IN THE UPPER TRIBUNAL **Upper Tribunal case no:** JR/2749/2018

ADMINISTRATIVE APPEALS CHAMBER

Before: Mr E Mitchell, Judge of the Upper Tribunal

Hearing: 26 November 2018, Field House, Central London

Date of decision: 27 November 2018

Attendances:

For the applicant: Ms S Hannett, of counsel, instructed by Bevan Brittan Solicitors LLP.

For the 1st and 2nd interested parties: Mr J Friel, of counsel, instructed by SEN Legal.

Decisions:

(1) Under section 16(1) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal grants the applicant permission to bring judicial review proceedings in respect of a decision of the First-tier Tribunal taken on 12 November 2018 (tribunal reference: *EH/213/18/00027).*

(2) The Upper Tribunal refuses to grant relief under section 15(1) of the 2007 Act. This application for judicial review is dismissed.

Under rule 14(1) of the Upper Tribunal (Tribunal Procedure) Rules 2008 I hereby make an order prohibiting the disclosure or publication of any matter likely to lead to a member of the public identifying the young person whose EHC Plan is under consideration in the appeal proceedings with whom this application is concerned. This order does not prevent disclosure to (a) any person exercising statutory (including judicial) functions in relation to the young person; (b) a party's legal representative; (c) disclosure by a parent, acting in the best interests of the young person.

REASONS FOR DECISION

Introduction

1. This is an application for the Upper Tribunal to grant relief under its judicial review jurisdiction conferred by section 15 of the Tribunals, Courts and Enforcement Act 2007. The parties are as follows:

- the applicant is the West Berkshire Clinical Commissioning Group ("the CCG");
- the respondent is the First-tier Tribunal (although it has properly taken a neutral stance in these proceedings);

- the first and second interested parties, AM and MA, are the parents of a young person, whom I shall refer to as BB, whose Education, Health and Care Plan ("EHC Plan") is currently the subject of appeal proceedings before the First-tier Tribunal. AM and MA are jointly represented and I refer to them together as "the parents"
- the third interested party is Westminster City Council ("the local authority") which is the respondent in the proceedings currently before the First-tier Tribunal. It has not taken an active part in the present proceedings.

2. I am grateful to counsel for both the CCG and the parents for their assistance at the hearing and to the legal advisers more generally for their co-operation in ensuring that this application could be heard at very short notice. I should also acknowledge the excellent work done by staff of the Upper Tribunal so that this application could be heard two working days after it was made, and three days before the proposed final hearing of the proceedings before the First-tier Tribunal to which this application relates. Although few cases before the Upper Tribunal are subject to a timescale as demanding this, it has the staff and systems in place to decide cases very rapidly where necessary.

3. The parties were informed of my decision the day after the hearing of the CCG's application. I now give the reasons for my decision.

Summary of decision

4. Education, Health and Care Plans include sections for a child or young person's healthcare needs and healthcare provision. While healthcare provision may not be specified in an EHC Plan without the relevant health commissioning body's agreement, the First-tier Tribunal now has power to make healthcare-related recommendations.

5. In this case, the CCG applied to be joined as a party to appeal proceedings before the First-tier Tribunal in order to make representations about the healthcare provision that could appropriately be made the subject of a recommendation. The First-tier Tribunal rejected the CCG's application. I dismiss the CCG's challenge to the Tribunal's decision.

The underlying issue: dispute between the CCG and the local authority

6. To put this decision in context, I shall describe the underlying dispute that gives rise to the CCG's application. I wish to stress that this description contains no findings of fact. To the extent that the dispute between the CCG and the local authority is relevant to the ongoing appeal proceedings before the First-tier Tribunal, any necessary fact-finding will be done by that Tribunal. Nothing in the following description is intended in any way to influence the Tribunal's fact-finding.

7. In 2014 the local authority prepared an EHC Plan for BB who was, at that time, still a child. The Plan provided for his placement to be jointly funded by the authority (their education and social care departments) and the Central London CCG. The placement was in West Berkshire, not Central London. BB requires an extraordinary amount of specialist care. I cannot recall a case about a child or young person with greater needs than BB. For example, he has three dedicated care and support workers at *all* times, rising to 4 when accessing the community. Of course, all this is very expensive.

8. In 2018, the Secretary of State for Health determined that West Berkshire CCG, rather than Central London CCG, were responsible for commissioning the health services that BB required. According to the papers in the First-tier Tribunal bundle, the CCG assert that they were both (a) unaware that the Secretary of State had been asked to determine the responsible commissioner, and (b) not formally notified of the Secretary of State's decision until some months after it was taken.

9. I observe that, upon a change in the responsible commissioning body, regulation 16(2) of the Special Educational Needs and Disability Regulations 2014 provides: "the original responsible commissioning body must notify the new responsible commissioning body of the change in responsible commissioning body within 15 working days beginning on the day on which it became aware of

the change". I do not know if a regulation 16(2) notification was given in this case.

10. If the CCG's claims are correct, it is a matter of some concern. Given the extent of BB's needs, it must have been obvious that a change of commissioner had the potential both to disrupt the continuity of his healthcare provision as well as the financial planning of any CCG newly fixed with commissioning responsibility (given his extraordinarily high levels of need). Such risks can only have been heightened if the CCG was not involved to some extent in the process for determining the responsible commissioner. Now, I make no findings about the process by which the Secretary of State determined that West Berkshire CCG were the responsible commissioner. But if the CCG were unaware that the matter was under consideration by the Secretary of State, and also found it surprisingly difficult to obtain confirmation of the determination once made, it seems to me that something must have gone wrong in the procedure.

11. Following the Secretary of State's determination that West Berkshire CCG were the responsible health commissioner, that CCG assessed BB's eligibility for NHS Continuing Care. According to the *National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care* (Department of Health, March 2018), "where a person qualifies for NHS Continuing Healthcare, the package to be provided is that which the CCG assesses is appropriate to meet all of the

individual's assessed health and associated care and support needs" (paragraph 172).

12. In response to BB's NHS Continuing Care eligibility decision, the local authority took the view that the CCG were responsible for all aspects of BB's care and support requirements including, so it seems, any support of an educational or training nature. The result was that the local authority decided to cease to maintain BB's EHC Plan. The appeal against that decision is one of the appeals currently before the First-tier Tribunal.

13. What all this meant was that an issue potentially arose as to the legal relationship between a young person's eligibility for NHS Continuing Care and a local authority's statutory duties under the Children and Families Act 2014 ("CFA 2014"). Accordingly, there is in my view a realistic prospect that the First-tier Tribunal, in determining the appeal currently before it, might decide to address the question of legal boundaries between the NHS legislation and the Children and Families Act 2014.

14. A local authority must deliver the special educational provision specified in an EHC Plan (section 42(2) CFA 2014). If it is the case that BB's NHS Continuing Care decision effectively catered for his educational and training needs, there would arguably be no need to maintain an EHC Plan. And that is why the present appeal

before the First-tier Tribunal may result in it addressing legal boundaries between the CFA 2014 and the NHS legislation. But, if the matter is addressed, a practical difficulty may then arise. The CFA 2014 does not permit anyone to impose, within an EHC Plan, obligations on an NHS body (the NHS body must agree). If the underlying legal finding or assumption, by reference to which a Tribunal decides an appeal, is that a CCG is responsible for funding any required special education provision, that finding would not be binding on a CCG. A stalemate could arise with the loser being the young person. There would be no EHC Plan yet the anticipated funder may disagree that its NHS Continuing Care obligations extend, or even permit it, to fund some or all of a young person's required special educational provision.

15. However, it seems to me that the risks of such a stalement may be more theoretical than real provided that the First-tier Tribunal is supplied with detailed information about the plan for delivering NHS Continuing Care services to the young person. The Tribunal would then know which, if any, of the required educational and training provision would be funded by the NHS. A local authority might dispute a CCG's legal assumptions about the scope of NHS Continuing Care but any such dispute would have to be resolved elsewhere because, as explained in more detail below, the First-tier Tribunal cannot impose EHC Plan obligations on a CCG.

16. In the light of the above considerations, the CCG was not in my view acting unreasonably by seeking to become involved in the appeal currently before the First-tier Tribunal. But whether it is entitled to become involved is a different matter.

Proceedings before the First-tier Tribunal

17. The background to BB's case has been described as follows:

> "[BB] was born [in February 1999], and is 19 years of age. He has been diagnosed with Autism Spectrum Disorder, and a Severe Learning Difficulty. Until the age of 12, [BB] lived in Spain with his adopted parents...In August 2011, [BB] and his parents relocated to London, specifically, to within the local authority's area and BB began to attend [P School] in Berkshire. The School is an independent special school for children and young people with Autism. [BB] attends the school on a residential basis for 52 weeks a year.
>
> [BB's] placement at [P School] was funded initially by [father's] employer. From Summer 2014 [BB] had an EHC Plan, with his placement funded pursuant to a tripartite agreement between the local authority (education

and social care) and Central London CCG" (*taken from the CCG's skeleton argument for the hearing of this application*).

18. As I have explained, Central London CCG dropped out of the picture following the Secretary of State for Health's determination that West Berkshire CCG were the responsible health services commissioner.

19. There are currently before the First-tier Tribunal appeals against two decisions taken by the local authority in relation to BB's EHC Plan:

(1) an appeal against the contents of an EHC Plan issued on 24 January 2017; the appeal seeks amendments to Parts B (special educational needs), F (special educational provision) and I (placement) of the Plan;

(2) an appeal against the local authority's decision of 30 August 2018 to cease to maintain BB's EHC Plan. Since an appeal was duly made against the local authority's decision, BB's EHC Plan has been maintained pending determination of the appeal (section 45(4) of the 2014 Act).

20. BB was aged 17 when the EHC Plan challenged in appeal (1) was issued and 19 when the decision challenged in appeal (2) was taken. I am told that, in the

light of BB's impaired mental capacity, the parents bring appeal (2) even though BB was a young person when the relevant decision was taken.

21. On 24 September 2018, the First-tier Tribunal refused the *local authority's* application for the CCG to be made a second respondent in the appeal proceedings. The CCG was not represented at the telephone hearing at which the Tribunal considered the authority's application. The Tribunal did, however, state as follows in the case management directions given on 24 September 2018:

> "The request to join West Berkshire Clinical Commissioning Group as a party to this appeal is refused. However, the Local Authority…will notify them of this appeal and of the health care issues arising within one working day of the receipt of this order, including serving on them a copy of this order, and copies of the appeal documents.
>
> The local authority will obtain a submission from the CCG to be sent to the Tribunal and the Appellants together with its own response to the appeal by no later than noon of 5th November 2018 together with any supporting evidence."

22. Then, on 5 October 2018, the CCG itself applied to be made a second respondent. The application was supported by the parents and the local authority.

I need not set out the CCG's arguments in support of their application because they are very similar to the arguments relied on in the present application.

23. The CCG's application was refused by the Deputy President of the First-tier Tribunal's Health, Education and Social Care Chamber on 12 November 2018. The Deputy President's reasons:

- Noted that the CCG supported the parents' challenge to the local authority's decision to cease to maintain BB's EHC Plan, as well as their ongoing role in identifying a placement for him;

- Found that only a local authority is responsible for making and maintaining an EHC Plan;

- Noted that the CCG and Westminster City Council appeared to be in dispute over whether there was a need to maintain BB's EHC Plan but that the Tribunal has no power to resolve disputes between local authorities and CCGs;

- Noted that a local authority was by law obliged to supply the Tribunal with all relevant information and evidence, including that which might be considered not to support the authority's position;

- Considered that adding the CCG as a second respondent would introduce unnecessary complexity. It would extend the duration of the final hearing and add to the cost and complexity of the proceedings;

- Relied on the fact that the Tribunal's healthcare-related powers are limited to making non-binding recommendations;

- Stated that the local authority could identify a CCG witness to attend the final hearing;

- To expect local authorities and CCGs to resolve their internal disputes outside the Tribunal process was in accordance with the spirit and letter of the CA 2014.

Legal framework

EHC Plans – healthcare needs and provision

24. Section 21(3) of the CFA 2014 defines "health care provision" as "the provision of health care services as part of the comprehensive health service in England under section 1(1) of the National Health Service Act 2006". Section 1(1) of the 2006 Act places the Secretary of State under a duty to:

> "continue the promotion in England of a comprehensive health service designed to secure improvement –
>
> (a) in the physical and mental health of the people of England; and
>
> (b) in the prevention, diagnosis and treatment of illness".

25. To a significant extent, the Secretary of State for Health discharges his duty under section 1(1) through a system of delegations to NHS bodies including clinical commissioning groups. For present purposes, I need not go into the details of the delegation arrangements.

26. Section 1(1) of the 2006 Act is effectively the legal foundation for the NHS in England, which is reflected in the Act's definition of the "health service" as the service continued under section 1(1) (together with its Welsh equivalent). Accordingly, "health care provision" in section 21(3) of CFA 2014 Act really means

anything done by the NHS in England in seeking to provide a comprehensive health service.

27. However, certain 'health care provision' is treated by the CFA 2014 Act as special educational provision and, thus, a responsibility of local authorities and within the jurisdiction of the First-tier Tribunal on appeal. This is because section 21(5) CFA 2014 provides:

> "Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision."

28. An "EHC needs assessment" is an assessment of the educational, health care and social care needs of a child or young person (section 36(2) CFA 2014). While an assessment involves an assessment of health care needs, such needs are not taken into account by the statutory test for determining whether an EHC needs assessment is required. An assessment is required if an authority determines that it may be necessary for special educational provision to be made for a young person in accordance with an EHC Plan (section 36(3)).

29. Similarly, the test for determining whether an EHC Plan is required is concerned only with whether it is necessary for special educational provision to

be made for a young person in accordance with an EHC Plan (section 37(1) CFA 2014). Despite that, an EHC Plan must specify "any health care provision reasonably required by the learning difficulties and disabilities which result in [the young person] having special educational needs" (section 37(2)(d)). Such provision is to be specified in section G of an EHC Plan (regulation 12(1) of the Special Educational Needs and Disability Regulations 2014). However, the requirement in section 37(2)(d) should not be read too literally because no such provision may be specified in an EHC Plan unless agreed by the responsible commissioning body, typically a CCG (regulation 12(2)).

30. If an EHC Plan specifies health care provision, the responsible commissioning body is required to arrange its provision for the young person (section 42(3) of the 2014 Act). This will not come as a surprise to the commissioning body because it must already have agreed to inclusion within the EHC Plan of the specified healthcare provision. The "responsible commissioning body" means "in relation to any specified health care provision, … the body…that is under a duty to arrange health care provision of that kind in respect of the…young person" (section 42(4)).

First-tier Tribunal's powers, including the power to give health care recommendations

31. Section 51 CFA 2014 confers rights of appeals against various decisions taken under Part 3 of the Act. There is no night of appeal against an EHC Plan's description of a young person's health care needs nor a Plan's specification of health care provision.

32. Section 51(5) CFA 2014, however, provides:

> "Regulations under subsection (4)(c) [*regulations about the powers of the First-tier Tribunal on determining an appeal*] may include provision conferring power on the First-tier Tribunal, on determining an appeal against a matter, to make recommendations in respect of other matters (including matters against which no appeal may be brought)".

33. The Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 ("the 2017 Regulations") apply to appeals against certain local authority decisions taken, or EHC Plans made or amended, on or after 3 April 2018 (regulation 3). While Department for Education guidance refers to the scheme under the 2017 Regulations as a 'national trial', the Regulations themselves are not time-limited (they contain no sunset clause).

34. Previously, the First-tier Tribunal's power to give recommendations was conferred by the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) (Pilot) Regulations 2015 but these (a) only applied to specified pilot local authorities and (b) were revoked, with effect from 31 August 2016 by the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) (Pilot) (Revocation and Transitional Provisions) Regulations 2016. Accordingly, in the present case the First-tier Tribunal only has power to make a recommendation when it determines the second appeal (the appeal against the decision to cease to maintain BB's EHC Plan).

35. Regulations 4 and 5 of the 2017 Regulations confer certain powers on the First-tier Tribunal to make health care recommendations. Regulation 4 permits the tribunal to recommend that the health care needs in section C of the EHC Plan be amended or added to. Regulation 5 permits the tribunal to recommend that the health care provision in section G be amended or that health care provision of a particular kind be specified in section G.

36. Regulation 6 of the 2017 Regulations deals with what happens next following a tribunal recommendation under regulation 4 or 5:

(a) the Tribunal must send a copy of the recommendation to the responsible commissioning body (regulation 6(1)). It may also send a copy of its decision on the appeal (regulation 6(2));

(b) within five weeks of the date of the recommendation, the responsible commissioning body must respond to the young person and the local authority (regulation 6(3)) although the tribunal has power to set a different time limit (regulation 6(4));

(c) the responsible commissioning body's response must be in writing, state what steps (if any) it has decided to take in response and, if the recommendation is not followed in whole or in part, give reasons why (regulation 6(5));

(d) within one week of the date on which the local authority receives the commissioning body's response, it must send a copy to the Secretary of State (regulation 6(6)).

37. In March 2018, the Department for Education issued *SEND Tribunal: single mode of redress national trial, Guidance for local authorities, health commissioners, parents and young people*. I was told at the hearing, and I agree, that this is non-statutory guidance in the sense that it is not given under some

specific statutory provision that requires the persons to whom it is addressed to take it into account. The guidance, while recognising that a tribunal recommendation is non-binding, also states that "they should not be ignored or rejected without careful consideration" (p.14) and health commissioners are "generally expected to follow them" (p.24). The guidance also includes the following passages:

"- The policy aims of the national trial are to:

- create a more holistic, person-centred view of the child or young person's needs at the Tribunal,
- bring appeal rights in line with the wider remit of EHC plans,
- encourage joint working between education, health and social care commissioners,
- bring about positive benefits to children, young people and parent" (p.4);

- "It should be noted that the Tribunal will only make a recommendation about health and social care needs or provision related to a child or young person's learning difficulties or disabilities which result in them having special educational needs...The Tribunal will not make decisions relating to

conflicting clinical diagnosis from medical professionals concerning health needs or health provision" (p.9);

- "If requested by the Tribunal, LAs must provide evidence from the health and social care bodies in response to the issues raised, within the timeframe specified, and as necessary can seek permission to bring additional witnesses to the hearing (see the Tribunal Procedure Rules)" (p.8);

- "If mediation resolves the appealable educational issues, the parent or young person will not be able to ask the Tribunal to make recommendations on any health and/or social care aspects of the EHC plan" (p.13);

- "For a trial appeal, the LA will be required to provide evidence from the health and/or social care commissioners [*I should state that I have not been able to identify the statutory basis for such a requirement*]. The Tribunal's Procedure Rules give the Tribunal discretion to give case management directions in each case, including on the number of witnesses. The Tribunal has limited the number of witnesses who can attend the hearing to three for each party, and careful thought should be given to the

identification of the witnesses who are required at the hearing. As necessary, LAs will be able to request an additional witness from the health commissioning body or from social care to give evidence at any hearing (i.e. four, rather than the three witnesses usually allowed by the Tribunal), as will the parent or young person who has requested the recommendation. Where a fourth witness is required because of health or social care issues, then the party seeking to bring an additional witness will need to make an application to the Tribunal for permission to bring them explaining why their attendance is required" (p.16);

- "The Tribunal seeks to ensure that the process of appealing is as user friendly as possible, and to avoid hearings that are overly legalistic or technical. It is the Tribunal's aim to ensure that a parent, young person, LA or health commissioner should not need to engage legal representation when appealing a decision" (p.16);

- "...The LA will also have to obtain and submit evidence relating to the social care and health issues about which the parent or young person has requested Recommendations..." (p.17);

- "The Tribunal has extensive powers to direct the production of evidence by the parties and by third parties where they consider it necessary, and powers to direct that existing evidence be supplemented or its adequacy improved. It is therefore important to ensure that reports prepared during the assessment process are sufficiently detailed and specific. The Tribunal can also issue witness summonses to require the attendance of witnesses who have indicated to the parties that they will not attend the hearing otherwise" (p.17);

- "...the Tribunal may be asked to review a decision and/or give permission to appeal to the Upper Tribunal if there is an error of law, and this will include errors relating to health and social care issues considered by the Tribunal" (p.24);

- "Parents and young people will be able to complain to the [Public & Health Services Ombudsman] about a failure to agree to implement a non-binding tribunal recommendation or, where a non-binding recommendation has been agreed, a failure to deliver on the agreement in respect of the health aspects of EHC plans..." (p.28);

- "Parents and young people can seek to have the health or social care commissioner's response to the Tribunal recommendation decision judicially reviewed, depending on the reasons given for refusing to implement the Tribunal recommendations" (p.28).

38. On a successful appeal against a local authority's decision to cease to maintain an EHC Plan, the First-tier Tribunal's powers include ordering the local authority to continue to maintain the plan with amendments to those parts that set out special educational needs and special educational provision (regulation 43(2)(f) of the Special Educational Needs and Disability Regulations 2014).

Part 3 of CFA 2014 – integration of educational and health care provision

39. Section 25 CFA 2014 is entitled 'Promoting integration'. Section 25(1) requires a local authority to exercise its functions under Part 3 of CFA 2014 (special educational needs) with a view to ensuring the integration of education and training provision with health care provision (as well as social care provision) where the local authority thinks that this would achieve certain things, including:

(a) promote the well-being of young people in the authority's area who have special educational needs (section 25(1)(a)); or

(b) improve the quality of special educational provision made in the authority's area for young people who have special educational needs (section 25(1)(b)(i)); or

(c) improve the quality of special educational provision made outside the local authority's area for young people for whom it is responsible who have special educational needs (section 25(1)(b)(ii)).

40. Section 26 CFA 2014 is entitled "Joint commissioning arrangements". Section 26(1) requires a local authority and its "partner commissioning bodies" to make arrangements about the education, health and care provision to be secured for young people for whom the authority is responsible who have special educational needs and young people in the authority's area who have a disability. These arrangements are called "joint commissioning arrangements"; the partner commissioning bodies must have regard to them in the exercise of their functions (section 26(6)).

41. "Partner commissioning bodies" is defined by section 26(8) of the 2014 Act as:

> (a) the National Health Service Commissioning Board, to the extent that it is under a duty under section 3B of the National Health Service Act 2006 to arrange for the provision of services or facilities for—

(i) any children and young people for whom the authority is responsible who have special educational needs, or

(ii) any children and young people in the authority's area who have a disability, and

(b) each clinical commissioning group that is under a duty under section 3 of that Act to arrange for the provision of services or facilities for any children and young people within paragraph (a)."

42. Therefore, by virtue of section 26(8)(b) of CFA 2014, West Berkshire CCG is one of Westminster City Council's partner commissioning bodies. It must be since it is under a duty to arrange NHS services or facilities for a young person for whom the council is responsible. As mentioned above, the appeal against the local authority's 'cease to maintain' decision meant that BB's EHC Plan was maintained during the currency of the appeal proceedings.

43. Section 26(3) CFA 2014 specifies certain arrangements to be included within joint commissioning arrangements, including:

(a) "how complaints about education, health and care provision may be made and are to be dealt with"; and

(b) "procedures for ensuring that disputes between the parties to the joint commissioning arrangements are resolved as quickly as possible".

44. Section 28(1) CFA 2014 requires a local authority to co-operate with each local partner, and *vice versa*, in the exercise of the authority's functions under Part 3 of CFA 2014. An authority's local partners include a clinical commissioning group that is under a duty under section 3 of the National Health Service Act 2006 to arrange for the provision of services or facilities for whom the authority is responsible (section 28(2)(k)).

45. Section 31 CFA 2014 is about co-operation in specific cases. It applies where a local authority requests the co-operation of certain bodies in the exercise of a function under Part 3 of the Act. The bodies include a clinical commissioning group. Section 31(2) requires the body to comply with the request unless it considers that doing so would be incompatible with their duties or otherwise have an adverse effect of the exercise of the body's functions. If the body refuses to comply, it must give written reasons (section 31(3)).

Tribunal rules

46. Rule 2(1) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("2008 Rules") defines a "party" as an applicant or respondent in proceedings before the Tribunal or, if the proceedings have been concluded, a person who was an applicant or respondent when the Tribunal finally disposed of all issues in the proceedings. On an appeal under Part 3 of CFA 2014, the respondent includes "the person who made the decision" as well as a person added as a respondent under rule 9. Accordingly, a local authority is a respondent as a matter of course but a clinical commissioning group is not.

47. Rule 9(2) confers power on the First-tier Tribunal to give a direction adding a person to the proceedings as a respondent.

48. The overriding objective of the Tribunal's procedure rules is to "enable the Tribunal to deal with cases fairly and justly" (rule 2(1)). Rule 2(2) provides that this includes:

> "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues."

49. Rule 2(3)(a) requires the Tribunal to seek to give effect to the overriding objective when it exercises any power under the Rules including, of course, its power to add a person to the proceedings as respondent.

50. Rule 5(3(d)) of the Rules confers a specific power on the Tribunal, in addition to its general power to regulate its own procedure, to "permit or require a party or other person to provide documents, information or submissions to the Tribunal or a party".

51. Rule 16(1) provides:

"(1) On the application of a party or on its own initiative, the Tribunal may–

(a) by summons require any person to attend as a witness at a hearing at the time and place specified in the summons; or

(b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings."

52. Rule 24 provides that, subject to the Tribunal's power to exclude a person from a hearing under rule 22(7), each party is entitled to attend a hearing. The general rule is that special educational needs appeals hearings are held in private (rule 26(2)), although the Tribunal has power to determine who is permitted to attend a hearing held in private (rule 26(4)).

53. Other rights of a 'party' under the Rules include:

(a) to apply for a summons requiring a person to attend a hearing as a witness (rule 16(1)(a));

(b) to apply for an order requiring a person to answer questions or produce documents (rule 16(1)(b));

(c) the right to be sent the Appellant's application notice and any accompanying documents (rule 21(6));

(d) the right to be supplied with any respondent's response and any accompanying documents (rule 22(5));

(e) the qualified right to require the Tribunal to hold a hearing before determining an appeal (rule 23(1));

(f) the general right to attend a hearing (rule 24(a));

(g) the general right to be notified of the time and place of a hearing (rule 25(1));

(h) the right to be supplied with written reasons for the Tribunal's decision (rule 30(2)(b));

(i) the right to apply for the Tribunal's decision to be set aside under rule 45(3));

(j) the right to seek permission to appeal to the Upper Tribunal against the Tribunal's decision (section 11(2) & (3));

(k) the right to apply to the Tribunal for review of its decision under rule 48(2).

54. So a person who is not a party is deprived of those rights but, on the other hand, a non-party may not be made the subject of (nor apply for) a costs order under rule 10(1)(b) such orders being available "if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings".

The Upper Tribunal's judicial review jurisdiction

55. The right of appeal to the Upper Tribunal against a decision of the First-tier Tribunal, on a point of law, is conferred on a "party to a case" (section 11(2), Tribunals, Courts and Enforcement Act 2007). This explains why the First-tier Tribunal in the present case (correctly) decided it had no jurisdiction to determine the CCG's application for permission to appeal to the Upper Tribunal.

56. The Upper Tribunal also has a judicial review jurisdiction, exercisable if an applicant's claim for judicial review falls within a class specified by direction given under section 18(3) of the 2007 Act. The Lord Chief Justice's direction, given under section 18(3), includes:

> "any decision of the First-tier Tribunal…made under Tribunal Procedure Rules…where there is no right of appeal to the Upper Tribunal and the decision is not an excluded decision within paragraph (b), (c) or (f) of section 11(5) of the 2007 Act" (Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 W.L.R. 327).

57. I am satisfied that the decision challenged in the present proceedings is not an excluded decision under the provisions of section 11(5) referred to in the Practice Direction. Accordingly, the present claim falls within the Upper Tribunal's judicial review jurisdiction. On such a claim, the Upper Tribunal's powers to grant relief include power to make a quashing order or a mandatory order (section 15(1)). In deciding whether to grant relief, the Upper Tribunal must apply the principles that the High Court would apply in deciding whether to grant that relief on an application for judicial review (section 15(4)).

58. If the Upper Tribunal makes a quashing order, it may in addition substitute its own decision for the decision in question (section 17(1)(b)). However, section 17(2) provides:

> "The power conferred by subsection (1)(b) is exercisable only if—

(a) the decision in question was made by a court or tribunal,

(b) the decision is quashed on the ground that there has been an error of law, and

(c) without the error, there would have been only one decision that the court or tribunal could have reached."

59. Permission to apply for relief under section 15(1) of the 2007 Act may not be granted unless the Upper Tribunal considers that the applicant has a sufficient interest in the matter to which the application relates (section 16(3)). I am satisfied that the CCG has such a sufficient interest.

Proceedings before the Upper Tribunal

Case management

60. The Upper Tribunal received the CCG's judicial review claim form, seeking to challenge the First-tier Tribunal's refusal to make them a second respondent, on 21 November 2018. The case was referred to me on 22 November 2018. The CCG seek (a) an order quashing Deputy President Tudur's refusal to make them a

second respondent, and (b) an order making them a second respondent. As I put it to the represented parties at the hearing, the relief sought could only be granted in relation to the second of the appeals currently before the First-tier Tribunal. This is because the Tribunal has no power to make a health recommendation on the first appeal. The decision under challenge was taken in the period after revocation of the pilot recommendations regulations but before enactment of the 2017 national recommendations regulations. During this period, the Tribunal had no power to give healthcare-related recommendations (see para. 34 above).

61. The CCG requested an urgent 'rolled up' hearing (i.e a hearing to consider both whether to grant permission to apply for relief and, if permission were granted, to determine whether to grant relief). The final hearing before the First-tier Tribunal was listed for 28 November 2018 (i.e. one week after this judicial review application was received by the Upper Tribunal). This application clearly justified an urgent hearing.

62. On the date this application was referred to me, I gave the following case management directions:

"(1) A hearing of this application is to be held... on [Monday] 26 November 2018...;

(2) At the hearing, the judge will consider both whether to grant permission to bring judicial review proceedings and, if permission is granted, whether to go on and grant the Applicant relief under section 15(1) of the Tribunals, Courts and Enforcement Act 2007. Accordingly, rule 31 of the Upper Tribunal Rules 2008 [which provides for responses to be supplied following the Upper Tribunal granting permission to bring judicial review proceedings] shall not apply in the event that the Upper Tribunal grants permission to bring judicial review proceedings;

(3) The hearing is to be listed for half a day;

(4) The Applicant is to be represented at the hearing. The interested parties may be represented at the hearing;

(5) An interested party who is not represented at the hearing may supply the Upper Tribunal, and the other parties (apart from the First-tier Tribunal), with a written submission. But any such submission must be received before **9.00 a.m. on 26 November 2018**;

(6) By **9.00 a.m. on 26 November 2018**, the Upper Tribunal must receive from the Applicant and any interested party who intends to be represented at the hearing, a skeleton argument;

(7) By **9.00 a.m. on 26 November 2018**, the Upper Tribunal must receive a bundle of authorities, relevant legislation and any relevant non-legislative material such as provisions of Codes of Practice. If either or both interested parties intend to be represented at the hearing, the bundle must be agreed by the attending parties. Otherwise, the bundle is to be supplied by the Applicant;

(8) The bundle must include any provision made in relevant joint commissioning arrangements for resolving disputes (see section 26(3) of the Children and Families Act 2014);

(9) If the First-tier Tribunal does not supply an acknowledgement of service by **9 a.m. on 26 November 2018**, it shall be treated as having acknowledged service and to have adopted a neutral stance in relation to this application (which I note is generally considered to be the appropriate stance for a tribunal to take in relation to judicial review proceedings).

(10) Considering this to be an urgent case, I disapply the general hearing notice requirements in rule 36(2) of the Upper Tribunal Rules."

63. The parents' solicitor duly informed the Upper Tribunal that they would be represented at the hearing. The local authority was not represented nor did it

supply a written submission. As I expected, the First-tier Tribunal was neither represented nor did it supply a written submission.

The CCG's response to direction (8)

64. Direction (8) required the hearing bundle to include any provision made in relevant joint commissioning arrangements, under section 26(3) CFA 2014, for resolving disputes. In response, the CCG supplied a witness statement of Ms A Davies, solicitor of Bevan Brittan LLP, which attached certain correspondence between the CCG and the local authority. This is described below. The CCG's skeleton argument also stated that, since the local authority did not accept that it was responsible for BB, there were no joint commissioning arrangements. At the hearing, Ms Hannett for the CCG said that, for this reason, there is in practice no dispute resolution procedure. However, the fact remains that, since BB's EHC Plan is statutorily maintained pending determination of appeal 2, the local authority is a "local commissioning partner" and so there ought, for the time being, to be a dispute resolution procedure. But I accept that this is likely to be of little practical relevance for present purposes. Given the local authority's stance to date, there must be very little chance of it agreeing, during the currency of the appeal proceedings, that it retains special educational responsibilities towards BB. If

appeal 2 fails, the local authority will of course no longer be a local commissioning partner.

65. I now describe the correspondence supplied by the CCG with their response to the Upper Tribunal's case management directions.

66. A letter dated 25 July 2018 from the local authority to the CCG's solicitors:

- argued the CCG were out of time for challenging the Secretary of State for Health's determination that the CCG were the responsible NHS commissioning body;
- argued that the CCG had failed adequately to plan for BB's next placement the need for which was urgent since his current placement would cease in August 2018 (although I note the provider subsequently agreed that BB could stay there until December 2018);
- stated that the local authority had themselves identified a suitable placement for BB.

67. A letter from the CCG's solicitors to the local authority, dated 26 July 2018, in response to the authority's letter of 25 July:

- accepted that the CCG were responsible for meeting BB's health needs, and associated social care needs, but denied they were responsible for meeting his educational needs. The CCG did however recognise their co-

operative duties and joint commissioning responsibilities under the CFA 2014;

- Argued that, under CFA 2014, the local authority remained the 'lead authority' for educational provision for so long as BB had an EHC Plan and he "remains within the SEND framework";
- stated that the CCG were not supplied with a copy of BB's EHC Plan as part of the authority's planning for his transfer from children's to adults' social care services. Nevertheless they "worked hard" to co-operate with the local authority;
- stated that the CCG were not informed that Central London CCG had asked the Secretary of State to determine BB's responsible health commissioner. They had still not had sight of the Secretary of State's determination;
- Argued that the CCG had never been consulted about the contents of BB's EHC Plan;
- Set out the CCG's understanding that the local authority had not decided to cease to maintain BB's EHC Plan and requested notification of the outcome of an impending EHC Plan review (at the date of this letter, the local authority had yet to decide to cease to maintain BB's EHC Plan);

- suggested that the CCG and the local authority should work jointly to procure a suitable placement for BB;
- asked the local authority to explain their proposals for the parts of BB's EHC Plan concerned with healthcare needs and provision;
- asked the local authority to confirm whether statutory transition planning for looked after children had taken place (it appears that BB was, as a child, 'looked after' for the purposes of the Children Act 1989);
- set out the CCG's understanding that, if BB were placed with the provider identified by the local authority, a "suitable property" would need to be purchased since the provider would only supply care and support. The CCG did not have funding to purchase a property. It might obtain grant funding from NHS England but not before April 2019. Moreover, regardless of the funding source, any property would need to be purchased by a housing association;
- The CCG had themselves "pro-actively commenced a procurement exercise in an attempt to identify a suitable placement".

68. A letter from the CCG's solicitors to the local authority, dated 10 August 2018:

- argued that the CCG had continued to attempt to co-operate with the local authority;

- asserted that the local authority had refused to meet with the CCG to "discuss and agree urgent arrangements for joint commissioning";

- explained that the CCG had already carried out a type of procurement exercise for BB's future care package, which resulted in the CCG identifying a preferred provider who had been asked to supply a formal proposal;

- noted the local authority's intention to cease to maintain Mr M's EHC Plan but argued that, in the meantime, the authority remained responsible for the educational provision within the Plan;

- stated that, while the CCG had not been supplied with BB's proposed care package in the event that he were placed with the provider identified by the local authority, it had nevertheless entered into discussions with that provider with a view to understanding "their offering";

- did not accept that the local authority had supplied the CCG with information about NHS grant funding and stated that, to the CCG's knowledge, there were no relevant NHS England grants available;

- asked the local authority to supply the First-tier Tribunal with specified CCG correspondence.

69. A letter from the CCG's solicitors to the local authority, dated 20 August 2018:

- confirmed that BB had been assessed as eligible for NHS Continuing Care funding;
- argued that the CCG and the local authority should jointly commission a package of care with the local authority acting as 'lead authority';
- explained that a possible provider identified by the CCG had assessed BB's needs but, due to their complexity, intended to carry out a re-assessment. Another possible provider was also planning to assess his needs;
- explained that the CCG had also been in discussions with a housing association who might be able to "offer a housing association type set-up".

70. A letter from the local authority to the CCG dated 30 August 2018:

- informed the CCG that the local authority had decided to cease to maintain BB's EHC Plan;

- argued that, in the light of Mr M having been assessed as eligible for NHS Continuing Care funding, the local authority's social services department "no longer has an active role in [Mr M's] case management and now the duty rests with [the CCG]".

The arguments

The NHS Clinical Commissioning Group

71. The CCG advance a broad argument that, as a matter of principle, CCGs are entitled to be made parties to proceedings in which healthcare recommendations are under consideration. Alternatively, the CCG argue that, in the circumstances of this case, they were entitled to be joined as a party to the Tribunal proceedings.

72. The CCG accept that, absent the First-tier Tribunal's power to make health-related recommendations, a CCG would not ordinarily have a sufficient interest in an appeal to justify making it a party to proceedings. Now that the Tribunal has such a power, matters are different. While the local authority is responsible for making and maintaining an EHC Plan, the CCG rather than the local authority is required to arrange any health care provision specified in a Plan. Furthermore, a young person or parent now has the right to seek a health-related

recommendation and, if the right is exercised, the Tribunal may well be engaging in the resolution of a dispute between that party and the health commissioner. While a recommendation is just that (not binding), it does have legal consequences under the 2017 Regulations and the Department for Education's guidance, which states, among other things, that a failure to follow a recommendation may lead to a judicial review claim against a health commissioner.

73. As a matter of general principle, a CCG's interest in Tribunal proceedings in which healthcare-related recommendations are under consideration are such that natural justice / principles of fairness require a CCG to have the right to participate as a party. The requirements of fairness cannot be satisfied by expecting a CCG to rely on a third party, typically a local authority, to put the CCG's position, particularly given that their views may differ. The requirements of fairness can only be satisfied by making a CCG a party to Tribunal proceedings.

74. Furthermore, a CCG's participation as a party would be likely to assist the Tribunal given the dynamic nature of the proceedings. The matters in issue may develop at a hearing so that CCG representation would assist the Tribunal to the extent that the evolving issues concern health-related matters.

75. At the hearing, Ms Hannett submitted that some support for her argument that, as a rule, CCGs were entitled to be made parties could be found in the Department for Education guidance. At p.16, the guidance states that local authorities will be required to provide evidence from health commissioners and anticipates that health witnesses may need to attend tribunal hearings. At p.17, the guidance also makes a reference to health commissioners appealing to the First-tier Tribunal - "it is the Tribunal's aim to ensure that a... health commissioner should not need to engage legal representation when appealing a decision". But, as I pointed out at the hearing, this part of the guidance is simply wrong. Health commissioners have no right of appeal to the First-tier Tribunal. Such a right of appeal would be pointless in any event since an EHC Plan may not specify health care needs or provision without the agreement of the relevant CCG. At p.24, the guidance also states that the First-tier Tribunal may grant permission to appeal to the Upper Tribunal "if there is an error of law, and this will include errors relating to health...issues considered by the Tribunal". Be that as it may, the First-tier Tribunal will not grant permission to appeal to the Upper Tribunal on the application of a non-party, as explained above (see para. 55).

76. At p.28, the guidance points out that a CCG's failure to implement a health-care related recommendation may result in a complaint to the Public Services and

Health Ombudsman or a claim to the High Court for judicial review. These may involve potentially significant legal consequences submits Ms Hannett.

77. As set out above in these reasons, the First-tier Tribunal has various powers that might be exercised so as to make a CCG aware of the issues arising on an appeal and ensure that the Tribunal is aware of a CCG's views. For example, the Tribunal may direct disclosure of appeal papers to a CCG, require a CCG to supply a written submission and require a CCG witness to attend a hearing. At the hearing of this application, I asked Ms Hannett, for the CCG, to explain why the availability of such powers was insufficient. Why could they never be exercised to ensure that a CCG is treated fairly (which must be the assumption on which the argument that CCG have an absolute right to be made parties is based)? Ms Hannett submitted that the key point was that, unless a CCG was a party, it would not be represented at a hearing and, therefore, would not be able to address issues as they developed at a hearing nor question the other party's witnesses.

78. Alternatively, argues Ms Hannett, if the requirements of natural justice / fairness do not, as a general principle, call for party status for a CCG, the only fair course open to the Tribunal in the present case was to grant the CCG's application to be made a second respondent, for the following reasons:

(a) both BB's parents and the local authority supported the CCG's application;

(b) the CCG had made it very clear to the First-tier Tribunal that granting their application would not delay determination of the proceedings. The CCG were prepared to put forward their case at the final hearing listed for 28 and 29 November 2018;

(c) the CCG and the local authority were in disagreement. The local authority thought the EHC Plan should cease to be maintained, the CCG did not. If the EHC Plan continued, it was clear that they would also disagree over its contents. In those circumstances, it was difficult to understand how the local authority could fairly or properly advance the position adopted by the CCG. At the hearing, Ms Hannett emphasised the extent of the disagreement between the local authority and the CCG. The local authority considered that its responsibilities towards BB had come to an end while the CCG considered a joint responsibility remained;

(d) to permit the CCG to send a witness to the final hearing would not satisfy the requirements of natural justice. Ms Hannett's skeleton argument submitted that "there is an obvious and material difference between giving evidence, and being permitted to make submissions in respect of the matters raised";

(e) complex issues were raised in the First-tier Tribunal proceedings regarding, in particular, the diving line between special educational and health provision. The Tribunal and the parties would be in a far better position if the CCG were a party and permitted to make submissions;

(f) BB had been assessed as eligible for NHS Continuing Health Care and, as the skeleton argument put it, "the CCG is proactively engaged in a without prejudice search for his future placement".

79. Ms Hannett submitted, and I accept, that my task is not to determine whether the Tribunal's case management fell within the zone of reasonable case management decisions. My task is to determine whether the proceedings were in fact conducted fairly (*R (Shoesmith) v OFSTED* [2011] EWCA Civ 642).

80. Ms Hannett relied on two case law authorities although she accepts neither are decisive.

81. *R (London Borough of Havering) v SEN & Disability Tribunal (interested parties: MG & London Borough of Dagenham)* [2006] EWHC 2344; 24 2007 ELR, was a decision of the High Court, Andrew Nicol QC, sitting as a Deputy High Court Judge (now Mr Justice Nicol). The child's parents appealed to the SEN &

Disability Tribunal. The respondent was the London Borough of Barking, the authority that maintained the child's statement of SEN. It is apparent from paragraph 27 of the decision that the SEN Tribunal's procedure rules provided for only a single respondent to an appeal. It also appears that both of the local authorities concerned agreed that the London Borough of Havering had a genuine interest in the proceedings since the child's parents sought an amendment to his statement of SEN so as to name a school in Havering's area.

82. In *Havering*, the Judge observed "while [but one respondent] may have advantages in minimising the number of parties...it can cause very real difficulties as the present case illustrates" and suggested that consideration be given to amending the SEN Tribunal's procedural regulations. As explained above, the First-tier Tribunal's rules do provide for more than one respondent to an appeal if the Tribunal so directs. At the hearing, Ms Hannettt submitted that she relied on *Havering* because it illustrated that the desirability of keeping tribunal proceedings as informal as possible may be outweighed by other considerations.

83. I am also referred to Upper Tribunal Judge Ward's decision in *JW v Kent CC* (SEN) [2017] UKUT 281 (AAC); [2018] ELR 81. *JW* involved First-tier Tribunal proceedings in which a child's father was not a party. The father wished to challenge the tribunal's decision. The First-tier Tribunal refused to accept his

application for permission to appeal to the Upper Tribunal on the ground that he was not a party to the proceedings. The father then sought the Upper Tribunal's permission. Judge Ward drew the parties' attention to the decision of the Tax & Chancery Chamber of the Upper Tribunal in *Razzaq & Malik v The Charity Commission* [2016] UKUT 546 (TCC) which held that the First-tier Tribunal's (General Regulatory Chamber) procedural rules permitted it to make a person a party to proceedings after a case had been determined, in order to confer a right of appeal on the person. Judge Ward held that a similar power was available under rule 9 of the Health, Education and Social Care Chamber. However, he declined to give guidance as to the factors to be taken into account in the exercise of the power, holding that "it is essentially a case management matter for the discretion of the First-tier Tribunal".

The parents

84. Mr Friel, for the parents, argues that this is a case in which a local authority is wrongly seeking to divest itself of all responsibility, including funding responsibility, for BB. However, that is not a matter for me to address in the present proceedings which are concerned solely with the First-tier Tribunal's refusal to make the CCG a second respondent. Mr Friel also argues that, at a case management hearing, a First-tier Tribunal judge indicated that an order would in

fact be made adding the CCG as a second respondent. But the fact is that no such order was recorded in writing and there is no proper basis on which I could find that the Tribunal made an oral order adding the CCG as a second respondent.

85. Mr Friel argues that the First-tier Tribunal's reasoning, in refusing to make the CCG a second respondent, was flawed. The Tribunal's reasons, while comprehensive, were based on "the fact that there appears to be a dispute between the CCG and the local authority". The dispute was between the parents and the local authority. But Mr Friel also argues that the reason appeal 2 was brought was to allow the First-tier Tribunal to determine the boundary between local authority and CCG responsibilities. In order to make such a determination, the Tribunal would need to address the issue whether it could 'go behind' the finding that BB was entitled to NHS Continuing Care funding. In order to do so properly, the CCG's involvement was necessary.

86. Mr Friel argues that, not infrequently, the First-tier Tribunal deals with appeals involving more than one respondent such as where two local authorities are in dispute over which of them is responsible for a child or young person. There was no material difference between that example and the dispute between the local authority and the CCG in the present case. A further reason why the CCG ought

to have been made a second respondent is that any Tribunal health-related recommendation has considerable legal significance and cannot conveniently be ignored as is shown by the Department for Education's guidance.

87. Mr Friel did not agree with Ms Hannett's wider argument that, in any appeal in which healthcare recommendations were under consideration, the relevant CCG must be joined as a second respondent. However, he agreed that, in the circumstances of this case, fairness required that the CCG be joined as a party to the proceedings.

Conclusions

88. I grant the applicant permission to apply for relief under section 15(1) of the Tribunals, Courts and Enforcement Act 2007. If for no other reason, I grant permission because the relevant issues are of some practical importance for the First-tier Tribunal. However, for the reasons given below I refuse to grant relief and dismiss this application. I am satisfied that the First-tier Tribunal's refusal to make the CCG a second respondent to the appeal proceedings did not involve an error on a point of law nor did it involve treating the CCG unfairly.

Introductory

89. No party, including the respondent First-tier Tribunal, opposes the CCG's application for judicial review claim (although the First-tier Tribunal would not normally be expected to play an active part in judicial review proceedings in respect of its decision: see *S v Special Educational Needs Tribunal and the City of Westminster* [1996] ELR 102). In other words, no one seeks to uphold the First-tier Tribunal's decision. But the reality is that the Tribunal must surely think it made the right decision and has clearly explained why it refused to grant the CCG's application. The fact that no party opposes the CCG's application does not mean the Upper Tribunal is bound to grant the CCG the relief sought. A party does not establish an error on a point of law in a decision of the First-tier Tribunal, or procedural unfairness, justifying relief under section 15(1) of the Tribunals, Courts and Enforcement Act 2007 simply because no party seeks to uphold the tribunal's decision.

Whether fairness always requires the Tribunal to grant a CCG's application to be made a party

90. If the First-tier Tribunal makes a healthcare-related recommendation then, as the word suggests, it is not binding. A recommendation does not determine a CCG's legal obligations under the NHS legislation. This is of itself a strong

indication that fairness does not require the Tribunal always to grant an application for a CCG to be joined as a second respondent whenever a Tribunal is considering making a healthcare-related recommendation. I do however accept that a Tribunal's healthcare-related recommendation has legal consequences for a CCG.

91. The direct legal consequences of a healthcare recommendation are set out in the 2017 Regulations, which, in summary, require a CCG to consider a recommendation and supply written reasons if it decides not to follow it. However, compliance with these procedural requirements is unlikely in my view to be unduly onerous. The possibility that tribunal proceedings will result in a CCG being placed under such requirements does not render tribunal proceedings unfair unless CCG's are joined as parties to the appeal proceedings. If a CCG considers that a recommendation made is flawed in some way, for example, it can say so when giving its reasons for not following the recommendation. Fairness does not require CCGs to be made parties to tribunal proceedings in order to seek to avoid the Regulations' procedural burdens from arising inappropriately. I think it is inevitable that becoming a party would be a greater drain on a CCG's resources than that caused by complying with the Regulations' procedural requirements. In other words, a CCG's interests in this respect can be adequately protected by means other than making it a party to tribunal proceedings.

92. If a healthcare-related recommendation is not followed by a CCG, that may have legal consequences. But this is not inevitable. It depends, firstly, on whether someone decides, for example, to bring a claim for judicial review or complain to the relevant Ombudsman and, secondly, a CCG's reasons for, and procedure adopted in, refusing to follow a recommendation. If a CCG's approach is consistent with the criteria applied by, for example, the High Court on a judicial review claim or the relevant Ombudsman, the claim or complaint will be dismissed. If not, the CCG will be rightly found to have failed to act in accordance with the applicable criteria. In either case, the fairness of the earlier tribunal proceedings is not dependent on CCGs being joined as parties to the proceedings so that they may be represented at a hearing and question witnesses to try and avert the potential legal consequences of failing to follow a tribunal recommendation. A CCG's interests may be adequately protected without them being joined as parties to proceedings by, in particular, the soundness of their reasons for refusing to follow a healthcare-related recommendation and that matter is, of course, in their own hands.

93. It is also argued that joining CCGs as parties is in the First-tier Tribunal's interests because it is likely to lead to better informed decisions. No one would argue against the idea that the Tribunal should be as well informed as is

reasonably possible. However, this can be achieved without making CCGs parties to tribunal proceedings. As set out above in these reasons, the Tribunal has a range of case management powers which it may use to require the supply of submissions and evidence, even from a non-party.

94. Ms Hannett argues that a CCG should not have to rely on a local authority, with whom it may be in dispute, to make submissions on its behalf. But it does not have to. The First-tier Tribunal's case management powers extend to requiring a non-party to supply a submission directly. If it is argued that, where a local authority is acting as a conduit for a CCG's views, it cannot be assumed it will act as an honest broker, I reject the argument. I cannot make a decision based on an assumption that a local authority will seek to undermine tribunal proceedings.

95. In so far as the Department for Education's healthcare recommendations guidance might support the argument that CCGs are entitled to be joined as parties in healthcare recommendation cases, there is a simple explanation for that. The guidance is either wrong or poorly drafted. This non-statutory guidance cannot create any rights nor can it legitimately seek to influence how the First-tier Tribunal might decide to case manage any particular appeal. The guidance incorrectly suggests, for example, that a CCG has a right of appeal by its reference to a health commissioner "appealing a decision".

96. For the above reasons, in my judgment the First-tier Tribunal is not required to grant a CCG's application to be made a second respondent whenever a healthcare-related recommendation is under consideration.

Whether fairness required the CCG to be made a second respondent in this case

97. I understand the CCG's wish to become involved in the proceedings before the First-tier Tribunal in the present case. It has found itself responsible under the NHS legislation, perhaps with very little advance notice, for a young person whose needs are such that his placement costs must be enormous. However, if the CCG is concerned that, unless it is involved in the appeal as a party, it may find itself having to fund the entire placement costs, or a share that is in some way unreasonable, it is a misplaced concern and certainly not one which required the First-tier Tribunal, in addition to the steps it did take to ascertain the CCG's position, also to make it a party to the proceedings.

98. The First-tier Tribunal took a number of case management steps in order to appraise itself of the CCG's position, steps which permitted the CCG to set out its views. Directions required the appeal papers to be supplied to the CCG and for it to supply a written submission. Arrangements were also made for a CCG witness

to attend the final hearing. Since the Tribunal has no power to fix the CCG with an obligation to provide any support for BB, in my judgment the CCG was treated fairly. As I shall explain, the steps taken by the Tribunal in advance of the final hearing adequately protected the CCG's interests.

99. In certain respects, the CCG's involvement in the proceedings was akin to that of a party. It was made aware of the issues before the First-tier Tribunal, provided with the appeal papers, enabled to provide a written submission and arrangements made for it to send a witness to the final hearing. It seems to me that, in practice, what the CCG has been deprived of, as compared to a party, is the right for a legal representative to attend the final hearing in order to make oral submissions and question other witnesses. However, this was not necessary in order for the proceedings to be conducted fairly insofar as they impinged on the CCG's interests.

100. The CCG's interests were not those of a person whose substantive legal rights and obligations were liable to be determined by the Tribunal. The risk that the CCG faced was that the Tribunal would give a healthcare recommendation that, if implemented, would place a greater drain on the CCG's resources than would be likely to flow from its own decision as to the extent of its NHS Continuing Care responsibilities. If a recommendation were given, it would no

doubt be time-consuming and frustrating for the CCG to have to deal with the recommendation if it were considered somehow flawed or otherwise inappropriate. But the CCG would not have to implement the recommendation and that is why I am satisfied that the steps taken by the First-tier Tribunal, in advance of the final hearing, ensured that the CCG was treated fairly. The CCG's interest in avoiding a flawed or inappropriate healthcare-related recommendation cannot be considered such a vital interest that the requirements of fairness compelled it to be joined as a party to the appeal proceedings in addition to the steps already taken by the First-tier Tribunal to make itself aware of the CCG's position. Those steps gave the CCG the opportunity to explain why it considered the local authority's view as to the extent of the CCG's obligation was flawed.

101. While I must decide for myself whether the Tribunal proceedings have, in advance of the final hearing, been conducted fairly, I cannot ignore the fact that the First-tier Tribunal has a better understanding that do I of the realities of tribunal life. Fairness is a matter for me to determine but I should give weight to the Tribunal's views (*R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855). The Deputy President's decision emphasised the need to avoid, wherever possible, introducing additional complexity into tribunal proceedings. This is not simply a matter that the Deputy President was entitled to take into account. Given the Deputy President's many years' experience of managing the business of education

appeals, she rightly took this matter into account. It really goes without saying that it is in the interests of children and young people for appeals about their education to be conducted with as little complexity as possible.

102. I find none of the remaining arguments persuasive for the following reasons:

(a) the fact that both parties supported the application was of little relevance. It is for the First-tier Tribunal, not the parties, to decide how an appeal is case-managed;

(b) even if granting the CCG's application would not have derailed the appeal timetable set by the Tribunal, it would have added additional complexity to the proceedings. Additional hearing time would have been necessary since an additional party would have made submissions and the final determination of the appeal may well be delayed due to the extra time taken writing a statement of reasons that takes account of an additional party's submissions;

(c) the complexity of the issues before the Tribunal did not require the CCG to be made a party to the proceedings. Making the CCG a second respondent would not necessarily have eased the Tribunal's task in resolving these issues;

(d) the High Court's decision in *Havering* is not analogous to this case. *Havering* involved a local authority for whom the determination of the appeal might lead to it being fixed with a legal obligation towards a child. The CCG did not face a similar risk. A healthcare recommendation, no matter how unhelpful or otherwise inappropriate, does not fix a CCG with any substantive legal obligation;

(e) the Upper Tribunal in *JW v Kent CC* declined to identify factors relevant to determining an application for a person to be made an additional party. For this reason, the decision neither supports or detracts from the CCG's case. And it is not argued, as it was in *JW*, that the First-tier Tribunal should have made the CCG a party in order to create a right of appeal to the Upper Tribunal;

(f) I cannot accept that the Tribunal proceedings were brought for the purpose of defining the respective responsibilities of the local authority and the CCG or, at least, not with the Tribunal's concurrence. As the Deputy President herself recognised, the Tribunal's decision could not bind the CCG.

(Signed on the Original)

E Mitchell

Upper Tribunal Judge

3 January 2019, date of reasons for decision (date of decision: 27 November 2018)