

Hospitals as ‘placements’ for looked after children under the age of 16

With effect from Thursday 9 September 2021 the amendments contained within the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161) (‘the Regulations’) come into effect which introduces regulation 27A.

15 September 2021

Many of our NHS Trust clients have experienced difficulties and been involved with court proceedings recently when a child under-16 is at hospital, ready for discharge but without a suitable discharge location. [Ed Pollard](#), partner, has teamed up with **Emma Sutton**, counsel at Serjeant’s Inn Chambers, to produce the attached note about a very recent change in regulations that may, unfortunately, compound the situation. Please do [get in touch](#) with Ed if you want to discuss.

1. With effect from Thursday 9 September 2021 the amendments contained within the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161) (‘the Regulations’) come into effect which introduces regulation 27A.
2. The aim of the amendment is to ensure that looked after children under the age of 16 are only placed in children’s homes or foster care, but limited exemptions have been included for alternative regulated settings, including hospitals.
3. Regulation 27A reads as follows (with our emphasis):

“A responsible authority may only place a child under 16 in accommodation in accordance with other arrangements under section 22C(6)(d) where the accommodation is –
a) in relation to placements in England, in –
i) a care home;
ii) a hospital as defined in section 275(1) of the National Health Service Act 2006;
iii) a residential family centre as defined in section 4(2) of the Care Standards Act;
iv) a school within the meaning of section 4 of the Education Act 1996 providing accommodation that is not registered as a children’s home;
v) an establishment that provides care and accommodation for children as a holiday scheme for disabled children as defined in regulation 2(1) of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013;...”
4. Whilst there are obvious concerns about placing children in unregistered accommodation, it will be immediately obvious that *finding* or *creating* a bespoke placement for young persons who urgently need care will be considerably harder following 9 September 2021. Even *prior* to the amendment, when considering the scope of the inherent jurisdiction, the Supreme Court observed in *Re T* [2021] UKSC 35183 (see §183, for example) that the court cannot, by authorising a child to be placed in an unregistered home, prevent the commission of a criminal offence by those who carry on or manage the establishment. After 9 September 2021, if a ‘lawful’ placement cannot be found, the

writers cannot see how the High Court could authorise local authorities to act in a way *specifically prohibited* by the Regulations.

5. The immediate concern from a health care perspective is the fact that a hospital setting is included within the definition of acceptable '*other*' arrangements for looked after children under 16. The definition of a 'hospital' (per section 275(1) of the National Health Service Act 2006) is wide, and refers to:
 - 5.1. any institution for the reception and treatment of persons suffering from illness,
 - 5.2. any maternity home, and
 - 5.3. any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such home or institution, and "hospital accommodation" must be construed accordingly.
- 5.4. With resources across the public sector already stretched, there is likely to be concern that local authorities may seek to utilise hospitals as lawful placements, including (for example) interim placements pending care home or foster care placements being identified. This is particularly relevant as (to the knowledge of the writers) there is no guidance on what local authorities are supposed to do to care for children who are currently in unregulated placements from 9 September 2021 onwards.
- 5.5. A hospital is entitled to say 'no' to local authorities if a child has no clinical need to be admitted, however cases are seldom 'black and white' and there are likely to be numerous instances where children are admitted to hospital with (for example) an acute physical and/or mental health need which then resolves, but cannot be discharged as there is no lawful placement for them to go. This is best exemplified where a child has complex needs which manifests in behaviours which places themselves and others at risk of serious harm, are admitted to hospital for assessment, but found not to be detainable under the Mental Health Act 1983 (justifying a secure hospital bed).
- 5.6. Where a child under 16 is medically fit for discharge, the family court is unlikely to authorise their transfer from a *lawful* hospital placement to an *unlawful* unregulated environment; such that a child is likely to remain in hospital for an unnecessary extended period of time. Local authority resources will not suddenly improve as of 9 September 2021, and remaining in an acute setting without clinical need at a young age is unlikely to be in a child's best interests, but in circumstances where the court is not presented with any viable lawful alternatives, its powers are limited.
- 5.7. Short of a hospital issuing eviction proceedings in the civil court, or seeking to judicially review the decision making of a Local Authority in the administrative court (both of which are unattractive options, and are also costly and time consuming), the inclusion of a hospital environment in Regulation 27A, without further clarity as to the rationale, is puzzling.

5.8. The amendments to the Regulations are (however) a useful reminder that all hospital admissions, including those for looked after children under the age of 16, must be based on genuine clinical need, and it is also suggested that if a child is admitted, a clear review mechanism between the hospital and local authority is put in place where it is apparent that longer term placement planning is likely to be necessary. Watch this space.

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15 September 2021

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