NCN: [2024] UKUT 179 (AAC) **Appeal No. *UA-2023-001777-HS***

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

MM (as alternative person for C)

Appellant

- v -

ROYAL BOROUGH OF GREENWICH

Respondent

Before: Upper Tribunal Judge Stout

Hearing date(s): 9 May 2024
Mode of hearing: Field House, in person

Representation:

Appellant: Matthew Wyard (counsel), instructed by Geldards LLP
Respondent: Mark Greaves (counsel), instructed by Royal Borough of Greenwich

On appeal from:

Tribunal: First-tier Tribunal (Health Education and Social Care Chamber) (Special Educational Needs and Disability)
Tribunal Case No: EH203/22/00082
Tribunal Venue: By video
Decision Date: 18 September 2023

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the appellant's son (C) in these proceedings. This order does not apply to: (a) the appellant; (b) any person to whom the appellant discloses such a matter or who learns of it through publication by the appellant, for reasons aimed in good faith at promoting her son's best interests; or (c) any person exercising statutory (including judicial) functions in relation to her son where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

SUMMARY OF DECISION

SPECIAL EDUCATIONAL NEEDS (85.6)

Education Health and Care Plan – Section 51, Children and Families Act 2014 – Capacity – Alternative person – regulation 64, Special Educational Needs and Disability Regulations 2014 (The Special Educational Needs and Disability Regulations 2014 (SI 2014/1530) – Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 (SI 2017/1306) – Health and social care recommendations

The First-tier Tribunal erred in law by failing to recognise that C was a young person who lacked capacity to litigate and thus that his mother should have been appointed as his alternative person under regulation 64 of the Special Educational Needs and Disability Regulations 2014. As his alternative person, his mother should have conducted the proceedings on his behalf in his best interests. The Upper Tribunal gives guidance as to: the approach the First-tier Tribunal should take to recognising and dealing with appeals where an issue as to capacity to litigate arises; appointment of an alternative person; the alternative person's duty to act in the best interests of the person lacking capacity; the approach the First-tier Tribunal should take where concerns arise as to whether the alternative person is acting in the individual's best interests; and, *obiter*, the power of the First-tier Tribunal to appoint a 'litigation friend' instead of a regulation 64 alternative person in an appropriate case.

The First-tier Tribunal also erred in law by failing to make health and social care recommendations under the *Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017*. The Tribunal erred in law by regarding itself as "unable" to make recommendations because a social care assessment had not been completed by the local authority. The Upper Tribunal gives guidance as to the nature of the First-tier Tribunal's jurisdiction under the 2017 Regulations and its relationship to the health and social care frameworks.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Upper Tribunal's Decision and Reasons follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal was made in error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside insofar as it relates to health and social care only. I remit the case to be reconsidered by the same tribunal in accordance with the following directions.

DIRECTIONS

1. **This case is remitted to the First-tier Tribunal for reconsideration at an oral hearing before the same tribunal.**

2. I direct that the file be placed before a salaried judge of the First-tier Tribunal (Health, Education and Social Care Chamber) (Special Educational Needs) for case management directions to be given.

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or Judge in the Social Entitlement Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This case concerns a young person (C) with diagnoses of Autism Spectrum Disorder (ASD), global developmental delay and complex medical conditions. The appeal raises issues as to: (i) the proper handling of cases involving young people who lack, or may lack, capacity to litigate; and (ii) the First-tier Tribunal's powers under the *Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017* (SI 2017/1306) (the 2017 Regulations), including whether and to what extent it is necessary or permissible for the First-tier Tribunal to have regard to, or await the completion of, a social care assessment by the local authority before making recommendations under those Regulations.

2. The structure of this decision is as follows:-

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Factual background

3. C was born on 12 January 2006 and was 17 years old at the time of the First-tier Tribunal decision that is under appeal in this case. He has diagnoses of ASD, global developmental delay and VACTERL Syndrome. VACTERL Syndrome is a complex of medical difficulties. The principal effects of VACTERL Syndrome in C's case include heart, breathing, spinal and intestinal difficulties. He is mostly in a wheelchair, although can walk a little with a frame. He is fed by tube. He has a colostomy and catheter. C's medical difficulties are such that there is no dispute that adults responsible for him in all environments spend a lot of time meeting his medical needs.

4. C has for many years had an Education Health and Care Plan (EHCP) made and maintained by the respondent under Part 3 of the Children and Families Act 2014 (CFA 2014). Prior to July 2022 C attended a special school, but he was withdrawn from that school by his mother and provided with online education at home.

5. C was from December 2019 recognised as a 'child in need' by the respondent and social care provision had been made for him. In January 2022 the respondent's social services took the view that certain actions of C's mother had put C at risk of harm and a Child Protection Plan was put in place. The rights and wrongs of what happened in this regard are not relevant to this appeal, but what is material is that there was breakdown in the relationship between C's mother and social services from around this time.

6. With effect from 6 September 2022, C's EHCP was amended by the respondent naming a different special school in Section I. The EHCP also included healthcare provision in Section G and social care provision in Section H. Among other things, Section G specified that C's school nursing team would administer paracetamol, carry out blood tests, carry out continence assessments, obtain blood pressure

readings every other week, respond to any asthmatic symptoms and that selected education staff would be trained by the school nurse to be competent in delivering "all of his healthcare needs during school hours". Section H specified (again among other things) that C would be provided with support at home during term time for two nights per week and 5 hours on Saturdays, and support during the school holidays for three nights per week and three days per week for 6 hours per week. It stated that C has access to 100 hours short break activities and two overnight short breaks each month at Richard House for 11 months of the year.

The appeal to the First-tier Tribunal and the Tribunal's decision

7. On 24 November 2022, an appeal against that EHCP was lodged with the First-tier Tribunal. C was then aged 16 and was over compulsory school age, so by virtue of s 51(1) of the Children and Families Act 2014 (CFA 2014) (read together with the definition of "young person" in s 83(1) and "compulsory school age" in s 8 of the Education Act 1996), if he had the necessary capacity, it was he and not his mother who had the right of appeal to the Tribunal. The application form was completed with C's name as the appellant, his mother's name as his 'advocate to support him in expressing his views' and a named representative from Coram Children's Legal Centre.

8. The appeal was against the specification of C's special educational needs and provision in Sections B and F of the EHCP, the school named in Section I and recommendations were sought under the 2017 Regulations in respect of C's health and social care needs to be specified in Sections C and D and the provision to meet those needs in Sections G and H.

9. The First-tier Tribunal considered C's case over the course of two days of hearing on 8 August 2023 and 13 September 2023. C was represented by counsel. His mother and sister attended the hearing. C did not attend. The LA was also represented. The only witness at the first hearing was Bola Obode, the local authority's Social Worker. The same people were present at the second hearing, together with senior members of staff from the two schools that were in contention for Section I. The First-tier Tribunal also had before it substantial volumes of documentary evidence. For the purposes of the present appeal, it is only necessary to note that the following documentary evidence was before the First-tier Tribunal at the first hearing:

    a. A 9-page Medical Report by Dr Fatosh Bakin (Specialty Doctor in Community Paediatrics), prepared following a medical examination on 6 January 2023, in response to a request for 'statutory assessment advice' by the respondent;

    b. A report dated 7 March 2023 by Helen James (Community Paediatric Dietician) titled "Updated tube feeding plan and GP recommendations following dietitian review via telephone and email (1-9 February 2023)";

c. Enviva Complex Care Plan for C, detailing his daily medical needs and routines;

d. A 28-page report dated 21 February 2023 by Maria Duah, Independent Social Worker (ISW), prepared on the basis of consultation with C, his mother and sister. Among other things, this included (p 222) a table setting out a "typical 24 hours currently" for C's mother, a report of C's views (which included that he was anxious to return to school) and a number of recommendations for amendments to Sections D and H of C's EHCP;

e. A 20-page statement from the respondent's social worker, Ms Obode, the title of which indicated it was "in response to parent proposed care package amendments".

10. In advance of the hearing the parties had, in accordance with standard practice in this chamber of the First-tier Tribunal, co-operated in the production of a Working Document in which C's mother had set out proposed amendments to the EHCP, and the LA had responded agreeing, disputing or proposing alternative wording.

11. At the first hearing on 8 August 2023 the First-tier Tribunal noted the extent of the parties' agreement and went on to determine certain issues in relation to Sections B and F. (I note that the First-tier Tribunal purported in its orders to make its decisions on Sections B and F at this first hearing final and binding; I observe in passing that the decisions on Sections B and F were necessarily provisional as the First-tier Tribunal has no power to make a binding determination of part of the appeal in advance of determining the whole and is bound to determine the whole appeal by reference to the position as it stands at the date of the final hearing: see eg *DH and GH v Staffordshire County Council* [2018] UKUT 49 (AAC) at [19]-[20]).

12. In relation to health and social care, the Adjournment Notice recorded the issues to be considered as follows:-

> **Health and Social Care Recommendations**
>
> 12. C requested the Tribunal make recommendations to amend Sections C, D, G, H1/H2 of the EHC Plan. At the start of the hearing it was identified that the outstanding issues to be considering making a Recommendation under the Extended Appeal powers were:
>
> - Section C to include full list of his medical diagnoses
> - Section G to include provision of professional medical support when attending a social event, provision of daily physiotherapy, medical staff to deliver health care in school, not teachers
> - Section D to add details of how medical needs impact on him accessing the community
> - Section H to add social care provision to meet his needs

13. However, it decided that it was unable to deal with the appeal in relation to Sections C, D, G and H at that hearing, explaining its decision as follows:-

> **Health care needs and health provision (Sections C and G)**
>
> 24. We were invited to consider making recommendations in relation to Health Care needs on the papers. We find that we are unable to do that without having sight of the transition to adult care plan that was mentioned by Ms Obode in her evidence. We have decided to adjourn this part to tie in with the placement hearing on 13 September 2023.
>
> **Social care needs and social care provision (Sections D and H1/H2)**
>
> 25. We heard from Ms Obode that she had been working with C since September 2022. She stated that there had been some issues with the allocated social worker and she was brought in to do a transition assessment given C's age. She stated that she had had difficulties coordinating with MM to do the assessment because she was not available. She stated that she had completed part of the assessment and was waiting for MM views in response, as well as C's views.
> She said that the LA had arranged for an advocate from Barnardo's to obtain C's views but he was on leave until today. She explained under questioning that they started the assessment in April with MM, which formed the basis of the draft report. Ms Simpson confirmed with Ms Obode at the end of her evidence that the assessment would inform Section H2.
>
> 26. We were invited to consider making recommendations in relation to Social Care needs on the papers. We find that we are unable to do that without having sight of the transition to adult care plan that was mentioned by Ms Obode in her evidence. We have decided to adjourn this part to tie in with the placement hearing on 13 September 2023.
>
> 27. In closing, we heard from MM who explained that C has a life limiting condition and she wants to give him the best that life can offer. She explained her struggles with C's medical care and the effect that it was having on her trying to manage everything by herself. She explained that she wanted more assistance from Social Services, but the right kind of assistance and we encourage MM to work with them to complete the transition to adult care assessment as it is in everyone's interest for that piece of work to be completed. We will incorporate MM's remarks in relation to schooling into the final judgment on 13 September 2023.

14. The First-tier Tribunal then made orders as follows:-

    Order

    1) The appeal in respect of Sections I, C, G, D and H1/H2 is adjourned to 13 September 2023 at 10am with a one day listing
    2) The appeal in respect of Sections B and F is concluded
    3) Parties are to file any additional evidence in relation to placement by 4pm on 6 September 2023
    4) LA are to provide information in relation to the costings of the two placements by 4pm on 6 September 2023
    5) LA are to provide the draft or final transition to adult care assessment by 4pm on 6 September 2023

15. Between the first and second day of the hearing, Ms Obode endeavoured to complete with C and his mother the Moving to Adulthood Needs Assessment or 'transition plan' as the parties refer to it. However, C's mother did not attend meeting(s) arranged for the purpose of that assessment. On 6 September 2023 what was described as a 'draft plan' was therefore submitted to the Tribunal by the local authority. As much turns on the content of this document, I need to describe it in some detail.

16. The transition plan is a 27-page document in a standard format. It contains a lot of detail about C and his mother. In the "Assessor's view on needs and outcomes" box, C's current support was described. Reference was made to the social worker having attempted to complete a Mental Capacity Assessment in relation to C's education, but noted that his mother had declined that as she wanted it to be completed jointly with a psychologist. It recorded that C's mother had declined the offer of Barnardo's Advocacy services being engaged on C's behalf. It noted that C was currently on a Children In Need plan that would end when he turned 18 in January 2024, as would his current respite provision Richard House. It continued by noting that, despite efforts by the respondent, C's mother had not attended a meeting organised to discuss the transition plan and thus had not yet provided her views or indicated the transition support required for C. It stated that her input was required in order to gather information about C's needs, her needs and the support required. It noted that as a result of C's mother's 'lack of engagement' a carer's assessment had also not been completed. It quoted from an email C's mother had sent explaining that she would not be attending a meeting about the plan on 31 August 2023 as follows: "My anxiety is very high today; sorry I am not able to attend the meeting today. You asked me what kind of funding for C respite we want. What we want is a personal budget which combines both social and health needs of C". It expressed the conclusion of the respondent's panel that (despite C's mother having not identified what care she wants for C) a care package for C would be proposed, but not respite for his mother until she engaged with the local authority to enable her needs as a carer to be identified. Despite C and his mother not having been spoken to, the boxes setting out their views and comments (pp 47-48) had been completed, including quotes attributed to C and his mother's comment that she is "overwhelmed and

exhausted from caring for C over the years". The Manager's comments (p 48) record that his mother has 'declined' a carer assessment. The Manager's comments observed the urgency of the need to identify appropriate support for C as he approaches his 18th birthday.

17. By the time the parties returned for the hearing on 9 September 2023, the latest version of the working document was still that labelled "Tuesday 08 August Version 7", i.e. that prepared for the 8 August 2023 hearing. (This was provided to me in the course of the Upper Tribunal by the parties at my request.) It included at Section C text that C's mother wanted added and at Section D text that C's mother wanted added, text she wanted removed and alternative wording proposed by the respondent. Section G did not include any amendments sought, but Sections H1 and H2 included proposed amendments by C's mother, at least some of which had been taken from the ISW report of Ms Muah. This included her recommendations for "1:1 24 hour support for C's complex medical needs that can administer medication unsupervised and attend to C's complex medical needs and 24 hr care routine", a "remote control wheelchair" and "daily physiotherapy programme", together with increased respite provision (albeit at Richard House which would not be available to C after he turned 18). I observe here, in the light of a submission made by Mr Greaves, that although Richard House would no longer be available to C after he turned 18 so that that particular provision could only have lasted a further four months, I do not accept the submission that the recommendation for Willow Dene school to support C's transition to his new school was out of date. The rationale for that was explained in Ms Muah's report as being that C still recalled staff at Willow Dene and so they would be "familiar faces" to help with transition even though he had not attended that school for a year.

18. The First-tier Tribunal's final decision was issued on 18 September 2023 following the hearing on 9 September 2023. It repeats its decision on Sections B and F from the previous Adjournment Notice, then sets out its decision that the respondent's proposed school should be named in Section I (the Tribunal having concluded in the light of the evidence it had heard that the school proposed by C's mother was not suitable). In relation to Health and Social Care, it recorded the issues again in the same terms as it had in the Adjournment Notice (quoted above). Putting that together with the final version of the Working Document, it seems to me (and the parties' representatives at the hearing before me) to be most likely that the reason why the paragraph of the decision identifying the issues to be decided specifies that the appellant wants Section G to "include provision of professional medical support when attending a social event, provision of daily physiotherapy [and] medical staff to deliver health are in school, not teachers" is because the Working Document had not included any wording as proposed by C's mother. It seems likely that these items were identified by counsel orally to the Tribunal. At [26]ff the Tribunal then set out the reasons why it was refusing to make recommendations on health and social care as follows:

Health care needs and health provision (Sections C and G)

26. We were invited to consider making recommendations in relation to Health Care needs on the papers. We find that we are unable to do that without having sight of the transition to adult care plan.

Social care needs and social care provision (Sections D and H1/H2)

27. We heard from Ms Obode on 8 August that she had been working with C since September 2022. She stated that there had been some issues with the allocated social worker and she was brought in to do a transition assessment given C's age. She stated that she had had difficulties coordinating with MM to do the assessment because she was not available. She stated that she had completed part of the assessment and was waiting for MM's views in response, as well as C's views. She said that the LA had arranged for an advocate from Barnardo's to obtain C's views but he was on leave until today. She explained under questioning that they started the assessment in April with MM, which formed the basis of the draft report. Ms Simpson confirmed with Ms Obode at the end of her evidence that the assessment would inform Section H2.

28. We were invited to consider making recommendations in relation to Social Care needs on the papers. We found that we were unable to do that without having sight of the transition to adult care plan that was mentioned by Ms Obode in her evidence. We adjourned this part to tie in with the placement hearing on 13 September 2023. On 13 September, we heard again from Ms Obode that MM had not engaged with the assessment process and she still did not have a completed transition to adult care plan. She explained that she needed MM to engage with her in order to do a carer's assessment to determine the level of respite provision required and to see what the post 18 plan would look like for C. She offered to arrange for a carer to look after C whilst MM attended the meeting. She also offered to take the names of any other professionals that MM would like to be invited to the meeting to inform the assessment. Ms Obode recognised that there had been a breakdown in trust between MM and Social Care and expressed a desire to try and rebuild that trust to move forward for C.

29. MM explained to the Tribunal that she had been unable to participate in the assessment meeting as she was finding the whole process immensely stressful. She explained about the history between her and the LA and said that whenever she attends those meetings, they pick what they want to write and it goes against her, which causes her anxiety. She explained that she still wanted the Tribunal to make recommendations in respect of social care but that being blamed for failing as a parent had limited her ability to cooperate with Social Care.

> 30. We considered carefully our position in respect of Social Care recommendations and whilst we have sympathy with MM's position, we find that we are unable to make recommendations in the absence of the social work assessment. We did stress at the last hearing the importance of the assessment in enabling us to make recommendations and it is unfortunate that MM was unable to engage with that process during the adjournment period. We would encourage MM to work with Ms Obode to complete that work so that Social Care are able to put in place the right package of care for C.

19. The First-tier Tribunal then made orders that the existing wording in C's EHCP for Sections B, F and I should be replaced by that in an attached final version of the working document. Although the attached final working document thus formed part of the decision, the parties had unfortunately not included it in the Upper Tribunal bundle, but produced it at my request during the hearing. Interestingly, despite the terms of the First-tier Tribunal's decision, the final version does apparently include changes to Sections C and D of the final working document, but as the Tribunal's order does not extend to Sections C and D, those amendments to Sections C and D cannot be regarded as part of its decision.

<u>The appeal to the Upper Tribunal</u>

20. The First-tier Tribunal's decision recorded the appeal as having been brought by C, "assisted by" his mother. His mother applied for permission to appeal. First-tier Tribunal Judge McCarthy, refusing permission, noted that the his mother was "not a party or a representative in the appeal" and that "in the absence of confirmation from C that he has appointed his mother as his representative, there is a question about whether the application is properly made", but Judge McCarthy decided to proceed on the assumption that it was properly made and refused permission to appeal.

21. I granted permission to appeal on the papers on the first three grounds of appeal (identified below). In doing so, I noted as follows:-

> 5. … I am concerned that the First-tier Tribunal in this case has recorded in its decision that the appeal is brought by the appellant (C) "assisted by his mother" without having apparently made any determination as to whether the appellant has capacity to bring and conduct the appeal or not. If he lacks capacity, then by virtue of s 80 of the Children and Families Act 2014 (the CFA 2014) and regulation 64 of The Special Educational Needs and Disability Regulations 2014 (SI 2014/1530) (the 2014 Regulations) it is his "alternative person" (as defined) who has the right of appeal under that legislation and not him. Further, on appeal to the Upper Tribunal, if the appellant lacks capacity the Upper Tribunal may be required to exercise its case management powers to appoint a litigation friend to conduct the appeal under s 11 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) in his stead acting in his best interests: cf AM (Afghanistan) v SSHD [2017] EWCA Civ 1123, [2018] 4 WLR 78 and Jhuti v Royal Mail Group Ltd [2018] ICR 1077.

> 6. The reasons why I am satisfied that good cause for concern about the appellant's capacity arise such that this issue needs to be considered are: (i) because of his special educational needs as they are described in the limited documentation I currently have before me; and, (ii) because the Moving to Adulthood Needs Assessment for the appellant started on 26 June 2023 indicates that social workers are concerned that the appellant may not have capacity to decide where he wants to live. The decisions required to conduct litigation are arguably more demanding than making a decision about where to live.

22. I made directions for the parties to file evidence on the question of capacity (including a full capacity assessment if possible), and listed a case management hearing at which a determination could be made by me if need be. I encouraged the parties to co-operate to ensure the issue could be resolved. They did so. The appellant's solicitor, Mr McManamon, who is experienced in capacity assessment, conducted a thorough assessment with C and provided a witness statement detailing his observations and conclusion that C does not have capacity to conduct these proceedings, even with appropriate support from his mother and legal team. Having read Mr McManamon's witness statement, I was satisfied that he had the necessary skills, experience and ability to conduct a capacity assessment and that the assessment was carried out in a way that complied with the legal principles and best practice for such assessments under the Mental Capacity Act 2005. I concluded that C lacks litigation capacity and accordingly directed that his alternative person, being his mother MM, must be substituted for him as the appellant in these proceedings in accordance with regulation 64(2) of the 2014 Regulations. The parties had also signed a consent order agreeing to that course of action.

23. Following this, and in accordance with my directions, the parties filed their further submissions and skeleton arguments in relation to the appeal. The appellant raised a fourth ground of appeal in the course of that process, based on the First-tier Tribunal's failure to identify at first instance that C lacks capacity. By consent, that fourth ground was dealt with at the hearing before me on a 'rolled-up' basis, with the parties making their full submissions on it on the understanding that I would in this judgment decided: (a) whether to grant permission on that ground; and, if so, (b) decide its merits. In the event, for reasons set out below, I have decided that permission should be granted.

24. The four grounds of appeal are therefore:-

    Ground 1: The First-tier Tribunal's conclusion that it could not make recommendations about health care provision was irrational or perverse, alternatively it lacked adequate reasons;

    Ground 2: The First-tier Tribunal's conclusion that it could not make recommendations about social care provision was irrational or lacked adequate reasons;

Ground 3: If further evidence was required, the First-tier Tribunal unlawfully failed to give effect to the obligations on it as an inquisitorial tribunal and/or failed to comply with the overriding objective;

Ground 4: The First-tier Tribunal unlawfully failed to consider or determine the issue of C's capacity to litigate the appeal.

25. The advocates took Ground 4 first and it is convenient for me to do so too, because of its potential bearing on the other grounds.

Ground 4: The capacity issue

The legal principles applicable where a capacity issue arises

26. Under section 51(1) of the CFA 2014 the right of appeal to the First-tier Tribunal against the contents of an EHCP (or any of the other matters specified in section 51(2)) belongs to a child's parent. Once the child has ceased to be of compulsory school age and is a 'young person' as defined by section 83(1) of the CFA 2014, read together with section 8 of the Education Act 1996 (EA 1996), the right of appeal is that of the young person. There is no discretion: however much they may want to, a parent cannot conduct an appeal on behalf of a young person, unless the young person has authorised them to act as their representative, in which case (like any other representative) the parent must act on the young person's instructions. The only exception is if the young person lacks capacity to conduct the litigation. The relevant legislative provisions are in section 80 of the CFA 2014 and regulation 64 of the 2014 Regulations made thereunder. They provide as follows:-

> **80 Parents and young people lacking capacity**
> (1) Regulations may apply any statutory provision with modifications, for the purpose of giving effect to this Part in a case where the parent of a child, or a young person, lacks capacity at the relevant time.
> (2) Regulations under subsection (1) may in particular include provision for—
> (a) references to a child's parent to be read as references to, or as including references to, a representative of the parent;
> (b) references to a young person to be read as references to, or as including references to, a representative of the young person, the young person's parent, or a representative of the young person's parent;
> (c) modifications to have effect in spite of section 27(1)(g) of the Mental Capacity Act 2005 (Act does not permit decisions on discharging parental responsibilities in matters not relating to a child's property to be made on a person's behalf).
> (3) "Statutory provision" means a provision made by or under this or any other Act, whenever passed or made.
> (4) "The relevant time" means the time at which, under the statutory provision in question, something is required or permitted to be done by or in relation to the parent or young person.
> (5) The reference in subsection (1) to lacking capacity is to lacking capacity within the meaning of the Mental Capacity Act 2005.
> (6) "Representative", in relation to a parent or young person, means—

(a) a deputy appointed by the Court of Protection under section 16(2)(b) of the Mental Capacity Act 2005 to make decisions on the parent's or young person's behalf in relation to matters within this Part;
(b) the donee of a lasting power of attorney (within the meaning of section 9 of that Act) appointed by the parent or young person to make decisions on his or her behalf in relation to matters within this Part;
(c) an attorney in whom an enduring power of attorney (within the meaning of Schedule 4 to that Act) created by the parent or young person is vested, where the power of attorney is registered in accordance with paragraphs 4 and 13 of that Schedule or an application for registration of the power of attorney has been made.

Where a young person lacks capacity
64.—(1) In a case where a young person lacks capacity at the relevant time—
(a) references to a young person in the provisions of Part 3 of the Act listed in Part 1 of Schedule 3 are to be read as references to both the young person and the alternative person;
(b) references to a young person or a detained person who is a young person in the provisions of Part 3 of the Act listed in Part 2 of Schedule 3 are to be read as references to the alternative person instead of the young person; and
(c) references to a young person in these regulations listed in Part 3 of Schedule 3 are to be read as references to both the young person and the alternative person; and
(d) references to a young person in these regulations listed in Part 4 of Schedule 3 are to be read as references to the alternative person instead of the young person.
(2) For the purposes of this regulation, "the alternative person" means—
(a) a representative of the young person;
(b) the young person's parent, where the young person does not have a representative;
(c) a representative of the young person's parent, where the young person's parent also lacks capacity at the relevant time and the young person does not have a representative.

27. As can be seen, regulation 64(1) refers to lists of provisions in Schedule 3 to the Regulations. Those lists are long and there is no need to set them out here. Broadly speaking, they provide that the various obligations in the CFA 2014 and the 2014 Regulations to 'consult' or 'have regard to the views' of young person or parent (such as in sections 19(a), section 27(3)(a) and (b) and section 30(6)(a)(i) and (ii) of the Act) are to be read as requiring consultation with both the young person or parent and the alternative person, while the more 'hard-edged' rights and duties, such as the right to request an assessment for an EHCP under s 36, or to express a preference for a school to be named in Section I of the EHCP under s 39 are to be read as being references to the alternative person only. The same goes for the right of appeal to the Tribunal in section 51.

28. The effect of section 80 and regulation 64 together is therefore that if a young person lacks capacity then their "representative" must be appointed as alternative person and it is they who then has the right of appeal. "Representative" by section 80(6) means only a Court of Protection-appointed Deputy or the donee of a Lasting or Enduring Power of Attorney. If the young person does not have a representative as so defined, then by regulation 64(2)(b) the young person's parent must be appointed as alternative person (or the parent's representative if the parent also lacks capacity). (For completeness, I add that regulation 63 makes similar provision for an alternative person to act in the stead of, or together with, a parent in relation to the parent's rights under the Act in respect of children under compulsory school age.)

29. Section 80 and regulation 64 thus make express provision dealing with lack of capacity of a party to proceedings. Lack of capacity to litigate is an issue that arises in all courts and tribunals and in all areas of the law. In other contexts, including in particular in the ordinary courts under Part 21 of the Civil Procedure Rules (CPR), lack of capacity of a party to proceedings is responded to by requiring the appointment of what is called a "litigation friend". The "alternative person" under the CFA 2014 and 2014 Regulations fulfils the role of "litigation friend", but the legislation effects that by a different mechanism. In the ordinary courts, an incapacitated party under CPR 21.2(1) must have a litigation friend and, by virtue of CPR 21.3(3) and (4), no party may take any step in the proceedings before a litigation friend is appointed; any step so taken is invalid unless the court orders otherwise. In accordance with long-established authority, however (*Pink v J.A. Sharwood & Co Limited* [1913] 2 Ch. 286), the litigation friend does not become a party to the proceedings. Section 80 and regulation 64, in contrast, substitute the alternative person as a party to the proceedings.

30. What the First-tier Tribunal needs to do where an issue as to capacity arises was considered in detail by Judge Jacobs in *Buckinghamshire CC v SJ* [2016] UKUT 254 (AAC). From Judge Jacobs' decision, the following paragraphs are of particular relevance to the present appeal:

> *Lack of capacity*
> [9] This is governed by the 2005 Act. Capacity depends on the matter in respect of which a decision has to be made: s 2(1). So a person may have capacity at one time but not at another, and may have capacity in respect of one matter but not another. The matter I am concerned with is the bringing of an appeal; that is what I mean when I refer to (lack of) capacity. The young person may have capacity in respect of that, but not in respect of other decisions that have to be made in the course of the proceedings. Equally, a person may lack capacity to bring an appeal, but have capacity to make other decisions in the course of the proceedings.
> [10] A person is presumed to have capacity until shown otherwise and then only after all practical steps have been taken without success to help them make a decision: s 1(2) and (3).
> [11] Whether a person has capacity is a matter of fact for the tribunal to decide. Mr Small argued in HS/0515/2016 that the tribunal had a particular responsibility to ensure that a young person had the necessary capacity. In a sense, that is correct. Any tribunal must be alert to the possibility that a person lacks capacity on a matter. However, the overriding objective for both the First-tier Tribunal and the Upper Tribunal requires parties to co-operate with the tribunal: r 2(4) of both the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) and the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). That may involve drawing an issue to the tribunal's attention and, perhaps, providing the tribunal with any evidence it needs to resolve the issue.

31. To what Judge Jacobs said in those paragraphs, I would add two observations:-

32. First, the 'matter' in respect of which a young person's capacity needs to be assessed in this context is not just the bringing of an appeal but the ongoing conduct of it, including the decisions that ordinarily need to be made by someone

conducting an appeal, such as what changes to the EHCP are sought and how to respond to matters raised by the local authority – in other words, the sort of decisions that are necessary to give instructions to a legal representative on the conduct of an appeal. Helpful further guidance on the approach the Tribunal should take to making an assessment of capacity in this context is to be found in the decision of HHJ Christopher Dodd, sitting in the Court of Protection in *A Local Authority v GP and RP* [2020] EWCOP 56.

33. Secondly, in other contexts it has been held that the threshold at which the Court or Tribunal will be expected to pause proceedings in order to make an assessment of capacity is where there is 'good cause for concern' about the person's capacity to litigate: see *Royal Bank of Scotland v AB* (UKEAT/0266/18/DA and UKEAT/0187/18/DA) at [23]-[27], approved by the Court of Appeal [2021] EWCA Civ 345 at [12]. I see no reason not to apply that approach in this context too.

34. It was held by the Court of Appeal in *AM (Afghanistan) v Secretary of State for the Home Department (Lord Chancellor intervening)* [2017] EWCA Civ 1123, [2018] 4 WLR 78 and by the Employment Appeal Tribunal in *Jhuti v Royal Mail Group Ltd* [2018] ICR 1077 (Simler J, as she then was) that common law procedural fairness and Article 6 of the ECHR means that, even if there is no express provision in the rules of a tribunal providing for assessment of capacity and appointment of litigation friends, Tribunals have the power to take such action as otherwise the incapacitated party's right to fair participation in the proceedings is abrogated. See in particular *Jhuti* at [15]-[36] and especially at [27] which explains the point as follows:

> 27 The appointment of a litigation friend for a person lacking capacity raises an issue not just of representation but of participation. If a person who lacks litigation capacity cannot have a litigation friend to assist her, then she cannot participate in proceedings in any real sense. Without a litigation friend the individual cannot access a court or tribunal to establish a wrong and cannot obtain any remedy for an established wrong.

35. Unlike most other Tribunals that do not have any specific rules dealing with the assessment of capacity and appointment of litigation friends, in appeals under section 51 of the CFA 2014, Special Educational Needs Tribunals have the power to appoint as the 'alternative person' the specific person provided for in regulation 64 (i.e. Court of Protection Deputy, donee of a Lasting or Enduring Power of Attorney or, in default of such, the young person's parent).

36. It is a fundamental principle under the Mental Capacity Act 2005 (MCA 2005), section 1(5) that, "An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests". That principle is not, however, so far as I am aware, expressly provided for in any legislation or Court or Tribunal rules other than in the MCA 2005 where, on the face of it, it applies only for the purposes of that Act. However, it is widely accepted that a litigation friend once appointed should heed those principles in their conduct of the litigation on behalf of an incapacitated party. In the High Court under CPR 21.4(3), the Court may only appoint a person to be a litigation friend

if satisfied that they "can fairly and competently conduct proceedings on behalf of the child or protected party" and "have no interest adverse to that of the child or protected party". The High Court also has express power under CPR 21.7 to remove a litigation friend and appoint a replacement.

37. Although section 51(5) of the CFA 2014 expressly imports the definition of capacity from the MCA 2005, no other parts of the MCA 2005 are imported. That includes the "best interests" principle in section 1(5). Judge Jacobs in the *Buckinghamshire* case gave consideration to the role and duties of an alternative person appointed under regulation 64. He had no difficulty accepting that the role of an alternative person in the First-tier Tribunal is the same as that of a litigation friend in the ordinary courts, i.e. that they are to conduct the appeal on behalf of the incapacitated person in that person's best interests:

> [14] …The appeal under s 51 is brought by the alternative person in that capacity but in the best interests of the young person. For the purposes of appeals, in both the First-tier Tribunal and the Upper Tribunal, it is the alternative person who is the appellant or respondent. They are acting in respect of the young person, but not on behalf of the young person in the way an advocate would.
>
> [15] The alternative person may act on their own or use the services of a representative in the advocacy sense. An alternative person who is a representative in the s 80 sense may also rely on the services of a representative in the advocacy sense.
>
> [16] Mr Wolfe referred me to Annex 1 to the Code of Practice, which deals with young persons who lack capacity. He drew attention to one mistake or infelicity in the wording. The second paragraph says that 'in most cases where a young person lacks capacity, decisions will be taken on their behalf by their parent'. Strictly, as he pointed out, the decision is not taken by the parent on the young person's behalf. Rather, it is taken by the parent in their capacity as the alternative person and in the young person's best interests.

38. It seems to me that what Judge Jacobs described in that last paragraph as a "mistake or infelicity" in Annex 1 to the Code of Practice is probably a result of the fact that, as observed above, regulation 64 has taken the approach of substituting the alternative person *as the party* to the appeal in place of the incapacitated young person, rather than merely appointing them as litigation friend and leaving the right of appeal as that of the young person. However, I agree with the substance of Judge Jacobs' conclusion on this point. The difference between the mechanism for appointment of an alternative person in contrast to an 'ordinary' litigation friend cannot make any difference to the principle that the right of appeal remains in substance that of the young person and that the alternative person is conducting the appeal on their behalf and in their best interests and not in their own right. If that were not the case, then regulation 64 would be doing exactly what *AM (Afghanistan)* and *Jhuti* recognised would be unlawful under common law and Article 6: it would be preventing the incapacitated party from accessing, and participating properly in, their appeal rights.

39. In *Buckinghamshire* at [17] Judge Jacobs added a further point:

> [17] There is an extra consideration for a young person who is aged 16 or 17. These persons are still children for the purposes of the Children Act 1989 and their parents retain parental responsibility. Section 27(1)(g) of the 2005 Act preserves that responsibility, except for property matters. Regulation 65 of the 2014 Regulations provides that reg 64 applies despite s 27, but that does not deprive the parents of their responsibility generally.

40. This requires a little ‘unpacking’. Section 27 of the MCA 2005 sets out a number of decisions that cannot be taken under that Act by someone acting in the best interests of an incapacitated person. By section 27(1)(g) that includes “discharging parental responsibilities in matters not relating to a child’s property”. The effect of that sub-section is to prevent someone under the MCA 2005 taking a decision on behalf of a parent in the exercise of that parent’s responsibility for a child other than a decision relating to a child’s property. It only applies to decisions under the MCA 2005 so in this context it only applies, in my judgment, where the alternative person appointed under regulations 63 or 64 is a Court of Protection-appointed Deputy or donee of an Enduring or Lasting Power of Attorney, i.e. someone appointed under the MCA 2005 to exercise decisions on behalf of an incapacitated party in respect of personal welfare, property and affairs decisions under that Act (see MCA 2005, s 9 for LPOAs and s 16 for Deputies; similar provision was made for EPOAs previously). Normally, section 27(1)(g) is a ‘for the avoidance of doubt’ provision to make clear that such persons cannot exercise parental responsibility over a child (under 18) in the stead of an incapacitated parent, save in relation to the child’s property.

41. The conduct of an appeal under section 51 of the CFA 2014 will include matters relating to a child that would normally fall within the ordinary exercise of parental responsibility and thus which the Deputy or donee would be prohibited from dealing with on behalf of a parent by section 27(1)(g) MCA 2005. Regulation 65 of the 2014 Regulations in my judgment therefore just makes clear that is not the case and that, despite section 27(1)(g) MCA 2005, the Deputy or donee really can exercise the powers that are granted to them under the CFA 2014 and the 2014 Regulations. Contrary to what Judge Jacobs said in *Buckinghamshire*, therefore, regulation 65 has no bearing on a case such as the present where the young person’s parent is not incapacitated and no Court of Protection Deputy or donee is involved.

42. However, the broader point made by Judge Jacobs in that paragraph is correct: a parent of a young person who is still a child for the purposes of the Children Act 1989 will retain parental responsibility for them, albeit that the parent’s rights of parental responsibility will be of minimal significance in the statutory context of Parliament having passed the right of appeal from parent to child on the child ceasing to be of compulsory school age. That is especially so, given that, as is well established in other contexts, as children mature, the “dwindling right” of parental responsibility tends to fade from a right of control to (as they approach adulthood), “little more than advice” (*Hewer v Bryant* [1970] 1 QB 357). Nonetheless, the fact that rights of parental responsibility still exist for parents of

young persons aged 16 and 17 is of some relevance to this appeal, and is a point I return to when setting out my conclusions on this ground of appeal below.

The parties' submissions on Ground 4

The appellant's submissions

43. Mr Wyard referred to the legal framework and relevant authorities I have mentioned above. He submitted that it was clear from those authorities that, where a young person lacks capacity, it is unfair, and an error of law, to proceed with an appeal without appointing an alternative person as required by regulation 64 of the 2014 Regulations. He submitted that there was ample material before the Tribunal from which it should have appreciated that a capacity issue arose, in particular C's diagnosis of global developmental delay, his difficulties with communication and interaction generally, the references in the transition plan to attempts by the social workers to assess C's capacity as to where to live, the reference to the MCA 2005 in the statutory medical advice, and the fact that C was not participating in the appeal. He pointed out that both First-tier Tribunal Judge McCarthy and I had immediately noticed that a capacity issue arose in this case.

44. Mr Wyard argued even where the alternative person is prescribed to be the young person's parent, it makes a material difference if they are appointed as alternative person rather than just 'assisting' the young person. That is because of the obligation he submits lies on an alternative person, as on a litigation friend, to conduct the proceedings in the best interests of the young person. He submitted that if the First-tier Tribunal in this case had recognised that his mother was under an obligation to conduct the proceedings in C's best interests, this would (or should) have made a material difference to the approach it took to dealing with the health and social care recommendations, where the First-tier Tribunal effectively allowed C's mother's non-co-operation with the respondent's assessment process to prejudice C's position in the appeal. He pointed out that, when adjourning the appeal after the first hearing, the First-tier Tribunal at [27] made clear that it was in everyone's interests for the transition plan to be completed. He argued that by not co-operating with that process, C's mother was not conducting the litigation in his best interests, and that meant the First-tier Tribunal would have had to take steps to safeguard C's interests so as to ensure the proceedings were fair and his Article 6 rights were respected. He submitted that could extend to the First-tier Tribunal removing his mother as alternative person and appointing someone else, such as C's sister, who was better able to represent C's best interests. He submitted that *AM (Afghanistan)* and *Jhuti* make clear that these powers can be read into a Tribunal's rules where necessary to ensure fairness in a particular case where an individual is incapacitated.

The respondent's submissions

45. Mr Greaves in response submitted that it was clear from [11] of the *Buckinghamshire* case that the onus was not all on the Tribunal in terms of identifying a capacity issue, the parties also bore a responsibility. Especially where a party was represented by solicitor and counsel, he submitted the Tribunal was right, applying the presumption of capacity in the MCA 2005, to proceed on the basis that solicitor and counsel were satisfied that they were properly instructed and that their client had capacity. He therefore submitted that although it was now clear that C did not have capacity, it was not an error of law for the Tribunal to fail to appreciate and deal with this at the time. In the alternative, he submitted that any error of law on the part of the Tribunal was not material because it would have made no difference. The reality was that C's mother had conducted the appeal before the First-tier Tribunal and there was no reason to suppose that she would have conducted it any differently if she had been appointed as C's alternative person. He submitted that it was fanciful to suggest that the Tribunal either would, or should, have approached the question of whether or not to make health and social care recommendations any differently if MM had been appointed as alternative person. The Tribunal at [30] of its decision expressed sympathy with MM's difficulties in engaging with social services and so evidently did not consider that she was necessarily acting inappropriately, just that the result of her actions was that the Tribunal was not in a position to make health and social care recommendations. He submitted that it was doubtful that the Tribunal would have had power to remove MM as an alternative person in any event, given the terms of reg 64 of the 2014 Regulations.

Why the Tribunal erred in law in failing to conduct a capacity assessment and appoint MM as alternative person

46. In considering this ground of appeal, I have conscientiously endeavoured to see matters from the point of view of the First-tier Tribunal who considered this appeal and who did not, as I did when I first opened this case, have the benefit either of First-tier Tribunal Judge McCarthy's observations or (until the second day of the First-tier Tribunal hearing), the draft transition plan with its references to the social worker's efforts to carry out capacity assessments for C. I have asked myself whether, on the basis of the material before the First-tier Tribunal, it ought either on the first or second day of the hearing, to have recognised that there was 'good cause for concern' that C did not have capacity to conduct the appeal so that, applying the legal principles I have set out above, the Tribunal should have assessed C's capacity and determined that MM should be appointed as his alternative person.

47. Despite my best efforts to take a generous approach in accordance with the general principles applicable to appellate Tribunals, I am satisfied that this was a case where the fact that C probably did not have capacity to conduct the appeal 'shouted out' from the papers. The Tribunal ought to have recognised that this was an issue just from reading the bundle and before even starting the first day

of hearing. That is because of C's diagnosis of global developmental delay and the general description of his learning and communication difficulties.

48. Once the hearing had started and C was not participating in the hearing, the onus was in my judgment on the Tribunal to satisfy itself that the appeal was being properly conducted by him or on his behalf. This is an important part of the Tribunal's duties when dealing with appeals concerning young persons because, as the legal principles I have set out above make clear, if a young person does have capacity, it is important that the Tribunal ensures that they and not their parent conduct the appeal and make the decisions in the proceedings (unless the Tribunal is satisfied that the young person has capacity and has properly authorised their parent to conduct the appeal for them). Equally, if the young person does not have capacity, then regulation 64, as well as common law procedural fairness and Article 6 of the ECHR, require the Tribunal to ensure that the correct person is appointed to conduct the appeal on their behalf acting in their best interests. As is clear from the legal principles set out above, a person who lacks capacity is, essentially by definition, unable to participate in the proceedings and continuing without safeguarding their rights by the appointment of a litigation friend will be unfair.

49. Although professional legal representatives obviously also have a responsibility to ensure that their client has capacity and is able properly to give them instructions, and to alert the Tribunal if there is any issue in that regard, the Tribunal cannot rely on the parties' representatives to do this, however experienced those representatives may be. That is particularly so in the context of appeals under section 51 of the CFA 2014 where it is (in my experience) unfortunately relatively common for parties to forget or overlook the statutory change in appellant from parent to young person at the end of compulsory schooling. It is the Tribunal's responsibility to ensure a fair hearing.

50. That does not mean, of course, that the Tribunal should ignore the fact that there is a legal representative. A Tribunal faced with this situation should always begin by making respectful enquiries as to whether the legal representative has considered the issue of who their client is (or should be) and their capacity. However, in this case, where it was in my judgment obvious from the papers that C probably lacked capacity (and now, in the light of my decision on this appeal, clear that he did lack capacity), I am satisfied that the Tribunal's failure to pause the proceedings, assess C's capacity and appoint an alternative person constituted an error of law.

<u>Whether the Tribunal's error was material</u>

51. The next question is whether that error of law made any material difference to the hearing. There may be many cases in this context where it can truly be said that the fact that the appeal proceeded with a wrongly named appellant or without an alternative person being appointed made no material difference to a hearing. In cases where there is no suggestion of a divergence of interests as between parent and young person and the parent conducts the appeal in the normal way, as most parents do, with their son or daughter's best interests at heart, it will not

make any material difference whether the appeal has formally been brought in the correct name or not. This case was not, however, quite so straightforward because of the breakdown in relationship between MM and social services, the fact that MM had not (whatever the reasons for that) met with social services to discuss the transition plan and the consequences that had (a) for the position adopted by the respondent of maintaining that the transition plan could not therefore be finalised and (b) the Tribunal's consequent decision that social care recommendations could not be made.

52. In those circumstances, it seems to me that it became a relevant factor for the Tribunal to take into account in deciding what to do in relation to the health and social care recommendations that MM as C's alternative person ought to have been conducting the appeal on his behalf and in his best interests. To the extent that her actions had in the view of the Tribunal led to a situation where it was unwilling to deal with part of the appeal, the Tribunal needed to consider whether MM (who it should have appointed as alternative person) had failed to act in C's best interests and, if so, it needed to take that into account in deciding, in accordance with the overriding objective, how to proceed to do justice in the case.

53. I emphasise that I do not mean that the Tribunal needed to take over from MM and take decisions in C's best interests in her stead. Indeed, I am clear that it would be an error of law for the Tribunal to do that. Unlike the Court of Protection, the First-tier Tribunal does not exercise a 'best interests' jurisdiction. It cannot exercise the powers of the court in respect of a person without capacity in the way that the Court of Protection can under the MCA 2005, or the High Court can under its inherent jurisdiction.

54. However, what it can do, and in my view needs to do, if circumstances arise that call into question whether an alternative person is acting in the best interests of the incapacitated person in their conduct of the appeal, is to consider those circumstances. If it concludes that the alternative person has not in a particular respect acted in the incapacitated person's best interests, it must recognise that fact and take it into account as appropriate in its case management and substantive decision-making. I return to the issue of what steps the Tribunal should take in such circumstances after considering one specific option raised by the appellant in this case.

<u>Whether the Tribunal could have appointed someone else to act as alternative person instead of MM</u>

55. Mr Wyard for the appellant in this case submits that if the Tribunal considered that MM was not acting in C's best interests, it ought to have removed her as alternative person and appointed a replacement litigation friend (such as C's adult sister). I indicated in the course of argument that this might not be the appropriate case in which to decide whether the First-tier Tribunal could have taken that course. That was in part because the point has only been raised as a subsidiary argument in relation to whether the Tribunal's error of law in failing to appoint an alternative person was material and I questioned whether it would be necessary for me to decide the point in order to determine the appeal. It was also in part

because it seemed to me that (as a result of a combination of this being a late ground of appeal, not responded to in the respondent's skeleton argument and Mr Greaves having stood in at the last minute as counsel for the respondent) the parties had not come prepared to address this argument in the detail that would be necessary to decide it.

56. However, as Mr Wyard has advanced the argument, and it is a novel point which may arise in another case and which may yet be relevant to the further handling of this case, it seems to me to be helpful to record in brief terms the nature of the argument, and the conclusions that I have reached on it, although as will be seen I have in the event been able to determine this ground of appeal on an alternative basis so my conclusions are *obiter* (not binding).

57. As already noted, the First-tier Tribunal's jurisdiction under the CFA 2014 is unusual among Tribunals in that regulation 64 of the 2014 Regulations makes express provision for the appointment of what are in substance litigation friends. Most other Tribunals do not have any express provision in their rules or governing legislation. The issue for the Court of Appeal in *AM (Afghanistan)* (see above discussion of the relevant legal principles) was whether, despite the lack of specific provision in the rules of the Immigration and Asylum Chamber, the Tribunal did have power to appoint a litigation friend: ibid at [38]-[44]. The position was likewise in *Jhuti*. In *Jhuti*, Simler J (as she then was) had to consider the decision of Underhill J (as he then was) in *Johnson v Edwardian International Hotels Ltd* (UKEAT/588/07) in which he held that the Employment Tribunals did not have power to appoint litigation friends because it was not covered by their rules. Simler J reversed Underhill J's decision (with his blessing, as he made clear in *AM (Afghanistan)* at [48]). In doing so, she referred to the general principles of legislative interpretation as follows at [27]-[32] (I quote again the first half of [27] for context and add my own emphasis):

> 27. The appointment of a litigation friend for a person lacking capacity raises an issue not just of representation but of participation. If a person who lacks litigation capacity cannot have a litigation friend to assist her, then she cannot participate in proceedings in any real sense. Without a litigation friend the individual cannot access a court or tribunal to establish a wrong and cannot obtain any remedy for an established wrong. It seems to me in those circumstances that it would be incompatible with the common law duty of fairness to read section 7 of the 1996 Act or the power to make a case management order in rule 29 , as not empowering employment tribunals to appoint a litigation friend in a case where a litigant lacks litigation capacity.
> 28. I can see no necessary justification for construing the 2013 Rules in a way that amounts to an impediment or obstacle to the right to access justice to achieve a remedy for a legal wrong for those who lack litigation capacity but wish to vindicate their legal rights. Consistently with the principle established in R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539 that a statutory power, although expressed in general terms, should not be construed to authorise acts that infringe fundamental principles of common law, Parliament is presumed not to have intended to curtail such rights **unless that intention is clearly indicated either expressly or by necessary implication, and is reasonably necessary to achieve a legitimate aim**.

> 29. I reach the same conclusion by reference to the strong interpretive obligation under section 3 of the Human Rights Act 1998 . On this issue the Secretary of State adopts a neutral stance, but it seems to me, in agreement with the claimant and the Law Society, that to interpret rule 29 as permitting the appointment of a litigation friend in an appropriate case, accords with section 3 and goes **with the grain of the legislation and not against it**.
> 30. The primary and delegated legislation with which I am concerned regulates employment tribunal procedure in accordance with the overriding objective. That objective, which includes the requirement to deal with cases fairly and justly and to ensure that parties are on an equal footing, cannot be achieved in the case of a party who does not have capacity to conduct litigation without some means of enabling such a party to access justice to vindicate their rights. Other examples of rules performing a similar function are found in the 2013 Rules and regulate matters of practice and procedure (see for example rules 35 and 41). Here, the claimant has a legitimate interest in the proceedings in the employment tribunal, which began at a stage when she had capacity. She has a cause of action she wishes and is entitled to vindicate. She has common law rights to a fair trial together with rights under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms . If there is no means by which a litigation friend can be appointed in the employment tribunal, she will be put in a materially different position to other litigants acting without a disability and who have capacity. I can see no legitimate aim to be achieved, nor do I consider that the absence of an avenue for appointing a litigation friend in these circumstances can be regarded as a proportionate means of achieving a legitimate aim.
> …
> 32. Accordingly, while there is no express power provided by the 1996 Act or the 2013 Rules made under it, the appointment of a litigation friend is within the power to make a case management order in the 2013 Rules as a procedural matter in a case where otherwise a litigant who lacks capacity to conduct litigation would have no means of accessing justice or achieving a remedy for a legal wrong.

58. It is also notable that both the Court of Appeal in *AM (Afghanistan)* (in particular Underhill LJ at [49]) and Simler J in *Jhuti* (at [37])) emphasised the importance of rules being introduced for all Tribunals to regulate the handling of cases where a litigant lacks capacity. As Underhill LJ put it:

> 49 …. a litigation friend has wide authority to dispose of a party's legal rights, either directly by bringing and/or compromising proceedings, or indirectly by the way in which he or she conducts those proceedings. Those powers ought to be clearly defined and regulated, as they are by rule 21 in cases that come under the Civil Procedure Rules. It is very unsatisfactory that they should be exercised simply on the basis of the general case-management powers …

59. In the light of the approach taken in those authorities, accordingly, I was concerned that the existence of section 80 of the CFA 2014 and regulation 64 of the 2014 Regulations might mean that regulation 64 should be regarded as setting out the limits of the Special Educational Needs and Disability Tribunal's powers in terms of appointing litigation friends for incapacitated young persons

or parents in this jurisdiction. It seemed to me that if the legislature had seen fit to leave the First-tier Tribunal with no discretion as to who to appoint as a litigation friend in cases under the CFA 2014, there was an argument that neither the common law rules of legislative interpretation, or section 3 of the HRA 1998, would enable the Tribunal to appoint a litigation friend otherwise than the alternative person as stipulated by regulation 64 and section 80.

60. However, on reflection, I accept Mr Wyard's submission that, in principle, in an appropriate case, the Tribunal could appoint someone as a litigation friend in an appeal under the CFA 2014 who is not the alternative person required to be appointed under regulation 64. I arrive at that conclusion through a number of steps as follows:- first, because the Special Educational Needs and Disability Tribunal does not only exercise the jurisdiction under the CFA 2014, it also has jurisdiction over claims of disability discrimination in schools under the Equality Act 2010 (EA 2010). Its procedure, like that of the other Tribunals in the Health, Education and Social Care Chamber, is governed by The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699) (the FT Rules). Those rules contain no provision about capacity or appointment of litigation friends. In respect of all cases other than appeals under the CFA 2014, accordingly, the reasoning of the Court of Appeal in *AM (Afghanistan)* and the EAT *Jhuti* leads irresistibly to the conclusion that the First-tier Tribunal (Health, Education and Social Care Chamber) must generally have power, where a litigant lacks capacity, to appoint a litigation friend.

61. If the Tribunal has that case management power generally, the question then becomes whether regulation 64 'cuts down' that power in cases under the CFA 2014. It seems to me that, up to a point, it does. That is because regulation 64 is in mandatory terms and, in most cases, applying regulation 64 will result in an outcome that is procedurally fair and Article 6 compliant. As such, in most cases, the Tribunal should not resort to the residual, implied case management power to appoint a litigation friend under the FT Rules. I say 'should' because it seems to me there are two alternative analyses of how the Tribunal's powers work in this respect. First, it could be said that where regulation 64 applies, the residual, implied case management power does not exist as it is not needed to ensure fairness or compliance with Article 6 and therefore does not fall to be 'read into' the FT Rules in accordance with the principles discussed in *Jhuti*. Alternatively, secondly, it could be said that the implied case management power exists but it would be inappropriate to exercise it because the express provisions of the legislation prescribe what should happen in such cases and should therefore take precedence. In any event, it seems to me that, if applying regulation 64 resulted in a situation that was unfair or not Article 6 compliant (such as might occur if an alternative person persisted in conducting the appeal in a way that clearly conflicted with the interests of the incapacitated party), the reasoning in *AM (Afghanistan)* and *Jhuti* would lead to a conclusion that the Tribunal has power to remedy that by appointing a replacement litigation friend of its motion.

What a Tribunal should do where an alternative person may not be acting in the young person's best interests

62. However, even if I am right in my foregoing analysis and the Tribunal does have power to appoint a replacement alternative person other than the one prescribed by regulation 64, I am satisfied that the present case was not one where it would have been necessary for the Tribunal to consider replacing MM as C's litigation friend. In my judgment, such a course in this case would have been akin to using the proverbial sledgehammer to crack a nut. The removal of a parent as alternative person and appointment of a different litigation friend would be a significant step. While a court or Tribunal must be astute to ensure that a litigation friend (or alternative person) is conscious of their duty to act in the best interests of the incapacitated party, and must take corrective steps if they are seriously concerned that the litigation friend is not complying that with duty (including, at least in the ordinary courts, removing a person as litigation friend if necessary), in my judgment fairness and the overriding objective requires that alternative steps are considered first before resorting to that more drastic course. That is especially important in the context of cases under CFA 2014 where the parent will (if the young person is under 18) still have parental responsibility for the young person and is, in any event, a person who, given their very close relationship with the young person, has their own independent and legitimate interest in the proceedings (albeit an interest strictly subordinate to that of the young person).

63. In cases where concerns arise as to whether a parent appointed as alternative person is acting in the best interests of the young person, it seems to me that the Tribunal should first consider what it can do to 'neutralise' that conduct so that the conduct of the alternative person does not prejudice the young person's participation in the proceedings. This is a matter of ordinary, pragmatic case management. The Tribunal might begin, for example, by explaining to the alternative person their duty to act in the young person's best interests. That might be sufficient to prevent the conduct. In this case, the Tribunal went some way towards doing that on the first day of the hearing when it explained that it was in 'everyone's interests' for the transition plan to be completed, but that very general warning is not in my judgment a substitute for explaining properly to a parent who is (or should be) acting as alternative person the nature of their 'best interest' duties.

64. In some cases, the Tribunal may find that it is possible simply to ignore any prejudicial aspect of a parent's conduct so that it has no adverse effect on the young person. Alternatively, the Tribunal might be able to afford an opportunity for any prejudice to be remedied. For example, in this case, potentially, time could have been allowed at the hearing for MM to put forward her views on the transition plan and for the local authority's social worker to respond. I do not suggest that this was the only legitimate way forward in this case. It is merely an example of a step that might have been taken.

65. What is important, and what makes the Tribunal's error in failing to identify the capacity issue and appoint MM as alternative person a material error in this case, is that the Tribunal was as a result unable to take into account the fact of C not

having capacity and MM's duties as alternative person when deciding how to deal with the health and social care part of this appeal. As a result of its legal error, the Tribunal failed to take into account that MM should have been conducting the appeal as C's alternative person on his behalf in his best interests and, where circumstances were such that it appeared she may not have done so, it should have considered the nature and extent of any such failing and taken that into account in deciding how to case manage and how to dispose of the proceedings.

66. For all these reasons, ground 4 of the appeal succeeds.

Grounds 1, 2 and 3: health and social care

67. These grounds of appeal are each concerned with whether the Tribunal erred in law in deciding it was "unable" to make recommendations in respect of health and social care given that the transition plan had not been completed. The Tribunal itself concluded its judgment by encouraging C's mother to work with the local authority social worker to "complete that work so that Social Care are able to put in place the right package of care for [C]". In order to determine these three grounds of appeal, and give appropriate guidance to Tribunals as to the approach to be taken to the 2017 Regulations where social services assessments have not been completed, it is necessary to consider in some detail the relevant legislative provisions, including the health and social care frameworks. This unfortunately requires a large legal area to be traversed in order to answer what are, in the end, the relatively short points arising in this particular appeal. Before considering that framework, I set out a summary of the parties' submissions on these grounds.

<u>The parties' submissions on Grounds 1, 2 and 3</u>

<u>The appellant's submissions</u>

68. The parties both provided helpful written skeleton arguments, on which they elaborated through oral submissions at the hearing. Following the hearing, they also provided at my request a joint document dealing with the healthcare and social care framework and set out further submissions in the light of their consideration of those frameworks. What follows here is my composite summary of their submissions on Grounds 1, 2 and 3.

69. On Grounds 1 and 2, Mr Wyard for the appellant submits that the First-tier Tribunal acted irrationally in declining to make recommendations in respect of both healthcare and social care. Mr Wyard in particular relied on [47] and [55] of Judge Ward's decision in *VS and anor v Hampshire County Council* [2021] UKUT 187 (AAC) for the general proposition that a Tribunal ought to be willing to make recommendations even where the evidence is thin, so as not to frustrate the purpose of the 2017 Regulations. He submits that the local authority is wrong in suggesting that the case law dealing with the cases in which the local authority refused to implement recommendations (discussed below) means that there is a 'high burden' on local authorities if recommendations are made. He submits that this is not a proper characterisation of the legal position in terms of the obligations

that recommendations place on local authorities, and that this is not a reason for a Tribunal to exercise caution before making recommendations.

70. Mr Wyard points out that, when the First-tier Tribunal adjourned on 8 August 2023, it explained that it did not consider that it could make health or social care recommendations without sight of the transition plan. The First-tier Tribunal ordered the LA to provide the “draft or final” transition plan. The First-tier Tribunal thus recognised that it might not be possible for the local authority to produce a final plan in the time available. The terms of its order suggest that in principle it considered that a draft of the transition plan would be sufficient to enable it to resolve the appeal. By the time of the final day of hearing, the First-tier Tribunal thus had exactly what it asked for, the draft transition plan.

71. As to the plan itself, he submitted that the draft document as it stands is a comprehensive assessment. It addresses in full what C’s needs are, but not what MM’s needs for support are because she had not co-operated with the assessment. Mr Wyard drew my attention to the other evidence that the Tribunal already had, including Health Advice, the local authority social worker’s witness statement and the independent social worker’s report. He submitted this was comprehensive, detailed, thorough evidence, including (in the independent social worker’s report) recommendations for amendments to the social care elements of C’s EHCP.

72. As to Ground 1 (healthcare recommendations), Mr Wyard noted that the First-tier Tribunal decided that it was unable to make recommendations for healthcare because it had not had ‘sight’ of the transition plan. This was perverse, because it had received the draft plan. It was irrational for it not to proceed to make recommendations when it had asked for a draft plan and got that. It was irrational for it to refuse to make recommendations on healthcare because it had not received a final plan relating to social care. Mr Wyard submitted it was not good enough for the LA to suggest that the social care report would have a bearing on health, as health recommendations are distinct and separate. Section 22(1) of the Care Act 2014 (CA 2014) (discussed below) prevents the local authority from making health care provision save where it is of the sort that can reasonably be expected to be provided by the local authority, so a decision on healthcare could not have been dependent on social care, and as the inclusion of healthcare provision requires the agreement of the responsible commissioning body and not the local authority (reg 12(2) of the 2014 Regulations) the Tribunal should just have proceeded to make healthcare recommendations regardless of the local authority’s position on social care. In any event, the Tribunal did not say that the reason why it was not making a recommendation on healthcare was because it overlapped with the social care issues, or anything like that.

73. Mr Wyard submits that the local authority is also wrong to suggest that, reading the decision as a whole, the real reasons for refusing to make healthcare recommendations were the same as the reasons for refusing to make social care recommendations. The two are separate, and that cannot be assumed or inferred. Insufficient reasons for not making healthcare recommendations were given. There is no explanation as to why the Tribunal considered that the

evidence that it did have was insufficient. The Tribunal has failed to explain why the parties have won or lost.

74. As to Ground 2 (social care), Mr Wyard submits that it was irrational for the local authority to refuse to make social care recommendations just because there was no final transition plan completed by the local authority. He pointed out that even the local authority is not required to complete a carer's assessment before it can make provision for a young person: under the statutory framework (discussed below), the carer's assessment is separate and a carer may refuse to be assessed, in which case the local authority cannot assess them and would in fact have to complete the assessment for the young person without the carer's involvement. He further submitted that, despite the fact that transition plan was not 'final' so far as the local authority was concerned, it actually included a wealth of evidence about C's needs on the basis of which (together with the other evidence in the bundle) the Tribunal could have made recommendations as to social care. He submitted the Tribunal's refusal to do so was irrational and/or inadequately reasoned as the mere fact that the social work assessment had not been finalised was not an adequate reason for not making recommendations.

75. As to Ground 3, Mr Wyard submits that the First-tier Tribunal must exercise an inquisitorial jurisdiction in relation to health and social care in the same way as it does for education. He refers to *W v Gloucestershire County Council* [2001] EWHC Admin 481, *MW v Halton Borough Council* [2010] UKUT 34 at [36] and *Birmingham CC v KF* [2018] ELR 547 at [19]. He submits that if the Tribunal was right to consider that the evidence it had was still insufficient to enable it to make recommendations as to healthcare and social care, then the First-tier Tribunal failed to give effect to the obligations on it as an inquisitorial tribunal by adjourning the hearing. There are three options if the evidence is thin (*VS* at [55]): the Tribunal can make recommendations doing the best it can, it may refuse to make recommendations, can delay making recommendations by adjourning. The First-tier Tribunal is acting inquisitorially in relation to this jurisdiction as it is in relation to other cases under the CFA 2014. He submits that this applies equally to the First-tier Tribunal's jurisdiction over health and social care as it does to its special educational needs jurisdiction. Mr Wyard referred to *AJ v London Borough of Croydon* [2021] ELR 555 at [140]-[141] in support of his argument that a Tribunal dealing with a case under the 2014 Act *"cannot proceed on a purely adversarial basis, but [has] a duty to act inquisitorially, when the occasion arises by making sure they have the necessary information on which to decide the issues before them, rather than rely entirely on the evidence adduced by the parties"*. Mr Wyard submits that the First-tier Tribunal should have exercised its inquisitorial remit in order to decide whether or not it should adjourn again or obtain further evidence orally at the hearing. Alternatively, it should at the least have addressed its mind to that point and recorded its reasons for not ordering a further adjournment or seeking further evidence orally in the decision: see *AJ* at [142].

76. As to the local authority's submission that it was the fault of MM and C that the Tribunal did not have the evidence it needed, Mr Wyard submitted that C who lacked capacity could not be held responsible, while MM's difficulties should not have been allowed to adversely impact on C. It was in this respect that Mr

Wyard's submissions overlapped with his submissions on Ground 4 that I have already dealt with.

The respondent's submissions

77. Mr Greaves for the respondent submitted that it was not irrational for the First-tier Tribunal to exercise its power to make recommendations. The Tribunal had made clear what evidence it required, it did not receive it and so the Tribunal was entitled to decline to make recommendations. Because the Tribunal has a mere power rather than a duty to make recommendations under the 2017 Regulations, not making recommendations is not an abdication of responsibility in terms of decision-making. The burden on a local authority if it decides not to implement recommendations is significant and recommendations should not therefore lightly be made: see, in particular, *R (LS) v Merton* at [58]. *VS* speaks of the possibility of frustrating the purpose of the Regulations, but also observed ([55]) that 'the best should not be made the enemy of the good'. *VS* on its facts at [56] makes clear that the First-tier Tribunal in that case had little option but to deal only with the element of social care provision in respect of which it did have evidence. Refusing to make recommendations in relation to social care does not deprive the appellants of a right of appeal. The parties can legitimately be left to agree matters of health and social care because there is no direct right of appeal against those parts of the plan.

78. As to Ground 1, Mr Greaves submitted that the health and social care issues were closely related and they overlap. He referred me to the multiple references in the bundle where health and social care are considered together. He referred to the statutory prohibition in s 22(1) of the CA 2014 on the local authority making healthcare provision unless it is ancillary to its social care functions and the sort that the local authority is expected to provide. He submitted that it followed from that that healthcare and social care needed to be considered together in order to understand what provision was properly social care, what was healthcare and to ensure that provision was not unnecessarily duplicated.

79. Mr Greaves submitted that Grounds 1 and 2 included a reasons challenge, which relied on an artificial separation of the conclusions on healthcare and social care. It might have been stylistically preferable to put the conclusions about healthcare after social care, but it is clear that the one follows from another and must be read together. It was also clear in context (especially [29]-[30]) that the First-tier Tribunal was not saying at [26] that it had not seen the draft transition plan, only that it did not have the final plan. The standard of reasons in this context is not onerous: see *H v East Sussex County Council and ors* [2009] EWCA CIv 249, [2009] ELR 161 at [60].

80. In terms of what was sought by way of healthcare recommendations, they had not been included in the Working Document and what was in the First-tier Tribunal decision was vague in terms of what was sought by way of healthcare recommendations. It is not possible to tell what was being sought by way of healthcare as nothing has been included in the Working Document to reflect what was the parent's case as recorded in the Tribunal's decision. Normally parents

are complaining of a failure of joined up thinking, here the complaint is that the Tribunal should have separated matters. The mere fact that a draft transition plan had been filed did not compel the Tribunal to make recommendations on the basis of it. The Tribunal could not appropriately have relied on the health evidence that it did have as it needed up to date information.

81. As to Ground 2, the Tribunal was entitled to consider that the evidence it had did not justify making recommendations. The Tribunal had made clear when ordering the first adjournment that it was important that the transition plan was completed. The Tribunal only ordered a 'draft or final' plan because it was not in their control whether it was completed. It did not follow that they considered a draft plan would be of equal value to a final plan. It is unreal to consider that there is no qualitative difference between a draft plan and a final plan and that a finalised plan was not required. What was being sought by way of social care recommendations came from the independent social worker's report of 8 February 2023, but that was based on out of date material, and the provision sought about transition to post 16 and Richard House is also out of date. What the Tribunal was wanting was a post-18 plan. There was some evidence as to social care but it was thin evidence. There were a range of options open to the Tribunal. One of those was not to make a recommendation and it was rational for the Tribunal not to make a recommendation. The reasons given were more than adequate.

82. As to Ground 3, Mr Greaves agrees that the First-tier Tribunal exercises an inquisitorial jurisdiction in relation to health and social care, but he submits that Ground 3 is a perversity challenge to a case management decision. The Tribunal's primary role is to deal with educational matters. It was rational and reasonable not to adjourn for a second time. Although the Tribunal's jurisdiction in relation to health and social care recommendations is an inquisitorial one, it could not be an error of law not to adjourn for a second time. The Tribunal can be taken to have been aware of its power to adjourn and it is implicit from the fact that it did not that it would have considered whether to do so or not and decided it was not necessary. Baker J in *W v Gloucestershire County Council and ors* [2001] EWHC Admin 481 at [15] makes clear that the inquisitorial duty only applies "when the occasion arises". In this case, Mr Greaves submits that an adjournment was not required by the overriding objective. *VS* makes clear that delay may well be inappropriate where a child's education is at stake. C had been out of education and had lost an academic year of education and wanted to get back into education as soon as possible. As part of the proportionality analysis, it was relevant that the Tribunal had considered why MM had not co-operated and there was no reason to think that she would co-operate if an adjournment was granted. Also, C was represented and did not seek an adjournment. Finally, it was not appropriate for the Tribunal to obtain the evidence that it needed by questioning, it was entitled to have regard to the fact that an assessment had not been carried out and did not need to undertake an assessment itself as part of the hearing. Where parties are represented, the inquisitorial obligations are lessened.

The relevant legislative background under the CFA 2014 and 2014 Regulations

83. Education, Health and Care Plans (EHCPs) under Part 3 of the CFA 2014 replaced Statements of Special Educational Needs (SEN) under Part 4 of the Education Act 1996 (EA 1996). Statements of SEN dealt with a child's special educational needs in Part 2, the provision to meet them in Part 3 and the school or institution at which that provision was to be made in Part 4. Social care and healthcare needs were dealt with compendiously and relegated to Parts 5 and 6. There was no specific statutory duty on the local authority or health commissioners to make the provision specified in Part 6 of a Statement of SEN and no specific mechanisms for challenging or enforcing Parts 5 and 6.

84. EHCPs, as the name indicates, were intended to reflect a more joined-up approach to the needs of children and young people. The sections of the former Statements of SEN were re-ordered, so that all of a child's needs (educational, health and social care) were dealt with in sequential sections near the beginning of the Plan and then, after an outcomes section, the provision required to meet those needs was also grouped together in sections in the second part of the plan. The relevant legislative provisions governing the format of an EHCP are in section 37 of the CFA 2014 and regulation 12 of the 2014 Regulations as follows:-

> **37 Education, health and care plans**
> (1) …
> (2) For the purposes of this Part, an EHC plan is a plan specifying—
> (a) the child's or young person's special educational needs;
> (b) the outcomes sought for him or her;
> (c) the special educational provision required by him or her;
> (d) any health care provision reasonably required by the learning difficulties and disabilities which result in him or her having special educational needs;
> (e) in the case of a child or a young person aged under 18, any social care provision which must be made for him or her by the local authority as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970[...]1 ;
> (f) any social care provision reasonably required by the learning difficulties and disabilities which result in the child or young person having special educational needs, to the extent that the provision is not already specified in the plan under paragraph (e).
> (3) An EHC plan may also specify other health care and social care provision reasonably required by the child or young person.
>
> **12. Form of EHC plan**
> (1) When preparing an EHC plan a local authority must set out—
> (a) the views, interests and aspirations of the child and his parents or the young person (section A);
> (b) the child or young person's special educational needs (section B);
> (c) the child or young person's health care needs which relate to their special educational needs (section C);
> (d) the child or young person's social care needs which relate to their special educational needs or to a disability (section D);
> (e) the outcomes sought for him or her (section E);

(f) the special educational provision required by the child or young person (section F);
(g) any health care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section G);
(h)(i) any social care provision which must be made for the child or young person as a result of section 2 of the Chronically Sick and Disabled Persons Act 1970 (section H1);
(h)(ii) any other social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having special educational needs (section H2);
(i) the name of the school, maintained nursery school, post-16 institution or other institution to be attended by the child or young person and the type of that institution or, where the name of a school or other institution is not specified in the EHC plan, the type of school or other institution to be attended by the child or young person (section I); and
(j) where any special educational provision is to be secured by a direct payment, the special educational needs and outcomes to be met by the direct payment (section J),
and each section must be separately identified.
(2) The health care provision specified in the EHC Plan in accordance with paragraph (1)(g) must be agreed by the responsible commissioning body.
(3) Where the child or young person is in or beyond year 9, the EHC plan must include within the special educational provision, health care provision and social care provision specified, provision to assist the child or young person in preparation for adulthood and independent living.
(4) The advice and information obtained in accordance with regulation 6(1) must be set out in appendices to the EHC plan (section K).

85. Special educational provision, health care provision and social care provision are defined in s 21 as follows:-

21 Special educational provision, health care provision and social care provision
(1) “Special educational provision” , for a child aged two or more or a young person, means educational or training provision that is additional to, or different from, that made generally for others of the same age in—
(a) mainstream schools in England,
(b) maintained nursery schools in England,
(c) mainstream post-16 institutions in England, or
(d) places in England at which relevant early years education is provided.
(2) “Special educational provision” , for a child aged under two, means educational provision of any kind.
(3) “Health care provision” means the provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006.
(4) “Social care provision” means the provision made by a local authority in the exercise of its social services functions.

(5) 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).
(6) This section applies for the purposes of this Part.

86. With the CFA 2014 came new, specific, duties intended (as the Code of Practice and Explanatory Notes to the 2014 Act make clear) to promote a more joined-up approach to provision for children and young people with SEN, including duties of co-operation as between local authority social services and education departments and as between local authorities and health service bodies (sections 25, 26 and 28). A new specific duty was placed on the responsible NHS commissioning body to make the healthcare provision specified in the EHCP (s 42(3)) (albeit that healthcare provision can only be specified in an EHCP with that body's agreement: see reg 12(2) of the 2014 Regulations).

87. The 2014 Regulations, made under s 36 of the CFA 2014, place a specific duty on the local authority, when carrying out an assessment under that section for the purpose of deciding whether to make and maintain an EHCP and/or what it should contain, to obtain medical advice and information from a health care professional identified by the responsible commissioning body (reg 6(1)(c)) and advice and information in relation to social care (reg 6(1)(e)).

88. The rights of appeal provided for in section 51 of the CFA 2014 remained limited to the same, solely educational, elements of the EHCP as had been the case with old-style Statements of SEN as follows:

51 Appeals
(1) A child's parent or a young person may appeal to the First-tier Tribunal against the matters set out in subsection (2), subject to section 55 (mediation).
(2) The matters are—
(a) a decision of a local authority not to secure an EHC needs assessment for the child or young person;
(b) a decision of a local authority, following an EHC needs assessment, that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan;
(c) where an EHC plan is maintained for the child or young person—
(i) the child's or young person's special educational needs as specified in the plan;
(ii) the special educational provision specified in the plan;
(iii) the school or other institution named in the plan, or the type of school or other institution specified in the plan;
(iv) if no school or other institution is named in the plan, that fact;
(d) a decision of a local authority not to secure a re-assessment of the needs of the child or young person under section 44 following a request to do so;
(e) a decision of a local authority not to secure the amendment or replacement of an EHC plan it maintains for the child or young person following a review or re-assessment under section 44;
(f) a decision of a local authority under section 45 to cease to maintain an EHC plan for the child or young person.

> (3) A child's parent or a young person may appeal to the First-tier Tribunal under subsection (2)(c)—
> (a) when an EHC plan is first finalised for the child or young person, and
> (b) following an amendment or replacement of the plan.

89. There were no new mechanisms for challenging the contents of the health or social care sections of the EHCP in the CFA 2014 itself, but the Act included (in s 51(4) and (5)) power to make regulations extending the matters relating to EHCPs against which appeals could be brought to the First-tier Tribunal as follows:-

> (4) Regulations may make provision about appeals to the First-tier Tribunal in respect of EHC needs assessments and EHC plans, in particular about—
> (a) other matters relating to EHC plans against which appeals may be brought;
> (b) making and determining appeals;
> (c) the powers of the First-tier Tribunal on determining an appeal;
> (d) unopposed appeals.
> (5) Regulations under subsection (4)(c) 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).

<u>The 2017 Regulations</u>

90. It was under the foregoing sub-sections that the 2017 Regulations were made, coming into force on 3 April 2018. Although the Regulations had no 'end date', government policy was that they would operate initially on a trial basis. From September 2021, it was confirmed that the trial was at an end and the Regulations would continue in force.

91. The 2017 Regulations, made under section 51(5), introduced new powers for the First-tier Tribunal, when seized of an 'ordinary' SEN appeal under section 51, also to make recommendations in relation to the health and social care sections of the Plan. The relevant parts of those regulations are as follows:-

> **4.— Power to make recommendations in respect of health and social care needs**
> (1) When determining an appeal on the matters set out in section 51(2)(b) of the Act, the First-tier Tribunal has the power to recommend that—
> (a) health care needs, or health care needs of a particular kind, which relate to the child or young person's special educational needs are specified in the EHC plan in accordance with regulation 12(1)(c) of the 2014 Regulations;
> (b) social care needs, or social care needs of a particular kind, which relate to the child or young person's special educational needs or to a disability are specified in the EHC plan in accordance with regulation 12(1)(d) of the 2014 Regulations.
> (2) When determining an appeal on the matters set out in section 51(2)(c), (d), (e) or (f) of the Act, the First-tier Tribunal has the power to recommend that—
> (a) the health care needs specified in the EHC plan in accordance with regulation 12(1)(c) of the 2014 Regulations are amended;

(b) the social care needs specified in the EHC plan in accordance with regulation 12(1)(d) of the 2014 Regulations are amended;
(c) health care needs, or health care needs of a particular kind, which relate to the child or young person's special educational needs are specified in the EHC plan in accordance with regulation 12(1)(c) of the 2014 Regulations where those needs have not been specified in the plan;
(d) social care needs, or social care needs of a particular kind, which relate to the child or young person's special educational needs or to a disability are specified in the EHC plan in accordance with regulation 12(1)(d) of the 2014 Regulations where those needs have not been specified in the plan.

5.— Power to make recommendations in respect of health and social care provision

(1) When determining an appeal on the matters set out in section 51(2)(b) of the Act, the First-tier Tribunal has the power to recommend that—
(a) health care provision, or health care provision of a particular kind, is specified in the EHC plan in accordance with regulation 12(1)(g) of the 2014 Regulations;
(b) social care provision, or social care provision of a particular kind, is specified in the EHC plan in accordance with regulation 12(1)(h) of the 2014 Regulations.
(2) When determining an appeal on the matters set out in section 51(2)(c), (d), (e) or (f) of the Act, the First-tier Tribunal has the power to recommend that—
(a) the health care provision specified in the EHC plan in accordance with regulation 12(1)(g) of the 2014 Regulations is amended;
(b) the social care provision specified in the EHC plan in accordance with regulation 12(1)(h) of the 2014 Regulations is amended;
(c) health care provision, or health care provision of a particular kind, is specified in the EHC plan in accordance with regulation 12(1)(g) of the 2014 Regulations where that provision has not been specified in the EHC plan;
(d) social care provision, or social care provision of a particular kind, is specified in the EHC plan in accordance with regulation 12(1)(h) of the 2014 Regulations where that provision has not been specified in the EHC plan.

6.— Responding to health care recommendations

(1) When the First-tier Tribunal makes a recommendation in respect of health care needs or health care provision, it must send a copy of the recommendation to the responsible commissioning body.
(2) When sending a copy of a recommendation, the First-tier Tribunal may also send a copy of the decision which disposes of the appeal brought under section 51(1) of the Act to the responsible commissioning body.
(3) The responsible commissioning body must respond within 5 weeks beginning with the date of the recommendation to—
(a) the child's parent or the young person, and
(b) the local authority that maintains the EHC plan.
(4) The time limit specified in paragraph (3) does not apply where the First-tier Tribunal directs that a different time limit is to apply for the responsible commissioning body's response.
(5) A response under paragraph (3) must—
(a) be in writing,

> (b) state what steps, if any, the responsible commissioning body has decided to take following its consideration of the recommendation, and
> (c) give reasons for any decision not to follow the recommendation, or any part of it.
> (6) The local authority must send a copy of the response received from the responsible commissioning body under paragraph (3)(b) to the Secretary of State within 1 week beginning with the date it was received.
>
> **7.— Responding to social care recommendations**
> (1) When the First-tier Tribunal makes a recommendation in respect of social care needs or social care provision, the local authority must respond to the child's parent or the young person within 5 weeks beginning with the date of the recommendation.
> (2) The time limit specified in paragraph (1) does not apply where the First-tier Tribunal directs that a different time limit is to apply for the local authority's response.
> (3) A response under paragraph (1) must—
> (a) be in writing,
> (b) state what steps, if any, the local authority has decided to take following its consideration of the recommendation, and
> (c) give reasons for any decision not to follow the recommendation, or any part of it.
> (4) The local authority must send a copy of its response under paragraph (1) to the Secretary of State within 1 week beginning with the date of its response to the child's parent or the young person.

92. It is notable that the choice of language in regulations 4 and 5 of the 2017 Regulations in terms of setting out the "powers" of the First-tier Tribunal on an appeal is similar to that used in regulation 43(2) of the 2014 Regulations setting out the "powers" of the First-tier Tribunal on 'ordinary' SEN appeals in relation to Sections B, F and I of the Plan:-

> **43.— Powers of the First-tier Tribunal**
> …
> (2) When determining an appeal the powers of the First-tier Tribunal **include the power to**—
> (a) dismiss the appeal;
> (b) order the local authority to arrange an assessment of the child or young person under section 36 or a reassessment under section 44(2) where the local authority has refused to do so, where the appeal made under section 51(2)(a) or (d);
> (c) order the local authority to make and maintain an EHC Plan where the local authority has refused to do so, where the appeal is made under section 51(2)(b);
> (d) refer the case back to the local authority for them to reconsider whether, having regard to any observations made by the First-tier Tribunal, it is necessary for the local authority to determine the special educational provision for the child or young person, where the appeal is made under section 51(2)(b);
> (e) order the local authority to continue to maintain the EHC Plan in its existing form where the local authority has refused to do so, where the appeal is made under section 51(2)(f);
> (f) order the local authority to continue to maintain the EHC Plan with amendments where the appeal is made under section 51(2)(c), (e) or (f) so far as that relates to either the assessment of special educational needs or the special educational

provision and make any other consequential amendments as the First-tier Tribunal thinks fit;
(g) order the local authority to substitute in the EHC Plan the school or other institution or the type of school or other institution specified in the EHC plan, where the appeal is made under section 51(2)(c)(iii) or (iv),(e) or (f);
(h) where appropriate, when making an order in accordance with paragraph (g) this may include naming—
(i) a special school or institution approved under section 41 where a mainstream school or mainstream post-16 institution is specified in the EHC Plan; or
(ii) a mainstream school or mainstream post-16 institution where a special school or institution approved under section 41 is specified in the EHC Plan.

93. Although the use of the word “power” is the same, the obvious difference between regulation 43 of the 2014 Regulations and regulations 4 and 5 of the 2017 Regulations is that regulation 43 provides for the making of “orders” rather than merely “recommendations” (although there is also a recommendation-type power under regulation 43(2)(d) to refer a case back to the local authority to reconsider whether it is necessary to make and maintain an EHCP for a child/young person in the light of any observations the Tribunal may make). The significance of the difference in language is reinforced by regulation 44, which imposes a duty on local authorities to “comply” with the orders of the First-tier Tribunal, whereas regulations 6 and 7 of the 2017 Regulations only impose a duty on responsible commissioning bodies and the local authority to respond to the recommendations in writing, stating what steps they plan to take having considered the recommendations and giving reasons for any decision not to follow the recommendation. In this respect, the First-tier Tribunal’s jurisdiction under the 2017 Regulations resembles that of the Local Government and Social Care Ombudsman under the Local Government Act 1974.

94. Another difference that is worthy of note in view of the issue arising on this appeal is that, because there is a specific right of appeal against a refusal to carry out an assessment of SEN, regulation 43(2)(b) enables the Tribunal to order a local authority to carry out an assessment of SEN. In contrast, the 2017 Regulations provide for the making of recommendations only in relation to the description of the child/young person’s healthcare and social care needs in Sections C and D of the Plan, and the provision to meet those needs in Sections G and H. There is no power on the face of the 2017 Regulations for the Tribunal to recommend that an assessment of a child’s health or social care needs is carried out, and in ordinary parlance an “assessment” is neither a description of need nor specification of the provision required to meet that need. Earlier case law on Statements of SEN took the view that a Tribunal could not ‘specify’ in a Statement that an assessment should be carried out (see *A v Metropolitan Borough of Sefton and Appleyard* [2000] ELR 639 at [48]-[50] per Moses J and *CL v Hampshire CC* [2011] UKUT 468 (AAC) at [16] *per* Judge Mesher). In *E v Rotherham Metropolitan Borough Council* [2002] ELR 266 it had also been held by Bell J in the High Court that a Tribunal could not “specify” in what was then Part 3 of the Statement that special educational provision for a child could be changed by way of “a formal discussion” between the local authority, the NHS

Trust and one or both of the child's parents. Bell J held that such an order lacked the necessary 'specificity' and also had the potential to deprive the parent in that case of the right of appeal against changes to the Statement that she would have enjoyed if the local authority had amended the Statement mid-year through the normal statutory process.

95. What "specify" means in the context of the 2017 Regulations was the subject of the appeal in *VS and anor v Hampshire County Council* [2021] UKUT 187 (AAC). *VS* represents the most detailed consideration to date of the Tribunal's jurisdiction under the 2017 Regulations. In that case, which concerned a child that the First-tier Tribunal considered needed a 'waking day curriculum' at a residential school, the Tribunal made social care recommendations for support (14 hours carer support per week during school holidays and nine hours per week during term time) up to the next half-term holiday and no provision beyond that point, although it was common ground between the parties that some need would persist. The parents appealed on the ground that the Tribunal's recommendations were insufficiently specific and/or otherwise in error of law in failing to deal with the position after half-term.

96. The facts of *VS* thus have some overlap with the present because, although the appeal focused on the question of 'specificity', the essence of the appellant's complaint was that the First-tier Tribunal had failed to make any recommendations going beyond half-term. There is thus a similarity with the present case where the complaint is that the First-tier Tribunal made no recommendations at all. The appeal in *VS* was advanced on two alternative bases, depending on whether what was described as the 'first reading' or 'second reading' of the First-tier Tribunal's decision was accepted. The 'first reading' (see [23]) was that "the FtT recommended social care support until the October 2020 half-term, with all social care support ceasing thereafter". The second reading was that "the FtT recommended provision until October 2020 but then deferred to the local authority to decide following a review" what happened thereafter. The appellant submitted that the first reading was perverse because there was an agreed need for social care persisting after half term, while the second reading was unlawful for being insufficiently specific as it left it to the local authority to decide on provision following a review, a course that the appellant submitted was objectionable by reference to *E v Rotherham* (ibid).

97. Judge Ward considered that the second reading of the Tribunal's decision was the true one. He further concluded that although the Tribunal's reasons were inadequate in failing to make clear that it was the second reading that was intended (see [57]), there was in principle no error of law in the Tribunal recommending provision only up to half term with a review thereafter as the requirement to "specify" is "less rigid when applied to the recommendations power than when special educational provision is being ordered" ([48], [56]). As such, Judge Ward concluded that the Tribunal had not made recommendations on the perverse basis that there would have been no need for social care provision after half term (see [58]), but had lawfully made recommendations as

to provision lasting only so long as the evidence justified. Judge Ward also went further, however, holding that the Tribunal's implicit recommendation for a review thereafter with further provision thus to be determined by the local authority would also have been lawful. Judge Ward at [52] rejected the appellant's argument (by reference to *E v Rotherham*) that provision for a review would have been unlawful. Judge Ward held that, as there is no right of appeal that lies directly against amendments to the social care provision in the EHCP, providing for a review of social care did not deprive the appellant of any right of appeal she would otherwise have had ([49]-[53]). That may be taken as judicial approval of it being permissible for a 'review' to be 'specified' as 'provision', but whether that element of the decision is part of the *ratio* of the decision (and whether or not it is correct) will need to await determination in another case. For present purposes, I simply note that it does not appear to have been argued in *VS* that a "review" is no more "provision" than "assessment" is. The argument in *VS* appears to have proceeded on the assumption that a review was "provision" that could and should be specified in Section H, despite the fact that a "review" is not itself "provision" and "review" of an EHCP is not something over which the First-tier Tribunal has ever had any supervisory jurisdiction, the local authority's powers and duties in respect of reviews of EHCPs being provided for separately under s 44 of the CFA 2014 and regulations 18-28 of the 2014 Regulations, in respect of which no right of appeal lies to the Tribunal.

98. In the course of his judgment, Judge Ward gave the following guidance which is of relevance to the present appeal and on which the parties have placed reliance (emphasis added by me):

> 35. …The FtT in its special educational needs jurisdiction is first and foremost concerned with educational needs and provision. Health provision and social care provision which educates or trains becomes educational provision. The FtT has no ability to make recommendations in respect of health or social care provision, save when it is determining the matters set out in section 51(2), which concern educational provision. The FtT's orders, insofar as they relate to educational provision, must be complied with within time scales set down in regulation 44 of the SEND Regulations. If they are not, an application may be made to the Administrative Court. Accordingly, the FtT's orders create an enforceable right to the special educational provision.
> 36. By contrast, in relation to health provision and social care provision (not amounting to educational provision) the FtT is restricted to making a recommendation. Although regulation 12(1)(h) (above) is divided so as to refer to two distinct categories of social care provision, the FtT's power is in both cases nonetheless limited to making a recommendation: in particular, its function is not to determine provision under section 2 of the Chronically Sick and Disabled Persons Act 1970. The only requirement is to consider such recommendations within five weeks and to provide the notifications and explanations which the Recommendations Regulations require (see para 7 above). **Whilst there is a clear expectation that local authorities will generally follow FtT social care recommendations, nonetheless a sufficiently compelling justification would entitle the social care (or health) authorities not to follow a recommendation at all. Whilst I accept that an insufficient justification might expose them to judicial review, it is a considerable difference**

from the enforceable rights, backed by legislation, which regulation 44 of the SEND Regulations creates.
…
44. **Determining what has to be specified where those sections are concerned has to reflect that the FtT is dealing with a matter which is not directly enforceable, unappealable and in respect of which the body to whom implementation would fall (in health cases) is not a party before it.**
…
46. **A recommendation by the FtT**, a fortiori one in which (as I understand to be the case) members are selected for the panel in a case under the Recommendations Regulations if they have a particular understanding of relevant areas, **will add to the weight of a claim that such provision be made and will make it correspondingly harder for those responsible for social care or health to ignore**. When it is specific that will assist those concerned with delivering provision to the child or young person in understanding what the FtT had in mind and the more specific that the FtT can be, the more specific the relevant health or social care body is likely to have to be in providing its reasoned response to the recommendation if their response is to be legally adequate.
47. **There are, though, dangers in my view of expecting too much from the FtT before it can make a lawful recommendation, otherwise the opportunity for them to be made may be lost. Given the nature of the power, the panel needs to be free to make constructive recommendations in relation to health and social care provision. How specific it feels it can be is essentially a matter for the FtT, taking into account all relevant factors (which include the desirability of specificity where it is possible for the reasons given above)**.
48. For these reasons, despite the efforts of Ms Irving and Mr Broach to persuade me otherwise, I consider that when one acknowledges that its purpose is to give clear, practical guidance, the Code of Practice, where it makes a distinction between what "must" be done in relation to educational provision and what "should" be done in relation to health and social care provision is essentially correct. That the Code suggests a greater requirement for specificity where provision under section 2 of the 1970 Act is being set out in the EHC plan does not mean that it is the function of the FtT, which apart from the Recommendations Regulations has no jurisdiction in respect of it, to make its recommendations with an equivalent level of specificity, nor to import the legislative framework for adjudication on children's social services provision to its decision-making. Whilst the requirement to "specify" is consistently present across the relevant legislation, what that means is less rigid when applied to the recommendations power than when special educational provision is being ordered.
…
50. What options were open to the FtT? In the absence of any evidence going to the period after half-term, any attempt to use the personal knowledge and experience of the specialist panel members would have come up against the need to put matters derived from their own knowledge to the parties. The feasibility of holding the second day of the hearing evaporated, for reasons that are not altogether clear, but it seems that neither party objected to the conclusion of the FtT's consideration of the matter being on the papers alone.
51. An adjournment which neither party asked for, for the FtT to obtain evidence as to social care needs, would have slowed up deciding on the educational matters,

notably placement, causing delay which in the context of Kieran's needs and the stresses upon his family would have been far from ideal.
52. They might have included an express provision for review at half-term by the local authority in consultation with the parents. Though Ms Irving, on her alternative suggested reading of the FtT's decision, suggests that would have been unlawful, by reference to *E v Rotherham*, for the reasons above I do not agree.
…
54. Although the Guidance refers to a "Single Route of Redress National Trial", **the Recommendations Regulations do not provide a single route of redress for all disputes there may be concerning the health and social care needs of, or provision for, a child or young person with special educational needs. Rather, they are a further attempt to mitigate some of the effects of those differing duties and governance arrangements by providing an opportunity to raise all the concerns about an EHC plan in one place**.
55. **In such a context, there are in my view dangers in requiring too much from the FtT before it can make a lawful recommendation**. Stretching matters too far would make the best the enemy of the good. Although the National Autistic Society is concerned that "it appears that aspects of a dispute relating to social care are not being given the same level of care and attention in decision-making as the education parts of an appeal", that, if so, is unsurprising: the education and social care aspects of the FtT's jurisdiction, while linked, are qualitatively different. The National Autistic Society is well placed to have a view on the importance of social care support for children with autism and their families and the adequacy or otherwise of how it is provided, but it does not follow that the mechanisms of the National Trial can solve all whatever problems there may be. Mr Greatorex is correct in pointing out that proceedings in this jurisdiction come at a cost in time and money to parents, who if resources are limited are likely to concentrate them where they obtain the most clear-cut result, namely education; likewise the local authority is liable to concentrate where there is greatest likelihood of it becoming directly obliged to incur significant expenditure. **If the result is thin evidence, the question is whether it is preferable for the FtT to do what it can with what it has got, mindful that what it is making is a recommendation, which may nonetheless be useful, or to either delay or refuse to make a recommendation at all. The former is likely to be inappropriate in this jurisdiction where a child's education is at stake and where the cycle of reviewing an EHC Plan, with the potential for fresh proceedings in the FtT, comes round annually, while to decline to make a recommendation, even where the FtT panel may have useful recommendations to offer, because the lack of evidence precludes it from being done with the same degree of specificity, or a similar solid evidential foundation, to what would be required for educational provision, would risk frustrating the purpose of the Recommendations Regulations.**

<u>The social services framework</u>

99. At paragraph 47 of *VS*, Ward made an observation that is of importance to the present case. He stated that the 2017 Regulations do not "import the legislative framework for adjudication on children's social services provision [into the Tribunal's] decision-making". That observation is important. It has often been said

(harking back to Sedley LJ's judgment in *London Borough of Bromley v SENT* [1999] ELR 260) that the First-tier Tribunal stands 'in the shoes' of the local authority on an appeal, but it does not follow from that that the First-tier Tribunal is bound by the local authority or health authority's decision-making processes. The parties to this appeal are in agreement with that as a statement of principle.

100. I nonetheless invited them, in view of the Tribunal's reluctance in this case to make recommendations without the local authority having completed its social services assessment processes, to provide written submissions after the hearing on the key statutory provisions governing the provision of healthcare and social care by the relevant bodies, so as to understand to what it extent those statutory provisions might have a bearing on the Tribunal's exercise of its powers under the 2017 Regulations. I am grateful to counsel for the diligent way in which they approached this exercise, and the co-operation that they have shown, in line with the overriding objective, in producing a joint document on the topic. Drawing on their researches, it seems to me that the following points in relation to social care are particularly illuminating in relation to the present appeal:

Content of EHCP

a. As already noted, social care provision is defined in section 21(4) of the CFA 2014 as "Provision made by a local authority in the exercise of its social services functions". Section H1 of the EHCP must set out any social care provision to be made for the child or young person under s 2 of the Chronically Sick and Disabled Persons Act 1970 (CSDPA 1970) (reg 12(1)(h)(i) of the 2014 Regulations). Section H2 must set out any social care provision reasonably required by the learning difficulties or disabilities which result in the child or young person having SEN (reg 12(1)(h)(ii) of the 2014 Regulations).

b. The difference between H1 and H2 is thus between provision that 'must' be made under the CSDPA 1970 and provision that is 'reasonably required' for the child under the CA 1989. In practice, however, and as described further below, as the provision that 'must' be made by the local authority under the CSDPA 1970 depends on a determination of what is 'necessary', there is a discretionary element to the determination as to what should go in both Sections H1 and H2. The difference between what should go in Section H1 and what should go in H2 is therefore more a matter of considering the nature of the provision required: the CSDPA 1970 sets out a proscribed list of provision, whereas the CA 1989 contains more general powers. Provision under both statutes depends on the child meeting the 'child in need' threshold in s 17 of the CA 1989 (see s 2(4) CSDPA 1970).

Statutory framework in respect of children's social care

c. Section 17(1) of the CA 1989 provides that it is the "general duty" of every local authority: "(a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that

duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs". By section 17(10) a child "shall be taken to be in need" if "(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part; (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or (c) he is disabled". There is a specific definition of "disability" in section 17(11), which is drawn from section 29 of the National Assistance Act 1948 and is in consequently archaic language: "For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part "development" means physical, intellectual, emotional, social or behavioural development; and "health" means physical or mental health".

d. The duty imposed under section 17(1) CA 1989 is a general duty owed to children in the area and not a duty to meet the assessed needs of a particular child: *R (G) v Barnet London Borough Council* [2003] UKHL 57. A local authority cannot provide services under section 17 unless it is satisfied that the child is "in need" and the question of whether a child is "in need" is a matter for the local authority to determine, subject to challenge only by way of judicial review: see *MN, KN v London Borough of Hackney* [2013] EWHC 1205 (Admin) *per* Leggatt J (as he then was), especially at [38]-[43].

e. Services provided by a local authority under section 17 CA 1989 may include providing accommodation and giving assistance in kind or cash (s 17(6)). (Note that there is also a duty to provide accommodation under s 20 in certain circumstances.) Any service provided under section 17 CA 1989 may be provided for the family if it is provided with a view to safeguarding or promoting the child's welfare (s 17(3)). "Family" includes any person who has parental responsibility for the child and any other person with whom he has been living (s 17(10)). Assistance may be unconditional or subject to conditions as to the repayment of the assistance or its value, in whole or in part. Before giving assistance or imposing conditions, a local authority shall have regard to the means of the child concerned and their parents (s 17(7)-(8) CA 1989). See also *R (Spink) v London Borough of Wandsworth* [2005] EWCA Civ 302). However, no person may be liable to repay at any time when they are in receipt of specific benefits set out in section 17(9) CA 1989.

f. Section 2(4) CSDPA 1970 requires the local authority, in respect of any child for whom it has functions under the CA 1989 (i.e. any 'child in need' – see above) to make any of the following arrangements under section 2(6) that the local authority are satisfied it is necessary to make in order to meet the needs of the child:

"(a) the provision of practical assistance for the child in the child's home;
(b) the provision of wireless, television, library or similar recreational facilities for the child, or assistance to the child in obtaining them;
(c) the provision for the child of lectures, games, outings or other recreational facilities outside the home or assistance to the child in taking advantage of available educational facilities;
(d) the provision for the child of facilities for, or assistance in, travelling to and from home for the purpose of participating in any services provided under arrangements made by the authority under Part 3 of the Children Act 1989 or, with the approval of the authority, in any services, provided otherwise than under arrangements under that Part, which are similar to services which could be provided under such arrangements;
(e) the provision of assistance for the child in arranging for the carrying out of any works of adaptation in the child's home or the provision of any additional facilities designed to secure greater safety, comfort or convenience for the child;
(f) facilitating the taking of holidays by the child, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;
(g) the provision of meals for the child whether at home or elsewhere;
(h) the provision of a telephone for the child, or of special equipment necessary for the child to use one, or assistance to the child in obtaining any of those things."

g. By virtue of section 2(5) CSDPA and sections 7(1) and 7A of the Local Authority Social Services Act 1970 (LASSA 1970), local authorities exercising functions under section 2(4) CSDPA must act in accordance with any general guidance issued by the Secretary of State and may be directed by the Secretary of State to act in a particular case.

Assessment for children's social care services

h. Section 47 of the CA 1989 imposes a duty on the local authority to investigate where (among other things) it has reasonable cause to suspect that a child in their area is suffering, or is likely to suffer, "significant harm". Paragraph 1 of Part 1 of Schedule 2 to the CA 1989 imposes a duty on local authorities to take reasonable steps to identify the extent to which there are children in need in their area, and paragraph 3 provides a power to assess a child's needs where it appears to the local authority that a child within their area is in need and to do so at the same time as an assessment under the CSDPA 1970 or an EHC assessment under Part 3 of the CFA 2014. There is also a duty under section 17(4A) on local authorities, which applies "so far as reasonably practicable and consistent with the child's welfare" to ascertain the child's wishes and feelings regarding the provision of services and to give due consideration to those wishes and feelings before determining what (if any services) to provide for a particular child. However, there is no specific duty on a local authority to carry out an assessment of need in

relation to a child. The assessment process, which may differ as between local authorities, is instead an established practice, guidance in respect of which is given by the Secretary of State, in particular in *Working Together to Safeguard Children* (current version December 2023). A local authority has liberty to deviate from the guidance with good reason but is not free to take a substantially different course: *R v London Borough of Islington ex part Rixon* [1997] ELR 66. For an assessment to be lawful, it must be compliant with the Secretary of State's guidance, subject to the *Rixon* principle. The *Working Together* guidance requires local authorities to publish a threshold document setting out the criteria (i.e. level of need) for when a case should be referred to assessment and statutory services provided under section 17 CA 1989 (ibid, [117] and [141]). In line with the *Rixon* principle, a local authority should evidently normally follow its published threshold policy.

Adult social care framework and assessment

i. Children's and adult's social care are subject to separate regimes under, respectively CA 1989 and CSDPA 1970 on the one hand and the Care Act 2014 (CA 2014) on the other. Provision of adult social care for people over the age of 18 is thus governed by a separate regime. 'Young people' (i.e. people over compulsory school age as defined in the CFA 2014) may need to be considered for transition to, and then provision of, adult social care services.

j. Where it appears to a local authority that an adult may have need for care and support the local authority is under a duty to assess their needs under section 9 CA 2014. There is a statutory duty on local authorities to meet an adult's needs for care and support where they are ordinarily resident in its area, the care and support needs meet the eligibility criteria, where certain financial criteria are met and the needs are not being otherwise met by a carer. Section 19 CA 2014 creates a similar power giving a local authority a discretion to meet an adult's eligible care and support needs where there is otherwise no duty upon it to do so.

k. There is a statutory prohibition on local authorities meeting care and support needs by providing or arranging for the provision of a service or facility that is required to be provided by the NHS unless it is incidental or ancillary to the primary method of meeting needs and the service or facility in question is of nature that a local authority could be expected to provide (s 22(1) CA 2014; see further *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 on the health/social care dividing line for adult services and below where I outline the healthcare framework). Eligible care and support needs are those that meet the eligibility criteria in the *Care and Support (Eligibility Criteria) Regulations 2015*. By way of short summary, there is a specific list of eligible needs in regulation 2, such as 'managing and maintaining nutrition', 'maintaining personal hygiene', etc. To be eligible for care services an adult needs to have at least two eligible needs. Needs are eligible if the

adult is unable to meet the need themselves without assistance or doing so causes them “significant pain, distress or anxiety, is likely to endanger their health and safety or that of others, or takes them significantly longer than would normally be expected”. The unmet need must also have or be likely to have a ”significant impact on the adult’s well-being”.

l. Where, following assessment, a local authority is required to meet the individual’s care and support needs it must prepare a care and support plan, tell the individual which needs it is going to meet and help the adult decide how to have their needs met (s 24(1) CA 2014). Conversely, where a local authority is not going to meet an individual’s care and support needs despite their needs meeting the eligibility criteria, the local authority must prepare an independent personal budget for them (s 24(3) CA 2014).

Transition assessments

m. Where it appears to a local authority that a child is likely to have needs for care and support after turning 18, the authority must, if it is satisfied that it would be of significant benefit to the child to do so and in the child’s best interests, carry out an assessment. The assessment must consider: (a) whether the child has needs for care and support and, if so, what those needs are, and (b) whether the child is likely to have needs for care and support after becoming 18 and, if so, what those needs are likely to be (s 58(1)-(3) CA 2014). This is the “transition assessment” which was carried out in this case.

n. A young person who has capacity may refuse a transition assessment but, where an assessment is refused, a local authority must carry one out anyway where the individual is at risk of abuse or neglect (§16.36 Care and Support Statutory Guidance).

o. In carrying out an assessment, the local authority must “involve” the child, the child’s parents and any carer that the child has (s 59(2) CA 2014). There is no definition of what is meant by the obligation to “involve” a child’s parent in the assessment process. Neither is it addressed in the statutory guidance. There is further specific provision in section 59 about the matters that the local authority must take into account when carrying out an assessment, including the child’s wellbeing and the outcomes the child wishes to achieve and whether and, if so, to what extent, the provision of care and support would contribute to the achievement of those outcomes.

p. When the child turns 18, the local authority must decide whether to re-assess the individual or treat the transition assessment as being an adult needs assessment undertaken under section 9 CA 2014. In determining this, the local authority must take account of when the assessment was carried out and whether the individual’s circumstances have changed in any material way since it was carried out (s 59(7) CA 2014).

q. Where a transition assessment is being undertaken by a local authority under section 58 2014 and that local authority is required to make arrangements for a child under section 2 CSDPA, it must continue to make arrangements under section 2 CSDPA after the child reaches 18 until a conclusion is reached in the transition arrangements (s 2A CSDPA). Similarly, where immediately before they reach 18 a child in needs has an EHC Plan and is in receipt of services pursuant to section 17 CA 1989, the local authority may continue to provide services for the child under section 17 after the child reaches 18 whilst the EHCP continues to be maintained (s 17ZG(1)-(2) CA 1989).

Parent carer's assessment

r. Where a child and their family are persons for whom the local authority may provide or arrange for the provision of services under section 17, then under section 17ZD there is a specific duty on the local authority, where it appears to the authority that a parent carer may have needs for support, or on request by a parent carer, to assess whether the parent carer has needs for support and, if so, what those needs are. This is the "parent carer's needs assessment" that the local authority in this case was unable to complete. By section 17ZE(3) such an assessment may, but need not, be carried out at the same time as any other assessment of the child or its carers. In carrying out a parent carer's needs assessment, a local authority must have regard to the wellbeing of the parent carer and the need to safeguard and promote the welfare of the disabled child cared for (s 17ZD(10)). The local authority must 'involve' the parent carer (s 17ZD(12)(a), but is not relieved of the duty to carry out an assessment if the parent carer declines to be 'involved'.

s. When completing a transition assessment, a local authority must also assess a child's carer's need for care and support where it appears to a local authority that the carer of a child is likely to have needs for support after the child turns 18 and it would be a significant benefit to the carer to do so (s 60(1) CA 2014). Where a carer refuses an assessment as part of a transition assessment, the local authority is not required to carry one out (s 60(3) CA 2014).

The healthcare framework

101. Again drawing on counsel's researches, it seems to me that the following matters regarding the healthcare framework need to be considered:

Content of EHCP

a. "Healthcare provision" is defined in section 21(3) CFA 2014 as meaning the "provision of health care services as part of the comprehensive health service in England continued under section 1(1) of the National Health Service Act 2006". Section C of an EHCP "must set out…the young

person's health care needs which relate to their special educational needs" whereas Section G should set out "any healthcare provision reasonably required by the learning difficulties or disabilities which result in the young person having special educational needs" (reg 12(1)(c) & 12(1)(g) of the 2014 Regulations). The healthcare provision that should be included in section G is thus that made under the auspices of the NHS unless that provision educates or trains, in which case it is to be treated as special educational provision (s 21(5) CFA 2014).

Statutory framework for the provision of healthcare

b. The duty under section 1(1) of the National Health Service Act 2006 (NHSA 2006) is the general duty on the Secretary of State (and NHS England) to promote the NHS in England. Beneath that over-arching duty there sits a complex web of legislation that establishes the various elements of the NHS and the institutions responsible for commissioning and/or providing healthcare under that Act (as amended). The detail is not relevant to this judgment. What matters for present purposes is that the powers and duties in respect of healthcare commissioning and provision are (for the most part) general duties owed to the public at large to provide or arrange for the provision of such services as the relevant healthcare body considers necessary to meet the reasonable requirements of people in their area: see in particular the duty on Integrated Care Boards (ICBs) under section 3(1) NHSA 2006. The duties are not normally enforceable at the behest of any particular individual, save to the extent that an individual healthcare practitioner (or, vicariously, their employing organisation) owes a duty of care to an individual, or where duties to individuals arise under the Mental Health Act 1983. The specific duty on a responsible commissioning body under section 42(3) of the CFA 2014 to make the healthcare provision specified in an EHCP is therefore a significant departure from the norm so far as NHS services are concerned, albeit that the requirement in regulation 12(2) of the 2014 Regulations that the commissioning body agree any provision before it is included in the EHCP obviously in practice enables the NHS commissioning body still to determine what services it considers it appropriate to provide.

NHS assessments

c. The only relevant duties in respect of assessments so far as healthcare provision is concerned are to be found in the specific duties on ICBs under *The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulation 2012* (SI 2012/2996) (the Standing Rules) in respect of the provision of NHS Continuing Healthcare. NHS Continuing Healthcare is a package of care arranged and funded solely by the health service in England for a person aged 18 or over to meet physical or mental health needs which have arisen as a result of disability, accident or illness (reg

20). Regulation 21(2) imposes a duty on the relevant body to take reasonable steps to ensure that an assessment of eligibility for NHS Continuing Healthcare is carried out where it appears to that body that a person for whom they are responsible may be in need of such care. Eligibility must be judged by reference to the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care (current edition: July 2022) and initial screening must be by reference to the NHS Continuing Healthcare Checklist issued by the Secretary of State: reg 21(4)-(5). The decision-making process involves determining whether an adult has a "primary health need" such that their care falls to be provided by the NHS and thus cannot be provided by the local authority by dint of the prohibition in s 22(1) CA 2014 (discussed above and in the *Coughlan* case). (Note that there is no such prohibition on local authorities making what would normally be healthcare provision for children, although a division between health and social care will remain in practice as the local authority will not reasonably need to provide under section 17 of the CA 1989 what would normally be provided by health, though where healthcare provision educates or trains and is reasonably required to meet a child's special educational needs, it must of course be included in Section F of an ECHP and provided by the local authority: see ss 21(5), 37(2) and 42(2) CFA 2014.)

<u>Enforcement/complaints mechanisms in respect of healthcare and social care</u>

102. Both parties have placed reliance in this appeal on the case law that has considered 'enforcement' of recommendations made by Tribunals under the 2017 Regulations and I therefore need to set that case law in context.

103. As already noted, the right of appeal to the First-tier Tribunal under section 51 of the 2014 Act is a right of appeal only against the educational elements of the EHCP (or refusals to assess or make/maintain EHCPs). There is no free-standing right of appeal against the healthcare and social care elements. The 2017 Regulations simply provide for those parts of the EHCP to be considered as part of an appeal against Sections B, F and/or I. As also already noted, there is no duty on the local authority or NHS commissioning body to <u>comply</u> with a recommendation of the First-tier Tribunal, only a duty to <u>respond</u>. There have, however, been some cases in which bodies have refused to comply with a recommendation and been subject to challenge by way of judicial review as a result. Both parties in this appeal rely on those cases, albeit to opposite ends. Mr Wyard for the appellant seeks to emphasise the utility to parents/young people of securing a recommendation from the First-tier Tribunal, despite its lack of direct enforceability. Mr Greaves for the respondent seeks to emphasise the significance to the local authority of having a recommendation made, by way of support for his submission that recommendations should not be made 'lightly' by a Tribunal and that the Tribunal was in this case right to refuse to do so given the unsatisfactory nature of the evidence.

104. In *R (AT and BT) v London Borough of Barnet* [2019] EWHC 3404 (Admin) the First-tier Tribunal had recommended 12.5 hours per week of social care support at home or in the community during term-time and one night per week's respite for a seven-year-old with special educational needs related to autism. The local authority did not implement the recommendations but carried out its own further care assessments following the recommendations and made more limited provision. Parents claimed judicial review, in the course of which the local authority conceded that the 12.5 hours support should be provided so that the only remaining issue before the court concerned the overnight respite. Phillip Mott QC, sitting as a deputy High Court Judge, reviewed the case law on the circumstances in which a local authority could depart from non-binding recommendations of Ombudsmen, Tribunals or other advisory bodies and concluded at [13]:

> Although such recommendations can be rejected, or not followed, cogent reasons will be required for doing so. Such reasons will need to be even more cogent when the recommendation comes from a specialist Tribunal which has heard evidence and argument.

105. The judge went on to hold in that case that the local authority had failed to provide a response to the Tribunal as required by regulation 7(3) of the 2017 Regulations within five weeks stating what steps it had decided to take following consideration of the recommendation and giving reasons for any decision not to follow the recommendation or any part of it ([44]). He found that the local authority had failed properly to engage with the recommendations or properly explain why they were not being followed.

106. In *R (LS) v (1) The London Borough of Merton; (2) The Residential School* [2024] EWHC 584 (Admin), Freedman J considered the case of a 15-year-old with severe autism and complex mental health needs who the First-tier Tribunal decided required a 52-week residential school placement. There was a dispute between the parties as to whether the provision during the holidays was required for educational reasons or social care reasons and the local authority decided to offer a 38-week residential school placement with a package of social care support during the holidays. The parents sought judicial review of the local authority's decision. Freedman J held that the Tribunal had in fact decided that only a 38-week placement was necessary for educational reasons and that the 52-week placement was for social care reasons. Freedman J referred to Philip Mott QC's judgment in *AT and BT* and other relevant authorities at [57]-[60]. This included (at [60]) a passage from Simon Brown LJ's judgment in *R v Secretary of State for the Home Department ex p Danaei* (1997) EWCA Civ 2704 which might be said to indicate that an even higher threshold than 'cogent reasons' may apply where a body seeks to depart from the determination of an independent tribunal. However, it seems to me that Mr Wyard is right to emphasise that *Danaei* was dealing with departure from the decision of what was then an immigration adjudicator (now the First-tier Tribunal Immigration and Asylum Chamber) and thus concerned the decision of a tribunal that ordinarily would be binding, unlike the position with recommendations under the 2017 Regulations. I note that

Freedman J does not refer to *Danaei* when dealing with the substance of the case in *LS* at [67]-[87] and that he went onto conclude, on an application of ordinary *Wednesbury* principles, that the local authority's reasons for departing from the Tribunal's social care recommendation in that case were adequate and reasonable. However, this does not mean that some of the more general points made in the *Danaei* case quoted by Freedman J will not be relevant considerations when it comes to the High Court considering on judicial review whether a local authority's decision not to follow a Tribunal recommendation is lawful. If the recommendation has been made for strongly articulated reasons by a specialist panel following detailed consideration of evidence, it is likely to be harder for a local authority to establish lawfully cogent reasons for not following it than if the recommendation is made by the Tribunal on thin evidence or for weak reasons.

107. Finally, I record on this topic that the parties are agreed that, apart from the right to seek recommendations from the Tribunal under the 2017 Regulations in the context of appeals under section 51 of the CFA 2014, the only other mechanisms available in respect of 'enforcement' of social care provision are by way of internal complaint to the local authority, complaint to an Ombudsman, or judicial review. (I observe that there is also in principle the possibility of petitioning the Secretary of State to make a direction to the local authority in respect of the exercise of its powers, but it seems unlikely that such a course would yield results in practice.) Likewise, essentially the same avenues would in principle be available in relation to healthcare. There is no other Tribunal to which appeal may be made.

<u>The approach the Tribunal should take under the 2017 Regulations</u>

108. It seems to me that the following guidance may be drawn from the foregoing survey of the frameworks applicable to healthcare and social care provision as they bear on the issue that arises in this case concerning the circumstances in which a Tribunal may decline to make recommendations in relation to health and social care where recommendations are sought. In setting out this guidance at length as I do, I emphasise that I do not mean to suggest that a First-tier Tribunal has to consider the healthcare and social care frameworks in anything like the detail that I have done in this case. Rather, my intention in surveying the frameworks and providing this guidance is to enable Tribunals to take a much shorter route to the 'right' answer in any particular case than I have in this, and to make, where appropriate in the particular case, robust recommendations under the 2017 Regulations as to the health and social care needs/provision the Tribunal considers is reasonably required in the light of the child or young person's educational needs:-

    a. The Tribunal's powers to make recommendations in relation to the specification of health and social needs in Sections C and D and provision in Sections G and H under the 2017 Regulations are materially the same as the powers to make orders in respect of the content of Sections B and F under regulation 43 of the 2014 Regulations. Although there is no freestanding right of appeal against the contents of the healthcare and social care sections of the EHCP, once an appeal has

been brought under section 51 of the 2014 Act, the Tribunal's powers to make recommendations under the 2017 Regulations are an equal part of its jurisdiction. Where an appellant seeks recommendations under the 2017 Regulations, they are not to be viewed as an optional extra. Although different parts of an appeal may assume greater or lesser importance in any particular case for many reasons, in terms of the Tribunal's decision-making task, it is in principle as important that it decides the parts of the appeal under the 2017 Regulations as it is that it decides the part of the appeal in relation to Sections B, F and I.

b. The fact that the Tribunal's powers under the 2017 Regulations are powers to make recommendations in respect of which the local authority or responsible commissioning body is only required to provide a reasoned response rather than actually comply is not a reason for the Tribunal to regard its decision-making task as any less important. The First-tier Tribunal's jurisdiction in this respect is like that of the Local Government and Social Care Ombudsman, which also has 'only' a power to make recommendations. However, as a judicial panel including members with special expertise, the First-tier Tribunal's jurisdiction is arguably stronger. The First-tier Tribunal is the only independent tribunal that has been given jurisdiction to adjudicate on healthcare and social care provision. As the High Court judicial reviews of the local authority decisions not to implement Tribunal recommendations show, a recommendation can be a powerful tool. If made by the (specialist) Tribunal following detailed consideration of evidence and for strong reasons, it may be difficult for a local authority or responsible commissioning body to provide lawful (cogent) reasons for refusing to implement it.

c. The Tribunal's jurisdiction under the 2017 Regulations is to make recommendations as to the specification of (education-related) health and social care needs and the provision reasonably required to meet those needs. As with appeals in relation to Sections B, F and I, the Tribunal 'stands in the shoes' of the local authority in relation to those matters and must make decisions about needs and provision on the basis of the evidence before it at the hearing. The parties in this case agree, and I have no difficulty accepting, that the Tribunal exercises an inquisitorial jurisdiction in relation to health and social care in the same way as it does in relation to special educational needs. The reasoning of Baker J in the *Gloucestershire* case at [15] (and the other cases relied on by Mr Wyard) applies with equal force in relation to health and social care: the lay panel members for such cases include at least one lay member "with substantial experience of special educational needs and/or disability" and at least one lay member with "specialism in health and/or social care matters" (Senior President of Tribunal's *Practice Direction: Panel composition in the First-tier Tribunal, Health, Education and Social Care (HESC) Chamber* (May 2023)). As such, as Baker J put it, *"The tribunal will usually have much greater relevant expertise than the*

parents who appear before them". This is also a public law jurisdiction concerned with provision for children and vulnerable young people by public bodies. It is wholly appropriate that the Tribunal should exercise an inquisitorial jurisdiction in respect of all aspects of the cases that come before it under the 2014 Act.

d. The evidence the Tribunal considers will include assessments and reports in relation to the child, as well as oral evidence given at the hearing. The primary burden is on the parties to put before the Tribunal the evidence necessary to make out their respective cases. If the parties fail to do so, the Tribunal may decide the case on the basis of the evidence before it (which may include dismissing part of a party's case if it has failed to put the necessary evidence before the Tribunal) or it may, in the exercise of its inquisitorial jurisdiction and case management powers make directions for the parties to provide additional evidence, either orally at a hearing or by adjourning and directing the provision of further reports or assessments.

e. The Tribunal is not, however, required before determining what to order should be specified in Sections B and F, or what to recommend should be specified in Sections C, D, G and H, to ensure that the various statutory steps that the local authority should have carried out before making or amending the EHCP are completed. It is well established that the fact that the local authority has failed to comply with the requirements of regulation 6 of the 2014 Regulations by obtaining the necessary advice (as to education, health and social care) in the course of the statutory assessment, or as part of a review of an EHCP (reg 20 of the 2014 Regulations) before making or amending the EHCP, does not prevent the Tribunal from making a determination in relation to Sections B, F and I of the EHCP. No more does it matter, when it comes to the Tribunal's jurisdiction in respect of Sections C, D, G and H, that a local authority has failed to complete a social services assessment as required by the legal framework set out above, or that the NHS has failed to complete an NHS Continuing Care assessment. So far as the Tribunal is concerned, these assessments are not necessary preconditions to the exercise of its jurisdiction, but merely one means by which the evidence may be put before the Tribunal for it to consider the exercise of its jurisdiction to recommend specification of health/social care needs in Sections C and D and provision to meet those needs in Sections G and H.

f. Unlike the position in relation to special educational needs (where the CFA 2014 prescribes that there must be a statutory assessment under section 36 before an EHCP is first made under section 37, and the Tribunal has jurisdiction under CFA 2014, s 51(2)(a) to order an assessment if the local authority refuses to undertake one), there is no equivalent statutory requirement in relation to assessment before healthcare or social care provision can be included in an EHCP. Nor does the Tribunal have any express jurisdiction to order (or recommend) that either the responsible commissioning body or the local authority carry out

an assessment (although it can evidently make such orders as part of its case management powers in order to ensure that it has the evidence before it in respect of which to make recommendations as to need and provision).

g. Although the Tribunal is not required to comply with the decision-making frameworks applicable to the local authority or responsible commissioning body, it may be relevant for the Tribunal to take into account when making recommendations certain elements of the statutory framework applicable to health and social care provision by the local authority and the responsible commissioning body. For example, regard to the statutory framework will enable it to understand which provision needs to be in Section H1 (as provision to be made under s 2 CSDPA 1970) and which provision needs to be in Section H2 (as provision to be made under the CA 1989 or, for adults and young people transitioning to adult care services, under the CA 2014).

h. The social care legislative framework may also inform the approach that the Tribunal takes where there has, as in this case, been a breakdown in relationships between parent and social services. Where the appeal concerns a child and thus engages the local authority's duties under sections 17-17ZD of the CA 1989, the local authority must 'involve' the parent carer in a parent carer's assessment (s 17ZD(12)(a)), but it is not relieved of the duty to carry out an assessment if the parent carer declines to be 'involved'. That reflects the primacy of the welfare of the child under CA 1989: even an un-co-operative parent may need to be assessed where this impacts on the child. In contrast, at the stage of transition to adult care services where the local authorities duties under sections 58-60 of the CA 2014 are engaged, a refusal of assessment by the carer relieves the local authority of the obligation to carry it out (s 60(3) CA 2014). Either way, lack of co-operation by a parent should not in and of itself be treated by the local authority as an obstacle to completing an assessment for the child or young person. In a case such as the present, that is likely to be a relevant factor for the Tribunal to take into account. If the Tribunal fails to exercise its jurisdiction under the 2017 Regulations in such a case, it risks reinforcing a legally erroneous approach by the local authority.

i. A recommendation for social care provision made by the Tribunal will carry more weight if it is made on the basis of evidence and by reference to the relevant eligibility criteria. For this reason, as matter of good practice in cases where social care recommendations are sought under the 2017 Regulations, the First-tier Tribunal should require the local authority to provide it with the relevant local criteria. The same goes for healthcare, although different considerations may apply because the responsible commissioning body will not normally be a party to the appeal so the Tribunal may need to make 'third party' orders against it for evidence and submissions if necessary: see generally *NHS West*

Berkshire Clinical Commissioning Group v The First-tier Tribunal (Health, Education and Social Care Chamber) and ors [2019] UKUT 44 (AAC).

j. Finally, although I have above sought to emphasise the respects in which the Tribunal's jurisdiction over health- and social care is essentially the same as its jurisdiction over education, there are of course also important differences. In particular, that recommendations are not directly enforceable, and that the Tribunal has no 'freestanding' jurisdiction over health and social care, but only a jurisdiction that is conjunctive with its educational jurisdiction. For all the reasons explored by Judge Ward in *VS*, what is required for the Tribunal lawfully to 'specify' a health/social care need or provision under the 2017 Regulations is therefore not as rigid as it is for special educational needs and provision under the 2014 Regulations. As Judge Ward put it at [47]: *"Given the nature of the power, the panel needs to be free to make constructive recommendations in relation to health and social care provision. How specific it feels it can be is essentially a matter for the FtT, taking into account all relevant factors (which include the desirability of specificity where it is possible for the reasons given above)."* And, as he observed at [55], if the evidence the Tribunal has is "thin", it may adjourn for further evidence, or refuse to make a recommendation, but delay is likely to be *"inappropriate in this jurisdiction where a child's education is at stake and where the cycle of reviewing an EHC Plan, with the potential for fresh proceedings in the FtT, comes round annually, while to decline to make a recommendation, even where the FtT panel may have useful recommendations to offer, because the lack of evidence precludes it from being done with the same degree of specificity, or a similar solid evidential foundation, to what would be required for educational provision, would risk frustrating the purpose of the Recommendations Regulations".* Further, in line with the outcome of the appeal in *VS*, there is in principle nothing wrong with making recommendations on a time-limited basis if the evidence available only relates to a limited period.

<u>My conclusions on Grounds 1, 2 and 3</u>

109. In the light of the foregoing analysis, I can now state my conclusions in relation to grounds 1, and 3 as follows:-

<u>*Ground 1: Healthcare recommendations*</u>

110. As to Ground 1, reading the decision as a whole, I accept Mr Greaves' submission that the Tribunal's reasons at [26] must be understood as referring to not having received the final transition plan, rather than not having had sight of the transition plan at all as it is evident from [29]-[30] that they have seen the draft plan. However, I consider that it was irrational for the Tribunal to conclude that it was "unable" to make recommendations in relation to healthcare without having seen the final transition plan or, at least, it has failed to give adequate reasons for why it was "unable" to do so in this case.

111. In many cases there will be no overlap in relation to health and social care provision and the absence of social care evidence will be irrelevant to whether the Tribunal has the evidence before it to enable it to make healthcare recommendations. As set out above, Sections C and G of the EHCP are for the responsible commissioning body not the local authority (see especially reg 12(2) of the 2014 Regulations). Any shortcoming in social care evidence will therefore not normally have any impact on the Tribunal's ability to make recommendations in respect of healthcare. If the Tribunal had thought it was lacking evidence in relation to healthcare then it ought, when it first adjourned the case, to have made orders (if necessary against the responsible commissioning body as a third party) to ensure that the requisite healthcare evidence was provided.

112. I do accept Mr Greaves' submission that there was a substantial overlap between healthcare and social care in this case because of the nature of C's needs, but what follows from that does not justify the Tribunal treating healthcare as if it raised no separate issue to social care. This was a case where it was apparent from the draft plan and the provision already being made for C that this was a case that potentially engaged section 21(5) of the CFA 2014 and/or section 22(1) of the CA 2014 and thus required the Tribunal to address where the boundaries between social, education and healthcare lay in this case. Both school staff and social care staff were providing some ancillary nursing care in this case. The reasons suggested by Mr Greaves as to why, as a result, the Tribunal might in principle reasonably have refused to make healthcare recommendations if it reasonably considered it was not in a position to make social care recommendations might therefore have been rational. However, I am afraid that it is simply not possible to infer from the Tribunal's decision that those were the reasons why it considered it could not make healthcare recommendations in this case. The overwhelming impression from the decision is that the Tribunal simply overlooked that healthcare needed to be considered separately from social care and separate reasons given if the Tribunal for why the Tribunal considered itself unable to make healthcare recommendations in circumstances where it had not identified any deficiency in the healthcare evidence before it.

113. The Tribunal recorded in its decision that the recommendations sought by way of healthcare provision included "provision of professional medical support when attending a social event, provision of daily physiotherapy [and] medical staff to deliver healthcare in school, not teachers". The Tribunal needed in its decision to focus on the recommendations actually sought and whether it had the evidence before it to make those recommendations. Given what was being sought in this case, the Tribunal needed to canvas with the parties whether they accepted that the provision sought by way of healthcare could all be made by education or social care staff, such that there was no need to consider a separate role for health. If not, the Tribunal needed to consider what evidence it would require (if necessary making an order against the responsible commissioning body) in order to address what appears to have been the appellant's case that C had a need for healthcare provision which did not fall within the definition of special education provision (having regard to the definition of section 21(5) of the CFA 2014), or which could not reasonably be expected to be provided by social services (having

regard in relation to provision to be made after he turns 18 to section 22(1) of the CA 2014 and the *Coughlan* boundary discussed above).

Ground 2: Social care

114. As to Ground 2, I consider that the Tribunal also erred in law. It was an error of law to state that it was “unable to make recommendations in the absence of the social work assessment”. It is true that the local authority must normally carry out an assessment before making any social care provision (as set out above, the local authority has power under paragraph 3 of Part 1 of Schedule 2 to the CA 1989 to carry out an assessment before providing services for a child, and must normally carry out an assessment following the *Working Together to Safeguard Children* guidance; it also has statutory duties to carry out assessments for young people likely to transition to adult services under section 58 CA 2014 and for adults who may be in need under section 9 CA 2014. However, the Tribunal is not required to carry out an assessment, or to ensure that an assessment has been carried out, before it can make recommendations for social care provision under the 2017 Regulations. The Tribunal’s jurisdiction is to make recommendations as to the description of (education-related) social care needs and the provision required to meet those needs. The Tribunal erred in law in stating that it was “unable” to make social care recommendations without a concluded social care assessment by the local authority.

115. Given that the Tribunal’s recommendations under the 2017 Regulations are not directly enforceable, it could in principle make recommendations as to provision without any specific social care evidence at all and simply on the basis (for example) that it was apparent from considering the child’s educational needs and provision that it would also be desirable for some social care provision to be made. Recommendations made on a thin evidential basis like that may well carry less weight, and be easier for a local authority to provide lawfully cogent reasons for refusing to implement (see the discussion above as to the enforcement/complaints mechanisms in relation to social care), but recommendations thus made may be appropriate in a particular case, especially where making them would avoid ‘frustrating the purpose of the Regulations’ by not making a recommendation at all, as Judge Ward put it in *VS*.

116. The present case is not, however, one in which the social care evidence could properly be regarded as ‘thin’. The Tribunal had before it all the evidence it had received about C and his needs as a result of considering his educational needs and provision, it had a detailed independent social worker report, it had a witness statement from the local authority social worker and a draft transition plan that contained a wealth of information about C’s needs – sufficient, in fact, for the local authority’s panel to have concluded (as recorded in the draft plan) that, despite MM not having participated, it would propose a care package for C, albeit would not propose respite for MM until she engaged with the local authority to enable her needs as a carer to be identified. In other words, even the local authority had reached the stage where in principle it considered it had enough evidence to determine what provision was reasonably required for C. This was not, in my judgment, a case where the Tribunal could rationally conclude that it had

insufficient evidence on which to make recommendations as to social care provision. Contrary to Mr Greaves' submission, the evidence was not significantly out of date.

117. Further, it was highly relevant that what had prevented the local authority from completing its assessment was MM's failure to co-operate. The Tribunal records in its decision the reasons why MM had felt unable to co-operate, which included that she was finding the process stressful and that the history of her interactions with social care had left her feeling too anxious to engage directly with social care. This was thus a case in which the Tribunal's jurisdiction under the 2017 Regulations had the potential to be especially valuable. Here was a family with accepted social care needs where relationships with the local authority had broken down, to the extent that C may not have been receiving provision that he required (or MM receiving provision that she required in order to care for C) as a result of a loss of trust between parent and local authority. The Tribunal had an opportunity to make recommendations as to provision that might have cut through the Gordian knot and provided a way forward for both parties. The element that the local authority had been missing, and which prevented completion of the transition plan, was input from MM. Yet here was MM at the hearing, with the local authority social worker, and the Tribunal thus had the opportunity to do justice to both sides by allowing MM to say what social care provision she needed (which, in this case, had in fact already been done through what was in Section H of the Working Document), and allowing the local authority to respond.

118. Given that the obstacle that had arisen in relation to completing the transition plan was MM's failure to co-operate, for the reasons I have identified above when setting out the approach the Tribunal should take, the Tribunal should also have taken into account that under the social services legislative framework, MM's lack of co-operation should not have been treated by the local authority as an obstacle to completing the assessment for C. That was a relevant factor that in this case should have pointed the Tribunal towards making recommendations rather than against making recommendations as by doing so it reinforced the legally erroneous approach taken by the local authority.

119. The matters that I have discussed under Ground 4 above in relation to the relevance of C's lack of capacity to the approach the Tribunal needed to take under the 2017 Regulations are all relevant here too in relation to Ground 2.

120. In short, I find that in this case the Tribunal misdirected itself in law, failed to take into account relevant factors, and gave inadequate reasons for its decision not to make social care recommendations.

Ground 3: exercise of inquisitorial jurisdiction?

121. In the light of my conclusions on Grounds 1 and 2, I do not need to decide Ground 3. I make only these observations:- in principle, I accept Mr Greaves' submission that it is only necessary for a Tribunal to address expressly in its reasons why it has or has not decided to exercise its inquisitorial jurisdiction to adjourn 'when the occasion arises' (*per* Baker J in the *Gloucestershire* case, ibid, at [15]).

However, given that the Tribunal in this case had decided that it was not going to deal with a significant part of the appeal because it considered that it did not have the evidence to do so, the 'occasion' had plainly arisen and it was in my judgment incumbent on the Tribunal to raise this problem with the parties, consider any submissions they wished to make as to the appropriate course, and to address expressly in its reasons (*per* Judge West at [142] in the *Croydon* case) why it had decided to conclude the case rather than either inviting the parties to give further evidence at the hearing or adjourning the matter again. I agree with Mr Greaves that it is highly unlikely that a further adjournment would have been appropriate in this case given the unlikelihood of the position changing with a further adjournment, and the impact of delay on C, but the possibility of the Tribunal proceeding by taking additional oral evidence at the hearing was, in my judgment, an obvious way forward. Either way, if it had been necessary to determine this issue, I would have concluded that the Tribunal erred in law by failing to consider what procedural steps it should take in light of what it perceived to be a deficiency in the evidence and to give reasons for its decision in that respect.

Conclusion and what happens next

122. For the reasons set out above, I have upheld the appeal on Grounds 1, 2 and 4 and found it unnecessary to decide Ground 3. In summary, I have concluded that the Tribunal materially erred in law by:

    a. Failing to identify that an issue arose as to C's capacity, failing to carry out a capacity assessment and failing to appoint MM as C's alternative person;

    b. Refusing to make recommendations as to healthcare needs and provision in Sections C and G of the EHCP;

    c. Refusing to make recommendations as to social care needs and provision in Sections D and H of the EHCP.

123. Under section 12 of the Tribunals Courts and Enforcement Act 2007, I have power where I conclude that the First-tier Tribunal has erred in law to set the decision (or part of it) aside and either remit the case for re-determination by the same or a fresh Tribunal or to re-make the decision myself: see generally *Sarkar v SSHD* [2014] EWCA Civ 195, [2014] Imm AR 911 at [15].

124. Although in principle the success of Ground 4 (capacity) means that the whole of the Tribunal's decision should be set aside, neither party has suggested I should take that course, and I do not consider that I need to, or that it would be in C's interests for me to do so. The material impact of the Tribunal's failure to recognise and deal appropriately with the capacity issue was in relation to its handling of the health and social care recommendations. I therefore set the decision aside only insofar as concerns the health and social care aspects of the appeal.

125. Mr Wyard invited me, if I upheld the appeal, to determine for myself what healthcare and social care recommendations should be made in this case. Mr Greaves submitted that was unrealistic, and I agree. Although I agree that it would be desirable to avoid further delay for C in this matter, it is important that recommendations for health and social care provision are made on the basis of current evidence. Such evidence as there is, is now nine months' old. It is also not actually clear precisely what recommendations were being sought by the appellant in relation to health as none were included in the Working Document, we only have the summary version in the Tribunal's decision.

126. In the circumstances, it seems to me that the appropriate course in relation to health and social care recommendations is to remit the matter. Although some time has now passed since the hearing, I have no reason to consider that the matter cannot go back to the same Tribunal. The parties have not raised any argument as to the panel's ability to look at this case afresh. I have no reason to doubt that the panel will not approach the matter wholly professionally on remittal. The failure in this case was in not making a decision on part of the case, so there is no danger of the Tribunal having prejudged the issues. The remittal is to enable the panel to do the job that it should have done the first time round, and to make recommendations for health and social care (assuming that it considers it is able to do so in the light of whatever evidence the parties now put before it).

Holly Stout
Judge of the Upper Tribunal

Approved for issue on 17 June 2024