed with the families on one of those grounds and rejected the remaining five. The ground that the judge supported relates to the CCG's requirement in law to formally consult with Hertfordshire County Council (HCC), in a specific way despite the extensive engagement with HCC already undertaken, because the respite service funded by the CCG was deemed by the judge to be a health service.

Mr Justice Mostyn has directed us to the legal requirement that any substantial changes to health services need to be consulted on in a way that is prescribed and in accordance with a specific legal regulation: Regulation 23 of the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 (SI 2013 No. 218).

The ruling states that our decision was made on an 'incorrect legal basis', because we did not comply with that regulation. It is on that ground only, that the judge has quashed our decision to stop funding the service.

The implications of this are that the CCG now needs to follow the process outlined in Regulation 23 and formally consult the county council before making a decision on the future funding of respite services at Nascot Lawn.

The judge's ruling is set out in a lengthy judgement and he outlines in some detail the remaining five grounds for the judicial review that he dismissed.

B: Failure to assess the needs of users

C: Failure to consult

D: Breach of the Public Sector Equality Duty set out in section 149 of the Equality Act 2010.

E: Breach of section 11 of the Children Act 2004

F: Breach of Article 8 of the European Court of Human Rights taken with Article 3 of the UN Convention of the Rights of the Child

He states that normal practice is not to set out a judge's response to other grounds once he has concluded that the first ground of the claim is upheld, but Mr Justice Mostyn felt that in this case, because of what he called the 'fierce criticism' that had been levelled at Herts Valleys CCG, it was right to explain why the remaining grounds for the judicial review were rejected.

So, for example, the judge rejects the assertion that the CCG failed to assess the needs of users of Nascot Lawn. He makes clear that we complied with all that would be required of us and that therefore our decision to withdraw funding was not 'irrational or perverse' due to a failure to carry out individual assessments of the affected children as stated by the claimants.

Similarly, Mr Justice Mostyn makes clear that he sees 'no merit' in the claim that Herts Valleys CCG did not comply with obligations to consult the public – indeed he states that we 'fully complied' with our legal obligations and that 'there was very full public involvement in the proposal to withdraw funding'.

In terms of the remaining three grounds upon which the judicial review had been brought, which challenged our compliance with legislation concerning equality, treatment of children and human rights, the judge found in favour of the CCG. The equality impact assessment was 'sufficient and appropriate', the children's interests were 'properly considered' and he was satisfied that there was no breach of the European Convention of Human Rights.

The written judgement notes the CCG's need to balance priorities and our constrained financial position. There are references to our requirement to consider the sometimes competing interests of individuals and the wider community.

In terms of next steps, we will be submitting Herts Valleys CCG's formal consultation paperwork to HCC in the coming days, in full compliance with Regulation 23. We will invite HCC to comment on a proposal to withdraw funding for respite provision at Nascot Lawn. Following a six- week consultation period with HCC, we will consider their response and also make this available to the families of children receiving respite services at Nascot Lawn. Recommendations will then be made to our Finance and Performance Committee who will make a decision. We expect this will be during the early part of May.

The CCG's financial position continues to be very challenging and during this coming financial year 2018/19, we are expected to identify and deliver savings amounting to £30 million.

As we have stated previously, the question of the future funding of Nascot Lawn has been one of the most difficult our board members have faced and we continue to be concerned for the children who use Nascot respite services and their families. Having made the decision last November, we had hoped this judicial review would bring the matter to a conclusion. Given the judge's decision and the ground on which the ruling is based, we will now need to take those steps as outlined above. We are committed to ensuring we comply with these regulations in full and we are keen to resolve this as soon as possible, so that a greater level of certainty can be provided particularly to the children and their families. In any event this judicial decision means that the service will be funded on the current basis until at least August 2018.