IN THE UPPER TRIBUNAL **Appeal No.** HS/1637/2020
ADMINISTRATIVE APPEALS CHAMBER

On appeal from First-tier Tribunal (HESC Chamber)

Between:

VS and RS

Appellant

- v –

Hampshire County Council

Respondent

National Autistic Society

Interested Party

Before: Upper Tribunal Judge Ward

Hearing date: 29 April 2021

Representation:
Appellant: Alice Irving, instructed by Clifford Chance LLP
Respondent: Paul Greatorex, instructed by Head of Law and Governance
Interested Party: Steven Broach, instructed by Rook Irwin Sweeney LLP

DECISION

The decision of the Upper Tribunal is that the appeal fails in the result. Although the decision of the First-tier Tribunal made on 16 July 2020 under number EH850/20/00034 was made in error of law, I exercise my discretion not to set that decision aside.

I direct that the Upper Tribunal office is to send a copy of this decision to the Department for Education so that the Department is aware of it when there is an evaluation of the Recommendations National Trial.

REASONS FOR DECISION

1. This case is one of the few at Upper Tribunal level that have so far had occasion to look in any detail at the operation of the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017/1306 ("the Recommendations Regulations"). Whether it is appropriate to regard it as a test case may be disputed, however. The wider context is that the Regulations are in force as part of a national trial, which is due to conclude on 31 August 2021. It is understood that consideration will be given to whether to continue the power thereafter and if so on what basis.

2. Section 37 of the Children and Families Act 2014 ("the 2014 Act") provides, so far as relevant:

> "(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;
(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.

(4) Regulations may make provision about the preparation, content, maintenance, amendment and disclosure of EHC plans."

3. The content of an Education, Health and Care ("EHC") Plan is dictated by reg.12 of the Special Educational Needs and Disability Regulations 2014/1530 ("the SEND Regulations"):

"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); (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 Code of Practice[1] notes at (i) that

> "In this Code of Practice, where the text uses the word "**must**" it refers to a statutory requirement under primary legislation, regulation or caselaw"

(this and subsequent emboldenings in original).

At para.9.69 there is a section entitled "What to include in each section of the EHC plan". It suffices to note that in relation to section F, the Code states that:

> "Provision **must** be detailed and specific and should normally be quantified, for example in terms of the type, hours and frequency of support and level of expertise, including where this support is secured through a Personal Budget."

In relation to sections G and H1 however, the Code notes (italicised emphasis is my own) that

> "Provision *should* be detailed and specific and should normally be quantified, for example in terms of the type of support and who would provide it."

Whilst the Code goes on to apply "must" to the requirement to specify all services assessed as being required under s.2 of the Chronically Sick and Disabled Persons Act (see [8] below), it is clear from the contrast between the emboldened "must" in relation to section F and the unemboldened "should" in G and H that the authors of the Code saw a difference in the legal nature of the requirement to indicate provision that is detailed, specific and normally quantified.

5. By s.77(6) of the 2014 Act it is the duty of the FtT to

> "have regard to any provision of the code that appears to it to be relevant in relation to a question arising on an appeal under this Part."

6. The rights of appeal conferred by s.51 of the 2014 Act are as follows:

> "(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;

[1] *Special educational needs and disability code of practice: 0 to 25 years* (Department for Education and Department for Health, January 2015)

(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."

By sub-section (3)(b) the circumstances in which a right of appeal under sub-section (2)(c) arises include following an amendment of the EHC plan.

7. The present appeal only concerns the power to make recommendations in respect of social care provision. Similar powers exist in relation to health, although there are some distinguishing features. I therefore set out below the relevant provisions of the Recommendations Regulations in relation to both social care and health and, in order to depict the overall picture, those covering needs as well as those covering provision.

"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."

8. Chronically Sick and Disabled Persons Act 1970 s.2 provides:

> **"2.— Provision of welfare services.**
>
> …
> (3) Subsections (4) to (6) apply to local authorities in England.
>
> (4) Where a local authority have functions under Part 3 of the Children Act 1989 in relation to a disabled child and the child is ordinarily resident in their area, they must, in exercise of those functions, make any arrangements within subsection (6) that they are satisfied it is necessary for them to make in order to meet the needs of the child.
>
> (5) Subsection (4) is subject to sections 7(1) and 7A of the Local Authority Social Services Act 1970 (exercise of social services functions subject to guidance or directions of the Secretary of State).
>
> (6) The arrangements mentioned in subsection (4) are arrangements for any of the following—
> (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.
> …"

9. It is also relevant to mention s.25 of the 2014 Act, which provides:

> "(1) A local authority in England must exercise its functions under this Part with a view to ensuring the integration of educational provision and training provision with health care provision and social care provision, where it thinks that this would—
> (a) promote the well-being of children or young people in its area who have special educational needs or a disability, or
> (b) improve the quality of special educational provision—
> (i) made in its area for children or young people who have special educational needs, or
> (ii) made outside its area for children or young people for whom it is responsible who have special educational needs."

10. Section 28(3) of the 2014 Act provides:

> "(3) A local authority in England must make arrangements for ensuring cooperation between—
> (a) the officers of the authority who exercise the authority's functions relating to education or training,
> (b) the officers of the authority who exercise the authority's social services functions for children or young people with special educational needs, and
> (c) the officers of the authority, so far as they are not officers within paragraph (a) or (b), who exercise the authority's functions relating to provision which is within section 30(2)(e)

> (provision to assist in preparing children and young people for adulthood and independent living)."

11. The case concerns the needs of Kieran (not his real name), who is aged 12 and who, as found by the FtT

> "has diagnoses of autism and attention deficit hyperactivity disorder (ADHD). [He] presents with challenging behaviours and has been under the care of CAMHS since he was 4. [He] was diagnosed with a significant language disorder in 2016."

12. Kieran's sibling and parents have needs themselves. Details are not necessary and would detract from the anonymisation of this decision, but contribute to the importance of social care provision to the family's functioning in dealing with the issues which Kieran faces.

13. The appeal was under s.51(2)(c) of the 2014 Act. Kieran's parents contended that he needed a waking day curriculum and that he should attend school S, a non-maintained special school for pupils with an autistic spectrum disorder, on a residential basis. The local authority had named school G, a non-maintained special school catering for pupils with an autistic spectrum disorder as a day placement, but shortly before the FtT hearing indicated that it no longer considered school G would be an appropriate placement; it agreed residential placement at school S, not on the basis that a waking day curriculum was required, but because the travelling distance was too great for a day placement. The other areas of dispute were the provision of OT and mental health support and the need for, and provision of, social care.

14. Although the hearing was originally listed for 2 days, in circumstances which are not entirely clear only one day of hearing took place, with the remaining matters being addressed through written submissions. In its decision dated 28 August 2020, the FtT found that Kieran did need a waking day curriculum, which resolved the reason for placement. The FtT duly ruled on OT and mental health support. None of that is any longer in dispute.

15. As regards social care, the FtT's decision stated:

> "We find that [school S] will provide outreach to support [Kieran's parents] in using the same methods at home that have been used at [school S] to manage [Kieran's] demand avoidant behaviour. [Kieran] will be away from his family during the week in term time. We find it important that [Kieran] is able to spend time with his family at the weekend and during the school holidays. We are satisfied that with the support they receive from staff at [school S] [Kieran's parents will be able to use strategies consistent with those used at [school S] to manage his behaviour at the weekend and during school holidays without the need for additional support.
>
> We find there is a need for ongoing support whilst [Kieran] transitions to a residential placement at [school S]. Social Care acknowledge there is a need for ongoing support. We recommend Social Care make a lump sum payment of £3608.22 so [Kieran's parents] can fund carers for 14 hours a week during school holidays and 9 hours a week during term time up to October 2020 half term."

16. The FtT's order was more or less verbatim in the same form as the final sentence above.

17. What happened thereafter – and in particular the extent to which Kieran's parents had to take ongoing steps to challenge the respondent before it would do anything- is disputed and may not advance matters much, if at all, in an appeal limited to a point of law. It is however common ground that the outcome was that social care provision was extended so as to be maintained at least until Easter 2021.

18. An application to the FtT for permission to appeal was refused on the basis (in summary) that there had been no proposals or recommendations for social care provision beyond the October half-term break before the FtT, which had been as specific as it was able to on the limited evidence available to it.

19. On 4 December 2020 I gave permission to appeal. An application was then received from the National Autistic Society to be joined as interested party and to file evidence, which in due course it did in the event that permission were to be granted. The respondent's initial response submitted that the appeal was academic and as such should be dismissed.

20. On 12 February 2021, applying *R(Salem) v Secretary of State for the Home Department* [1991] AC 491(HL) I refused to dismiss the appeal as academic, concluding that even if it was academic, there was still a good reason in the public interest for hearing it. The public interest arose because the issues were likely to recur in other cases being handled by local authorities or before the FtT; the fact that the scheme was being operated on a trial basis meant that if the case produced useful insights into the legal framework, the legislators would have the opportunity to consider them in the course of reviewing the trial; and that the Upper Tribunal's role in giving guidance in the specialist areas with which it deals, acknowledged in authorities such as *R(Jones) v FtT* [2013] UKSC 13 at [46] and *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, made it appropriate for it to consider the issues raised by the appeal.

21. At the same time, I joined the National Autistic Society and gave directions for a substantive response from the respondent, to be followed by an oral hearing.

22. The hearing was held on 29 April 2021 by Kinly CVP and proceeded without significant technical complications. All three parties were represented by counsel. The material consisted of an agreed hearing bundle, a bundle of authorities and the papers from the FtT. The appellants attempted to submit further evidence, to which Mr Greatorex for the respondent objected. Whilst I have read it on a provisional basis (*de bene esse*), I have not needed to rely on it for the purposes of this decision.

23. Ms Irving for the appellants submits that there are two possible readings of the FtT's decision, both of which are - for differing reasons – unlawful. The first reading is that the FtT recommended social care support until the October 2020 half term, with all social care support ceasing thereafter. That, she submits, is a perverse ruling on the evidence before the FtT. The second reading is that the FtT recommended provision until October 2020 but then deferred to the local authority to decide following a review, which she submits was unlawful for being insufficiently specific.

24. Mr Greatorex refers to para 32 of the FtT's decision, where evidence from "Social Care" is set out that they propose a lump sum to cover to half term in order to fund care for 14 hours during the holidays and 9 during term time and that "the needs for social care support would be kept under review in order to meet the family's changing circumstances following [Kieran's] transition to a residential placement." He relies on (unspecified) authorities as to how an appellate body should read the reasons of a specialist tribunal to invite me to conclude that, given the evidence before it, the FtT's decision is not to be taken as conveying the first meaning, which would indeed be perverse. He invites me to adopt the second reading and to conclude that there was no unlawful lack of specificity, in that the requirements for specificity when applied to "special educational provision" are not equally applicable to recommendations for health and social care.

25. Both Ms Irving and Mr Greatorex offered submissions as to aspects of the recommendations power, as did Mr Broach. These are addressed below insofar as I consider it appropriate to do so in the context of the present appeal.

26. The version of the working document before the FtT records the parents as seeking

> "21 hours direct payments hours a week during all school holidays.
> 9 hours per week direct payments hours if residential school not named.
> 4 hours per week direct payments hours if residential school named."

27. It is fair to observe that whilst there was evidence of Kieran's need for social care provision in general terms, there was no evidence quantifying the provision he would in any event need in school holidays nor the provision that would be needed in the event that the FtT either did, or did not, order that school S be named. An assessment in April 2020 had agreed that direct payments could continue if required, but deeper therapeutic interventions were considered necessary. There was written evidence from Ms Skinner dated 12 June that support would be provided but its focus was on the immediate issues in Summer 2020 and it was written at a time before residential provision had been agreed. Ms Skinner had attended the hearing on the first day but was not then called upon to give evidence on this issue and when the second day never took place, it was left to written submissions to restate the number of hours the appellants were seeking.

28. The respondent's position was that continued direct payments would not address the family's difficulties; it relied on evidence given at the hearing that school S could provide support to ensure consistency of strategies at weekends and school holidays. Social care recognised a need for immediate support whilst Kieran transitioned to school S and a lump sum was proposed to cover the period until October half-term. Calculations were provided in support, indicating that the sum allowed 14 hours weekly of provision during the holidays and 9 hours weekly during term. They considered that given the changing circumstances and the specialist placement which school S represented it was necessary to keep social care support under review so it could be adapted to meet the family's changing circumstances.

29. I also note that the evidence of school S (FtT para 26) was that

> "[Kieran's] transition plan will be entirely student centric and led by him."

30. The longer-term position (i.e. outside an initial transitional period- see paras 43 and 44 of the FtT's decision, read together), as found by the FtT, was that

> "with the support they receive from staff at [school S] [Kieran's] parents will be able to use strategies consistent with those used at [S] to manage his behaviour at the weekend and during school holidays without the need for additional support."

31. That was a finding of fact which in my judgment it was open to the FtT to reach. Para 24 of the decision sets out evidence about the "robust support for families", and the key importance of the shared language and motivational strategies used both at home and by the school, of which some details are provided. This was evidently accepted by the FtT. I do not consider that their ability to do so was undermined by their finding, as part of explaining why a waking day curriculum was required, that it was

> "unrealistic to expect [Kieran's parents] to be able to generalise skills from the classroom to other contexts when staff at [his previous school], a specialist school, have been unable to meet [Kieran's] needs."

32. There is a difference in the extent and intensity of provision between a school operating on the basis of a school day and one operating a waking day curriculum. With waking day (and so, residential) provision, the school will have greater opportunity to deploy its techniques for assisting the child and to seek to embed them; when the parents are responsible for the child, they will receive him with the benefit of the additional work done by the school and for a reduced amount of time.

33. Based on that finding, what was left was how to deal with the transition period. As noted above, the evidence was that the transition would be led by Kieran himself. This meant that it was intrinsically difficult for anyone to anticipate how long that would take. Unless the FtT was to reject their content on the basis that, strictly speaking, they did not constitute evidence (an approach which would in my view have been somewhat formalistic and, given the difficulties in relation to the second hearing day, unfortunate), the parties' submissions were the evidence in relation to the Autumn Term. The respondent's submission was not predicated on an assumption that by half term the period of Kieran's transition to school S would necessarily have been completed, nor that school S would have so swiftly accomplished its work that the need for social care support would have fallen away. Rather, it was to be kept under review.

34. That, however, was not what the FtT said, at any rate not in terms. Their recommendation in respect of social care was phrased in terms which made no provision, in any form, for the period after October 2020 half term. Nor did they expressly state that they regarded provision up to that date as sufficient so were making no recommendation in respect of the period thereafter.

35. Key to resolving a number of the issues in this case is to determine what is required by law in relation to specifying the social care or health provision when making a recommendation in respect of it. 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 s.51(2), which concern educational provision. The FtT's orders, insofar as they relate to educational provision, must be complied with within timescales set down in reg.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 reg.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 s.2 of the Chronically Sick and Disabled Persons Act. The only requirement is to consider such recommendations within 5 weeks and to provide the notifications and explanations which the Recommendations Regulations require (see [7] above). Whilst there is a clear expectation that local authorities will generally follow FtT social care recommendations[2], 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 reg. 44 of the SEND Regulations creates.

37. As noted above, s.37(2) of the 2014 Act describes an EHC plan as "a plan specifying" certain matters, while sub-section (3) indicates that an EHC plan "may also specify" other health care and social care provision that is reasonably required. Regulation 12(1) of the SEND Regulations requires a local authority to "set out" the matters to be contained in the various sections of the plan, albeit reg.12(2) then provides the additional requirement that the health care provision "specified" in the plan must be agreed by the responsible commissioning body. The Recommendations Regulations refer to the power to recommend that health or social care needs or provision be specified under reg.12(1)(c), (d), (g) or (h) (as the case may be) and that needs or provision "specified" under those provisions may be amended.

38. The word "specify" is therefore being used throughout this corner of the legislation, irrespective of whether the subject of it falls within the realm of special educational needs or provision (and is within the FtT's power to make binding orders) or within those areas where the FtT's power extends only to making recommendations. However, does that consistency in use of language mean that all of the learning concerning specificity of educational provision applies equally to health or social care provision which is the subject of recommendations and if so, how?

[2] See *SEND Tribunal: single route of redress national trial* (Department for Education, March 2018)

39. The relevant principles in relation to specifying educational provision were helpfully summarised by Upper Tribunal Judge West in *Worcestershire County Council v SE* [2020] UKUT 217 (AAC) at [74]:

> "74. On the basis of this survey of the decided cases, it seems to me that a number of principles can be distilled from them:
>
> (i) the test of the required degree of specificity is that laid down by Laws J in *L v Clarke and Somerset* at p.137B-C as approved by the Court of Appeal in *E v Newham LBC*, namely
> "The real question … in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often a specification of hours per week will no doubt be necessary and there will be a need for that to be done."
> (ii) but as Judge Jacobs said in *BB* at [22]
> " … the whole paragraph is carefully worded to depend on what is appropriate in the particular: *so* specific, *so* clear, necessary in the *individual case*, and *Very often."*
> (and see too Judge Mesher in relation to the Code of Practice in *CL* at [13]).
> (iii) moreover, as Sullivan J explained in *S v Swansea CC* at p.327H
> "The question identified by Laws J has … to be answered not in the abstract, but against the background of the matters in dispute between the parties."
> Lack of particularity may allow less specific provision; a more detailed case may require more detailed provision.
> (iv) a requirement that the help to be given should be specified in a statement in terms of hours per week is nevertheless not an absolute and universal precondition of the legality of any statement: see Laws J in *L v Clarke and Somerset* at p.136H and *E v Rotherham MBC* at [25].
> (v) the statutory duty plainly cannot extend to requiring a tribunal to specify (in the sense of identify or particularise) every last detail of the special educational provision to be made: see *E v. Newham LBC* at [64(ii)].
> (vi) failure to specify a level of support after a particular date may lack the required degree of specificity: see *E v. Rotherham MBC* at [31-32].
> (vii) provision cast in the form of recommendations as opposed to requirements may lack the requisite degree of specificity: see *JD* at [8]; likewise the inclusion of "programmes tailored to need": see *JD* at [9], *B-M* at [5]; or "opportunities": see *JD* at [11], *B-M* at [5], but that must be read in the light of the following principles (viii) to (xi).
> (viii) there will nevertheless be some cases where flexibility should be retained: see Laws J in *L v Clarke and Somerset* at p.136H. The degree of flexibility which is appropriate in specifying the special educational provision to be made in any particular case is essentially a matter for the tribunal, taking into account all relevant factors. In some cases a high degree of flexibility may be appropriate, in others not: see *E v Newham LBC* at [64(iii)].
> (ix) in distinguishing between cases where provision is sufficiently specific and those where it is not, it is important that the plan should not be counter productive or hamper rather than help the provision which is appropriate for a child. The plan has to provide not just for the moment it is made, but for the future as well. If absolute precision is required, it can only be obtained by a continual process of revision of the plan, and the time involved in investigating and decision-making on exactly what is now required, with possible appeals, could disrupt the professional's ability to provide what the child requires and disrupt the child's progress. A plan must allow professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at thetime. A tribunal is entitled to use its expertise to decide on the proper balance between precision and flexibility: see Judge Jacobs in *BB* at [23].
> (x) the broad general principles laid down by the Court of Appeal in *E v Newham LBC* must be applied to the particular circumstances of each case as they arise. The contents of an EHCP have to be as specific and quantified as is necessary and appropriate in any particular case or in any particular aspect of a case, but the emphasis is on the EHCP being a realistic and practical document which in its nature must allow for a balancing out and adjustment of the various forms of provision specified as knowledge and experience develops on all sides. Wisdom lies also in leaving a wide scope to the expert judgment of the members of the First-

> tier Tribunal and not subjecting matters which fall rather uneasily within the framework of a judicial process to inappropriately technical standards: see Judge Mesher in *CL* at [15].
> (xi) the fact that provision is being made at a special school or college is a factor to be taken into account which may in an appropriate case permit more flexibility than when a mainstream school is involved: see *S v SENDIST* at [36], *East Sussex* at [41], *B-M* at [3]. Greater specificity might well be appropriate in the case of a mainstream school where staff have to be brought in, whereas in the context of a special school such staff may well in principle be available: see *E v Newham LBC* at [65(ii)]."

40. The legislation (as Laws J noted in *L v Clarke and Somerset* in relation to predecessor legislation) makes clear what matters have to be "specified" and where. But what is involved in "specifying" is, as the cases summarised by Judge West demonstrate, as encapsulated at [x] of his para 64, flexible within that and "as specific and quantified as is necessary and appropriate in any particular case *or in any particular aspect* of a case" (italics added).

41. Looking then at recommendations as the particular aspect of a case, where special educational provision is concerned, the local authority is by s.42(2) of the 2014 Act under a duty to secure it (see above). There is no equivalent in the 2014 Act for health and social care. What may be enforceable in the cases under the Recommendations Regulations are the procedural steps there set out and the adequacy of the response by the body concerned to the FtT's recommendation.

42. In relation to special educational provision, a further concern is that a local authority should not be permitted within the terms of an FtT's order to dilute the provision without amending the EHC plan, as that could deprive the child's parents or the young person of the right of appeal under s.51 which would arise on an amendment of section F. By contrast, there is simply no right of appeal in relation to sections C, D, G or H anyway, so the same concern does not apply.

43. While no doubt all concerned in a case seek to make appropriate educational provision for a child's special educational needs, opinions can and do differ as to what form that provision should take. Different provision will have different cost implications for the local authority which has to secure it and it will be a party as of right to any FtT proceedings. By contrast, a health commissioning body which is the potential subject of a recommendation has no right to be a party (see the *West Berkshire* case[3]), nor does the legislation envisage that the FtT proceedings will be the appropriate vehicle for determining substantive disputes concerning social care provision under the complex legislative framework which Mr Broach demonstrated exists in that regard.

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.

45. What in my view is key in the context of the exercise of the power under the Recommendations Regulations therefore is the acknowledgment within the existing

[3] *NHS West Berkshire Clinical Commissioning Group v The First-tier Tribunal (Health, Education and Social Care Chamber)* [2019] UKUT 449 (AAC)

authorities on specificity that there can be flexibility, rather than applying decisions such as *L v Clarke and Somerset* which required a high degree of detail, in the context of the particular dispute before them.

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 s.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.

49. It follows that *E v Rotherham MBC* [2001] EWHC Admin 432; [2002] ELR 266 cannot simply be read across to apply to the exercise of the recommendations power. It was a key point of Bell J's reasoning, addressing a point raised by counsel at [14], that:

> "[33] Thirdly, and in any event, the wording of the final bullet point in my view has the potential of depriving Mrs E of the right to appeal, which she would otherwise have by virtue of s 326(1) of the Act, against the amendment of the statement which would normally be required if the LEA decided to change the provision specified in the first three bullet points. Although the wording of the final bullet point does not expressly remove Mrs E's right of appeal against any amendment to the statement which is actually made by the LEA, it has the potential to which I refer because it allows the LEA to change the level of support in accordance with the wording of the statement and, therefore, without any need for an amendment of the statement which would trigger the right of appeal.

> [34] I do not believe that such a fundamental infringement of the policy of a right of appeal against the contents of a statement expressed in s 326 can be justified by any need for flexibility in the provision of SALT for a developing 4-year-old child. It might be possible legitimately to achieve that end by specifying acceptable minimum and maximum levels of provision of therapy if the evidence justified such an approach…"

As noted above, the fact that a party risks being deprived of a right of appeal that would otherwise have been available does not exist where the recommendations power is concerned.

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 MBC* [2001] EWHC 432 (Admin), for the reasons above I do not agree.

53. I can understand that health, social care and educational provision may all have a part to play in the life of a child or young person with special educational needs. I can further understand that dealing with a number of different bodies may prove to be very demanding for the parents or other persons who assist a child or young person. However, as I said in a different context in *E Sussex CC v KS (SEN)* [2017] UKUT 273 (AAC) at [64]-[65]:

> "The systems of special educational needs, care provision and health provision are the subject of differing statutory provisions, with differing duties imposed on differing bodies and differing governance arrangements. I further accept that that is carried through into the provisions of the SEN regime under the 2014 Act referred to at [43]. The clear intention of regulation 12(2) is that it is the responsible health commissioning body who has the function of determining the health care provision to be included in the EHC plan and by section 42(3) the duty to arrange it.
>
> Of course, a lack of coordination between those responsible for the differing types of provision which a child or young person with special educational needs might need is unhelpful. It is clear from the guidance on children and young people's continuing care and from the Code of Practice (see [18] above) that a high degree of coordination is expected. But the fact that the differing bodies are exhorted to collaborate, in the interests of delivering a more integrated result to the children and young people affected, does not mean that the underlying statutory distinctions do not exist, nor that the powers of the various bodies concerned can be stretched

> so as to yield a joined-up solution in the interests of the child where such a solution does not otherwise emerge."

It is no doubt as an attempt to mitigate the effects of the differing systems that provisions such as sections 25 and 28(3) of the 2014 Act (see [9] and [10] above) and statutory guidance in the social services field have been put in place.

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 NAS 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.

56. On the conclusions I have reached, the second reading of the FtT's decision would (if clearly stated) have been an entirely permissible position for it to take. It was common ground between the parties that some need for social care provision would persist after half-term, but no evidence (no matter how generously the concept of evidence was understood) which would enable its level to be determined. For the reasons I have given, the FtT had little option but to recommend in the terms it did, on the material that it had, and to leave the position after half-term to be decided after a review. Whilst that meant leaving it to the parties to negotiate as best they could, it

was not depriving Kieran's parents of any right of appeal under the 2014 Act they might otherwise have had, nor in my view was such a course objectionable by reference to *E v Rotherham*. (They may have had rights under social care legislation if dissatisfied with the outcome, but that is not a matter for these proceedings).

57. Considerable difficulty between the parties might have been avoided if the FtT had expressly added to its recommendation that there should be a review at half-term and whatever it felt able to recommend about how that should be carried out. The fact that the requirement for specificity, as I have held, plays out differently and less onerously in the context of the Recommendations Regulations does not mean that the content of what the FtT is recommending should not be clearly stated. On the assumption that a review was its intended recommendation, but not stated, the FtT was to that limited extent in error of law.

58. If, contrary to my view, it is the first reading of the decision that is the correct one, I would accept the submission (from which no counsel dissented) that it would have been perverse to conclude there was no need whatever for social care provision after half-term.

59. Either way, then, the FtT's decision was – or would have been – in error of law. In either case, I would exercise my discretion not to set the decision aside. Matters have moved on in relation to social care provision and by now an annual review of Kieran's EHC plan must be due or may have taken place.

60. In relation to other points made during the proceedings, the NAS expresses concern that National Trial cases are often listed for two days, but that the second day may be cancelled or used to determine the education aspects of the case, leading to social care aspects being rushed. What became of the second day in the present case is not one of the grounds of appeal and it would be inappropriate for me to comment on a general level on how the FtT organises its time in National Trial cases. For similar reasons, here is not the place to comment on a general level about what should be the FtT's approach to case management in National Trial cases. I merely note for the purposes of the review of the National Trial; the expressed concerns about the difficulty in obtaining a social care assessment in a number of cases and the doubts as to whether the FtT has any legal power to require a social care assessment to be carried out in such a case.

C.G.Ward
Judge of the Upper Tribunal
Signed on the original on 4 August 2021