

Item 3 Appendix J

The Consultation Institute Newsletter

CCG loses judicial review for failure to consult Overview & Scrutiny February 22, 2018

A High Court judgment* this week against the NHS in Hertfordshire is a timely reminder to all CCGs in England that a failure to consult Overview & Scrutiny Committees have serious consequences.

The full story is described in a press release from the Claimants' lawyers and concerns the withdrawal of funding for a respite centre for disabled children in Watford, called Nascot Lawn. The case is probably the first time that part of the NHS has tried to justify by-passing a local authority and sought to defend a failure to observe the 2013 Regulations on Health Scrutiny.

The rules are well-established and state that when the NHS is considering a substantial development or 'substantial variation' to a service, it must formally notify the Council and 'take such steps as are reasonably practicable' to reach agreement. If they fail, the Council can refer the matter to the Secretary of State on one of three grounds: – a failure to consult, inadequate consultation or a 'catch-all' formula that the proposals 'would not be in the interests of the health service in the area'.

In this particular case, lawyers argued that the cuts to this service were unlawful for several other reasons.

It alleged a failure to consult and a breach of the Public Sector Equality duty, and on both counts, the Judge found in favour of the CCG. This will give NHS Managers a degree of comfort, but a note of caution is in order. In suggesting that the CCG had sufficiently 'engaged' on the subject, the Court did not use the test of S.14Z2(2) which is the duty to involve (whether by being consulted or provided with information etc) but merely found that there had been 'public engagement' as would satisfy the terms of a consent order agreed by the defendant when a Court previously quashed the decision to withdraw funding.

Had the CCG acted lawfully and consulted the Council, who knows what consultation it would have requested?

Having found that the CCG were in the wrong in not consulting the Council, the Judge could – and maybe should have dismissed all the other claims without being considered. It may be helpful to see his conclusions, but without knowing what consultation would have been requested, it is impossible to be sure that the engagement undertaken on this occasion would have been sufficient.

To many readers, this all sounds like legal nit-picking. But the situation is: –

- Here is a case where the CCG has clearly had poor advice, and where the need to have a dialogue with the Scrutiny function of the Council seems cut and dried.
- The case should never have gone to Court and makes the NHS look heartless and unresponsive with probable erosion of trust with the local community.
- The CCG clearly has an enormous financial challenge and needs to engage with multiple stakeholders in order to mitigate the impact of potential closure.

* R (ex parte K, T & M) v Hertfordshire Valleys CCG [2018] EWHC 267