IN THE UPPER TRIBUNAL **Case No** HS/981/2017
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Mr David Lawson, Counsel

For the Respondent: Ms Deborah Hay, Counsel

Decision: The appeal is allowed. The decision of the First-tier Tribunal dated 21 December 2016 under reference EH845/15/00016 involved the making of an error of law and is set aside. The case is referred to the First-tier Tribunal (HESC Chamber) for rehearing before a tribunal consisting of a panel which is either entirely the same as, or entirely different from, the panel whose decision is under appeal to the Upper Tribunal. The file is to be placed before a salaried judge of the First-tier Tribunal as soon as possible for case management directions to be given.

REASONS FOR DECISION

1. The case concerns L, a girl now aged 5. She was born prematurely, at 29 weeks, and has a considerable range of needs, some of which are explored further below. The start of her education has been delayed. Proceedings in the First-tier Tribunal ("FtT") took 16 months, for reasons which will become apparent. The FtT subsequently gave permission to appeal and suspended the effect of its decision. The appeal to the Upper Tribunal has been expedited.

2. The case also concerns the division of responsibility between various parts of the public sector for meeting L's needs. The particular form in which the issue presents itself is an unusual one; it may be confined to one school, although there are understood to be eight cases involving that school which are or have been in the FtT. The issue may in any case have wider implications.

3. The school concerned, Chailey Heritage School ("CHS"), is a non-maintained special school (as defined in Education Act 1996, ss. 337A and 342). It had offered L's parents a place for her, conditional upon 1. the local authority agreeing to pay the education fees; and 2. the relevant commissioning body agreeing to meet what were described as the "clinical fees". As it turned out, following a recent change of practice in which the relevant commissioning body has started to carry out more systematic assessments than previously, it did not agree to do so, considering the provision unnecessary.

4. L's parents persisted in their attempts to get CHS named, through the tribunal process, and were successful. The local authority's concern in a nutshell is that it should not be made to act as funder of last resort for health care provision which the NHS body responsible for assessing need had concluded were not required.

The law – SEN

5. Section 20 of the Children and Families Act 2014 ("the 2014 Act") explains that a child has a learning difficulty or disability (terms explained in sub-section (2)) which calls for special educational provision to be made for him or her.

6. Section 21 provides important definitions for present purposes, for the part of the 2014 Act dealing with SEN:

> **"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.
> ….
> (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).
> …"

7. Section 37 defines when the duty is triggered to secure that an EHC Plan is prepared. The section goes on to provide:

> "(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."

8. Sections 38 and 39 create a qualified right for a parent to insist that an institution of their choice is named if it falls within certain categories. CHS as a non-maintained special school is within those provisions. The authority had no objection to the suitability of CHS to meet L's needs (though it did submit that to send her there would amount to an inefficient use of resources, which, if established, would defeat the parent's right.)

9. The duties that flow in relation to provision specified in an EHC Plan are set out in s.42:

> "(2) The local authority must secure the specified special educational provision for the child or young person.
>
> (3) If the plan specifies health care provision, the responsible commissioning body must arrange the specified health care provision for the child or young person.
>
> (4) *"The responsible commissioning body"*, in relation to any specified health care provision, means the body (or each body) that is under a duty to arrange health care provision of that kind in respect of the child or young person."

10. As will be seen at [13] below, the "responsible commissioning body" has the legal ability to control the health care provision which is specified, which it will then be required to arrange.

11. Where a non-maintained school is named in an EHC plan, s.63(2) requires a local authority to "pay any fees payable in respect of education or training provided for the child or young person at that school, institution or place in accordance with the EHC plan."

12. Section 77 creates a duty on, among others, local authorities and, where it appears relevant, the FtT to have regard to the Code of Practice. It is mentioned below where relevant to this decision.

13. The 2014 Act is supplemented by the Special Educational Needs and Disability Regulations SI 2014/1530. Reg. 12 both stipulates the form of an EHC plan and provides the mechanism for control over health care provision:

> "(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."

14. Reg.43 sets out the powers of the FtT on an appeal. Without setting out s.51 at length, the relevant powers of the FtT under reg 43 are those to:

> "(2) (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)."

Commissioning in the NHS – law and practice

15. By s.3(1) of the National Health Service Act 2006 ("the 2006 Act"):

> "(1) A clinical commissioning group must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility–
>
> (a) hospital accommodation,
> (b) other accommodation for the purpose of any service provided under this Act,
> (c) medical, dental, ophthalmic, nursing and ambulance services,
> (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as the group considers are appropriate as part of the health service,
> (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the group considers are appropriate as part of the health service,
> (f) such other services or facilities as are required for the diagnosis and treatment of illness."

16. A National Health Service Commissioning Board is created by section 1H of the 2006 Act (as amended). Where the Board is under a duty to arrange for the provision of a service or facility, a clinical commissioning group is not: 2006 Act, s.3(1E). The Board operates under the trading name of "NHS England".

17. Evidence from the CCG explained how services could be analysed in three groups: universal services, specialist services and children's continuing care. Universal services are available to all of the population of England from birth, including (inter alia) primary care from GP practices and school nursing. Relevant services in L's case under universal services include wheelchair services, OT, physiotherapy, SALT, and hospital appointments for services such as the seizure service. Specialist services are less common interventions needed by a relatively small group of patients: most are commissioned by NHS England but some elements may be commissioned by local CCGs or work closely with CCG-commissioned services. Children's

continuing care is a package of continuing care needed over an extended period of time for children with continuing care needs that arise because of disability, accident or illness and which cannot be met by universal or specialist services alone. Packages are funded in a variety of diferent ways between CCGs and local authorities, depending on the nature of the needs.

18. The Department of Health has issued guidance on this aspect in "National Framework for Children and Young People's Continuing Care" (January 2016). It provides :

> "23. Local authorities and CCGs must work together to make EHC plans work, and their joint arrangements should include an agreement as to how continuing care fits with the EHC process. Although the processes are different, the same information and professionals across disciplines should be involved, in order to result in a coherent package of care across health, education and social care for children and young people who are eligible for continuing care.
>
> 24. The information needed to make a decision on the continuing care package will be very similar to that needed for the health element of the EHC plan. Some form of pre-screening or decision making could determine the pathway for the process. A rapid assessment of whether or not a child is likely to have a continuing care need, could trigger the health assessor undertaking responsibility for health input to the co-ordinated process.
>
> 25. A decision by the deciding panel on the continuing care element of the EHC plan could be secured within 28 days, and the package of care commence, to be integrated subsequently with the other education and social care elements of the EHC plan as it takes shape. The health assessor's role would help facilitate the health input to the EHC plan. This would also allow a three month review to take place when the full EHC plan was considered for sign-off.
>
> 26. In line with the Haringey judgement [*R(ota D) v Haringey LBC* [2005] All ER (D)256], there are clear limits to what care should be funded by the local authority, which should not be a substitute for additional NHS care for children. In this case, the High Court determined that the duty under section 17 of the Children Act 1989 did not extent to meeting essential medical needs.
>
> 27. Similarly, the special educational needs support a child may require is the commissioning responsibility of the local authority, as an educational service. However, commissioners may find there is an overlap between their respective responsibilities, in relation to children with certain types of need."

Paras. 9.70-9.72 of the SEN Code of Practice also outline collaborative arrangements.

L's asserted medical and nursing needs

19. I summarise in tabular form L's medical conditions and the consequential need for provision, as put forward by her parents in the FtT proceedings. These are not to be understood as findings on my part.

Description of condition	Provision asserted to be required
Dicer 1 syndrome (causes cancerous and non-cancerous tumours)	Close monitoring by nurses and trained staff in school for body shape/weight loss which may indicate a tumour. School with onsite nursing to minimise time away from education post operatively. Quick access to onsite nurses and doctors to monitor urine output.
Chromosomal disorder	High level of direct specialist physiotherapy input.
Possible Marfan's syndrome (connective tissue disorder which can affect the heart)	Monitoring in school by nurses for any signs of connective tissue and heart issues.
West syndrome (form of epilepsy)	Seizure protocol and specialist training for staff in delivering range of medication 3 times during each school day; access to onsite nursing at all times to monitor and treat seizures as needed; quiet place to sleep.
Respiratory issues	Depending on health, may need suctioning up to 5/6 times a day. Need specially trained staff with onsite nursing backup for advice and support.
Gastrointestinal issues (L has gastrostomy). Frequent constipation.	Special feed to be made up - close monitoring of health and weight from onsite nurses and dietician, input from specialist SALT.
Ear infections (described as "constant")	Close monitoring by staff and nurses in school

20. A variety of other issues were also listed but need not be set out. L's parents summarised this aspect of their case in the following terms:

> "[L] has a wide range of complex medical needs as described above. She needs nursing support on site for the reasons above, both to monitor and intervene when needed, but also to train and give ongoing support and advice to classroom staff in managing her complex medical needs."

Placements at CHS: structure and financing

21. How CHS dealt with placements at the relevant time is apparent from the letter dated 7 October 2015 offering L's parents a place for her:

> "…[Subject to a formal referral being received from your Local Education Authority and subject to the following criteria, we would have a place…for [L] from January 2016:
>
> ● Your Local Authority's written acceptance of her placement which would be in line with the school's banding criteria which places [L] in Band 2 £42,207.00 per annum; and
> ● Written confirmation, usually from your local Clinical Commissioning Group to Chailey Heritage Clinical Services for their clinical fees.
>
> Chailey Heritage School works in close partnership with Chailey Heritage Clinical Services , who are part of Sussex Community NHS Trust, and who meet the full clinical needs of the pupils attending the school."

The model thus appeared to assume two separate sources of funding, one for the school fees and one for "clinical services", with the latter being provided through – and to – constituent parts of the NHS.

22. Dr Yasmin Khan, Consultant Paediatrician in Neurodisability and Clinical Director of CCS, gave evidence that:

> "The clinical provision identified for [L] is based on an individualised assessment of [L's] needs and also on experience of providing for children with complex long term conditions. There are fundamental clinical needs for any child with that combination of medical problems which are predictable based on many years of experience at CCS.
>
> CCS works as teams of multidisciplinary professionals around the child. Every child placed at [CHS] for education/care will have a consultant led team and the "core team" professionals are:
>
> ● Consultant Paediatrician in Neurodisability
> ● Named key nurse: Children's Registered Nurses/learning disability registered nurses
> ● Behavioural Psychologist
> ● Speech & Language Therapist
> ● Physiotherapist
> ● Occupational Therapist."

23. Dr Khan went on to explain how the fee was made up. It can be summarised as follows:

Nursing	£5,985	
Therapy (Occupational Therapy/Speech and Language Therapy/Physiotherapy)	£7,009	
Medical	£3,509	
Total for "Clinical Support to Day Pupil"		**£16,503**
Net equipment cost	£1,500	
Net pay cost	£3,799	
Operating cost	£2,384.70	
Total for Rehabilitation Engineering Services (indicative cost, based on the interventions identified at the initial referral assessment)		**£7,684**
Assessed Clinic Cost (indicative cost based on the clinical needs which can only be supported by outpatient clinics – a supporting list was provided)		**£11,990**
Total		**£36,177**

24. Based on these figures, the total which the CCG would have to agree to pay annually, albeit based in part on indicative figures, was £36,177. However, the FtT accepted (decision, para. 69) other evidence that the £11,990 would not have to be paid where a local resident such as L was concerned, as it was covered by a block funding arrangement made with the CCG. There has been no suggestion that the services provided by CCS, or the fees payable to them, would be variable to reflect provision ordered by the FtT.

25. A service level agreement between CHS and CCS was in evidence. The section on the medical service highlighted a "consultant led paediatric neurodisability service provided 24 hours a day, 52 weeks a year"; "on-site provision by consultants, non-consultants [sic] paediatricians and nurse practitioner 9.00-5.00 Monday to Friday;" and "On-call telephone support out of hours consultant service". Each pupil was to have a designated consultant "specialising in neurodisability who ha[s] expertise in the management of all aspects of complex physical disability". On-site specialist support was to be provided in the management of epilepsy, the management of movement disorders, orthopaedic complications (including spinal and hip management), pain management, nutrition and growth, respiratory complications, including ventilator care, neuromuscular conditions and mental health wellbeing for children with complex disability.

26. The section on nursing explained that in addition to "health promotion" and "health education", the nursing role included "responding to altered health care needs" and "health maintenance". Under the former, "any child who has altered health status can expect the nurse to attend, advise and support CHF

staff[1] in their care, they will also work closely with the medical team. Altered health care needs will be assessed and planned by a nurse and care implemented by the nursing staff and CHS staff as appropriate…". Under the latter, "the nursing team will intervene when a young people's [sic] every day health needs change through direct intervention or through the delegation of clinical tasks to CHF staff. The nursing team will continue to oversee and monitor as appropriate." Each child has an "allocated nurse."

Assessment of L by the clinical commissioning group

27. On 8 January 2016, Mr Graham Griffiths, Director of Performance and Delivery for the NHS Hastings and Rother Clinical Commissioning Group, had informed the local authority that:

> "Whilst having complex needs I believe that this child has been assessed as not meeting the National Framework Assessment for NHS Continuing Care and therefore the CCG positon is that we would have no grounds for providing "top up" funding required only because of the placement rather than assessed need of the individual.
>
> I understand that the Chailey Consultant identified a "need" which may be considered from a holistic point of view but is not the same as the needs as assessed using the CHC national framework."

28. On 25 February 2016 the CCG's solicitors confirmed this, indicating that

> "Her care needs have been assessed as being able to be met via universal services. The CCG is not therefore on its current assessment of [L's] needs intending to make a direct contribution via [children's continuing care] to the care costs at Chailey to meet its fees, nor, in the CCG's view, would it be reasonable to do so on the information available to it at present."

29. On 31 August 2016 Ms Fearns, the Lead Nurse who has the function of Commissioner for Children's Continuing Healthcare on behalf of the CCG, completed a full assessment for children's continuing care. The result was that while L was considered entitled to receive a children's continuing care package, that did not mean that she was entitled to have the fees paid to CCS. Rather, to quote the CCG's solicitors:

> "in effect, the provision which [L] was deemed to require to meet her health needs was the provision of home care support to provide short breaks to her parents."

[1] "CHF" is the foundation under whose auspices CHS – and a children's home – operate. "CHF" and "CHS" appear to be being used interchangeably in the extracts in this paragraph.

So far as her education was concerned, it would suffice if she attended a school where a teaching assistant could be trained to meet her health needs.

30. Remaining needs, it was said, could be provided via universal services. In written evidence to the FtT, Ms Fearns explained that:

> "Chailey provide, at a cost, comprehensive healthcare during school hours. As the CCG understands the current position, they seek funding for various interventions that would be provided in the usual course via universal services, such as SALT and OT input that currently comes from the CITS integrated team.
>
> The CCG would be asked to pay for these services outside of the universal service provision [L] currently accesses and the Chailey teams, including SALT and OT, would take over from the [CITS] team".

Thus it appears that for the CCG the matter seems to have given rise to concerns to avoid making, within the NHS, what was considered duplicated provision for L.

31. There matters rested so far as the CCG's assessment of L's needs is concerned. The routes of challenge apparently available would be judicial review or a complaint to the Health Services Ombudsman. However, no challenge was made by L's parents to the CCG's decision.

The appeal in respect of L's EHC Plan

32. The parents' appeal in respect of L's EHC plan included a number of disputed issues relating to sections B and F. Though some are relevant to what I have to decide, they are not directly the issue before me. Additionally, the parents wanted Chailey Heritage School to be named in Section I, while the local authority proposed Grove Park School, a maintained special school.

33. None of the CCG, CCS and CHS were parties to the FtT proceedings, although all were aware of them.

34. The FtT held hearings on 26 September and 10 October 2016, both of which were adjourned for further evidence. This was followed by a telephone case management hearing on 4 November, following which further written evidence and representations were received by the FtT. The FtT decided not to hold a further hearing (the request to do so came from the CCG rather than the present parties) and reached its decision following a day of deliberation on the papers. The procedure adopted is of some significance to the outcome of this appeal.

35. The FtT concluded that Grove Park School was unsuitable for meeting L's needs, for reasons it gave. It decided not to follow up an alternative proposal by the authority after the first day of hearing, Glyne Gap School.

36. In relation to CHS, the FtT noted at para. 8 of its decision:

> "The LA argues that the Tribunal does not have the jurisdiction to order the CCG to pay this second element and that, as it covers clinical services, it is not something that they [sc. the local authority] should pay. The LA's argument is that the Tribunal is therefore unable to order…CHS, by naming it in Section I of [L's] EHC plan."

37. It dealt with the argument in the following way. It accepted that the tribunal had no jurisdiction over specification of health care needs or provision (para. 71). It noted (para. 72) that part of the clinical support fee covered therapies, which it said had been accepted by the local authority as educational provision when it issued the EHC plan. It noted s.21(5) of the 2014 Act, saying that at no time during the appeal had the authority challenged the application of that provision in L's case. It observed, somewhat enigmatically, that

> "Whilst the LA, or an individual school, can and often does, in the experience of the Tribunal, commission therapy services from the NHS as a provider of health services they can be commissioned from elsewhere. Recent case law contained in *East Sussex CC v TW* [2016] UKUT 0528 (AAC) further confirms this position. The LA have a duty to provide special educational provision and that includes paying for specified therapeutic services where they are identified as special educational provision."

38. In para. 73 it addressed the nursing and medical costs:

> "Nursing support has already been agreed between parties as educational provision in Section F of the EHC plan and therefore the LA has a duty to provide it and incur the cost, if it is not already included in a school fee. Evidence from the service specification from CHS outlines what families can expect from the medical services at school. This includes management of epilepsy. Again epilepsy support is already agreed by parties as educational provision in section F of the EHC plan. It is accepted by them as part of the special educational provision that [L] requires. Both elements of support we consider are essential in order for [L] to be educated. Evidence from CHS and Grove Park School was that the cost of nursing and medical provision to support [L's] epilepsy is included in the core cost of the school. We consider it is therefore a cost for which the LA are liable and which can be legitimately covered as part of the school fee charged by CHS."

39. In para. 74 it addressed the rehabilitation engineering service:

> "The provision of support from a rehabilitation engineering service for the maintenance of equipment, in particular [L's] wheelchair and seating and standing arrangements, has also been agreed between the parties as specified in Section F of the EHC plan. The evidence from CHS was that this is an element of the total school fee which they currently contract with [CCS] to provide. Grove Park School also gave evidence that such a service would be provided from within the school's core funding and was not part of any separate arrangement with the local CCG or health care providers. This is the experience of the Tribunal as a specialist panel when considering the cost of such provision in other educational placements. We decided that it is a service that would need to be provided by any educational placement that [L] attends and therefore the provision of such a service is a cost which the LA are liable to incur as a part of the school fee charged by CHS."

40. With regard to the commercial/procurement arrangements, it observed:

> "CHS confirmed that no child can be placed there without the educational and clinical services element of the fee being paid. Whilst they have a service level agreement with CCS to provide services to the school this arrangement, despite being long-established and considered by all to be an integrated service, could be changed and the school could purchase services from other providers. We concluded that they are in fact outsourcing elements of the provision they make at CHS to CCS. Evidence from the CCS confirmed that they have other patients referred to them from across the county and CHS is not their only client. For these reasons, we decided that the clinical service fee, excluding the element for outpatients clinics, was part of the total fee of a child attending CHS and therefore is a cost which the LA can and will be liable to pay if the school is named in Section I of [L's] EHC plan."

41. In para. 76 the FtT noted that the case did not fall with the scope of the pilot scheme then operating[2] enabling tribunals to make recommendations on health and social care matters, noting that

> "This is unfortunate as the appeal has presented a situation which the use of the Tribunal's extended powers to make recommendations might have resolved…The provision of essential nursing and medical support, without which a child could not attend school, is an area which would seem to logically be the responsibility of the local CCG to fund. In this case, the LA had already agreed it was required as special educational provision but in future appeals where this may not be the case, then any decision by the CCG not to specify this provision in

[2] Under section 51(5) of the 2014 Act and the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) Pilot Regulations 2015 SI 2015/358

> Section G of the EHC plan may prevent a child attending an educational placement and be open to legal challenge."

The local authority's submissions

Ground 1: implications of finding that health out of jurisdiction

42. Mr Lawson submits that on the FtT's reasoning that health was outside its jurisdiction and nursing and medical support are logically a matter for the CCG, it did not have power to name CHS in Part I without the CCG agreeing to commission the health services. The tribunal was, wrongly, in effect overturning the decision of the CCG. An order could not be made requiring the authority to provide nursing, what was described as the "medical" service in Dr Khan's statement, outpatient clinics (if in issue) or rehabilitation engineering services (in total or that part of them which relates to equipment outside school). The FtT's observations in [41] above that the recommendations pilot "might have resolved" the situation serve further to demonstrate the lack of power which the FtT actually had.

43. A division of responsibility for care, education and health is reflected in the regimes created by (respectively) the Children Act 1989, the 2014 Act and the 2006 Act. Such a division is reflected within the special educational needs jurisdiction in the provisions considered above regulating the format of an EHC plan and those limiting the parts of a plan against which an appeal lies and in the different allocation by s.42 of the 2014 Act of duties to give effect to the content of an EHC plan.

44. Mr Lawson further submits that *East Sussex CC v TW* [2016] UKUT 0528(AAC), by limiting the powers of the FtT to intervene to cases involving such health or social care provision as falls within s.21(5) further supported the demarcation of statutory responsibility.

45. The legal issue, he submits, is, contrary to the FtT's view, not occasioned purely by the fee structure operated by CCS at the material time (and since under review, but without definite outcome at the date of the Upper Tribunal hearing), which split the fee into an educational element and a health element. The difficulty would remain even if CCS, as the FtT suggested, adopted a more opaque fee structure. Far from being a case of CHS outsourcing elements of provision to CCS as the tribunal suggested, what is involved is that the educational appeal to the tribunal is reliant on medical evidence that L should attend a particular school in order to benefit from medical services which the commissioner of medical services has decided not to commission.

Ground 2(a): power to require local authority to provide rehabilitation services and nursing

46. Mr Lawson submits that the FtT could not conclude that there was agreement that nursing was an educational need, based on the working

document or the submissions made in the case. As to the working document, he points out that references to L's nursing needs being at a high level; to the need for a nurse to monitor urine infections; to support from a 1:1 worker trained by a nurse; to a need for ongoing nursing support to monitor seizures; to the need for day to day cover from a nurse; and to a requirement for seizure observation from someone trained by a nurse were all not agreed by the local authority. There was one "agreed" reference: that L "must have an allocated nurse at school who would be responsible for updating her care plan, seizure profile and suction machine guidance". As to this, Mr Lawson suggests it could be viewed as a mere reference to updating a plan - not amounting to nursing provision – or just a mistake. He refers to the tensions created in the drafting of EHC plans by the fact that they are used for a number of different purposes. The local authority's closing submission (which I take as being that dated 4 November 2016 addressing "the education, health and care borderline"[3] had expressly submitted that the nature of the services and the body providing them indicated that it was health provision and fell to be provided by the health service and that it was for the commissioner of health services to decide what services to commission; and further, that nursing was not an educational need.

47. The EHC plan ordered by the FtT requires support 1:1 from staff trained by a nurse; a pupil support worker to be trained by a nurse; an allocated nurse to update care plan, seizure profile and suction machine guidance; and that practice and procedure should be monitored by nursing and medical staff on an ongoing basis.

48. Mr Lawson submits (a) that a statement that an allocated nurse needs to draw up a plan is does not provide a basis on which to include that nursing is an educational need or that nursing provision is educational provision; and (b) that nursing, rehabilitation engineering and the other services set out in the evidence from CCS are not educational. He relies on *City of Bradford v A* [1996] CO 3788/95; *R v Lambeth ex p MBM* [1995] and *OD v Gloucestershire CC* [2013] UKUT 112.

Ground 2(b) Treatment of therapy services

49. Mr Lawson further submits that, contrary to what is stated by the FtT, the local authority did take issue with s.21(5), raising it in its submission of 4 November 2016, and that the local authority does not accept that all therapy provided to L is educational provision by virtue of that section. He further relies on *East Sussex CC v TW*.

Ground 3: no duty to fund the placement ordered at Section I

[3] In the respects with which we are concerned, a subsequent "final submission", undated but filed on 29 November 2016, neither materially added to, nor detracted from, the submission of 4 November

50. Mr Lawson submits that provision from CCS is neither education nor training, nor is it provided "at that school" and thus it would fall outside the s.63(2) duty. In any case, by his above grounds he submits that a placement could not be ordered at CHS where it was conditional on payment of fees to CCS. The duty in s.42(2) is limited to provision which is in fact educational. The power to specify provision should be interpreted in the light of the duty to pay for that provision.

51. Ground 4 is a fall-back ground, which need not be considered further in the light of the decision I have reached.

Ground 5: Grove Park School

52. Mr Lawson submits that by rejecting Grove Park School, the consequence is that L has to be educated in a school specialising in cerebral palsy and that, wrongly, amounted to the FtT applying a standard in excess of what is "appropriate" and "reasonably required".

Proposed disposal

53. Mr Lawson submits that the review of CHS's charging structure does not affect the validity of his arguments, nor make it any less appropriate to adopt the course which he invites me to do, namely to remit the case to the FtT which, in the light of the errors of law he submits were made, should be differently constituted.

Submissions on behalf of the parents

54. In the initial grounds of resistance, not it appears drafted by Ms Hay, but subsequently adopted by her in her skeleton argument, L's parents made a number of general points. They complained about the stay imposed by the FtT - but no application was ever made to lift it. They submitted that the issues raised by the appeal have a limited shelf life, because (a) of the review commenced of the charging structure of CHS and (b) because it is proposed to reinstate the pilot project but extended so as to operate nationally from January 2018. They also seek to rely on there being, it is said, 27 pupils from the same local authority being educated at CHS, 7 of whom are funded entirely by the authority.

55. Ms Hay accepts that whatever school L comes to be in, she will need to be accessing a range of services, some of them medical. The respondents submit that grounds 1 to 3 "are rooted in an interpretation of the FtT decision which cannot be sustained as it seeks to conflate unexceptional references in Section F to essential components of [L's] 'provision', e.g. suctioning, without which her life is at risk, to funding medical provision." The local authority's grounds rely on "artificial divisions" rather than addressing the severe and complex needs which L has, which require a high level of specialist support in order for her to attend education. It would be incorrect, submits Ms Hay, given

the nature of the difficulties experienced by the cohort of which L forms part, to construe "educational provision" otherwise than widely. To determine that the provision required by L was non-educational would be a "quantum leap" in the light of the needs identified in the working document. The FtT's self-direction at para 71 was correct, as was its analysis at [72] and [73], and it did not exceed its jurisdiction.

56. As regards s.21(5), it was submitted that the services included as part of the clinical service fee are necessary for L to be educated and to enable her to have curriculum access. The FtT was entitled to accept that the clinical service fee was necessary to implement the support contained in Part F. There could be no dispute that for example speech therapy is special educational provision. Analysis of the additional fee of £16K "quite clearly" represents the purchasing of special educational provision.

57. CCS is a provider of educational provision for CHS, in the same way that the Children's Integrated Therapy Service would be commissioned by the local authority to provide support for L if she were to attend a state school. The FtT's outsourcing analysis ([75]) was correct. What CHS provide is an integrated service, of which relevant parts could theoretically be purchased from a provider other than CCS. Such an analysis was, moreover, as Ms Hay submitted, adopted by the FtT in another case, in which it gave its decision on 19 May 2017 i.e. the working day before the Upper Tribunal hearing.

58. As to the local authority's ground 5, Ms Hay submitted that none of the reasons why the FtT considered Grove Park could not meet L's needs are to be categorised as non-educational and they involve no error of law. It is futile to seek to exclude CHS from consideration when there is no guarantee that an FtT will ever approve any local authority maintained special school for L. The FtT's reasoning, in particular at paras. 31-37 and 64-67 is more than adequate. The FtT identified peer group, classroom environment and specialism in the staffing as elements which would not be in place for L at Grove Park School; these were entirely proper matters to consider. It would be wrong to latch onto one element, such as hoist systems, as does the local authority, and thereby seek to call into question the FtT's rejection of Grove Park School for which there were numerous other and perfectly legitimate reasons.

Proposed disposal

59. If, contrary to her submission, the Upper Tribunal were to conclude that the FtT's decision was in error of law, the matter should be remitted to the FtT with a view to it making a decision in time for the start of the new academic year. Remission should be to the same panel, as it is already seized of the matter.

Analysis

60. Dealing first with the respondents' general points, Permission to appeal has been given and I am required to determine the appeal. Developments elsewhere, even if established, could go to remedy if I were to decide there was an error of law. However, there was and is no evidence of a definitive outcome from the charging review. Such limited indications as there are are equivocal. The situation of cases based on a restructured fee arrangement will have to be considered if and when an appeal on them is made.

61. Reliance on other cases does not materially assist me. The present issues have arisen following a change by the CCG to a more structured approach to commissioning. Even if the cases in which the local authority is paying were to be materially identical (which I do not know), that would not make payment lawful if it was otherwise unlawful.

62. The national pilot project is not yet in force and, if it is only intended, like the more limited pilot to confer powers to make recommendations in respect of health, appears unlikely to provide a complete answer in a case of this type.

63. The local authority's Ground 5 can be disposed of shortly. The FtT made legally adequate findings of fact in relation to Grove Park School at paras. 31-37. The content of those findings were a matter for it alone. Its reasoning at paras 64 to 67 records a number of concerns which were proper matters for the FtT to address, such as the class environment, peer group and staffing arrangements. This was entirely sufficient to allow the FtT to come to the conclusion that Grove Park School could not make appropriate provision to meet L's needs. If it did venture outside the educational in relation to tracking (which is not something I have to decide), it would in my judgment have made no difference to the FtT's overall conclusion on this issue. I do not accept that the FtT was drawn into a comparative exercise which led to it applying a higher test than is legally required. The grounds of appeal have not attacked the FtT's unwillingness to pursue the latterly tabled alternative of Glyne Gap School. If, as it was entitled to do, the FtT rejected Grove Park School, effectively all that was left on the table was CHS. It is whether or not the FtT was entitled to name that school to which I now turn.

64. On the level of theory, I accept Mr Lawson's submission. 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 reg. 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 s.42(2) the duty to arrange it.

65. 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. The *Haringey* case, cited in the Guidance, illustrates how the scope of other powers, in that case those under the Children Act, should not be expanded so as to exonerate the institutions of the National Health Service from discharging the functions with which they are tasked.

66. Subject to s.21(5), health care provision is not the local authority's responsibility and a local authority has in my judgment no statutory power to pay for it. That provision was considered in *East Sussex CC v TW* [2016] UKUT 0528. There Upper Tribunal Judge Jacobs held that it is the FtT's function to classify social care or health care provision by reference to the test introduced by the subsection of whether it "educates or trains a child or young person" and only to the extent that it is properly considered to meet that test, so that it constitutes "special educational provision" by virtue of the sub-section, does the FtT have any jurisdiction over it and the local authority a duty under s42(2) to secure its provision.

67. Save for possible problems of classification of particular provision, the matter is in my view clear. Ms Hay did not provide any reasoned argument against the existence of such a statutory split and in my judgment she was correct not to do so.

68. As the question is which body is required to secure or arrange what provision, the matter is not resolved merely because the cost of something for which a local authority is not otherwise required – or allowed – to pay is wrapped up in a more all-encompassing fee. I do not consider that the FtT was correct in saying (at [71]) that:

> "Whilst mindful that the Tribunal's role is not to be forensic accountants we had to decide whether it was in fact one total fee for educational placement or two separate but interdependent amounts for educational and health services".

Under s.63(2) , where special educational provision is made at a school and the school is named in the plan, "the local authority must pay any fees payable in respect of education or training provided for the child or young person at that school…in accordance with the EHC plan". I leave for another occasion the scope of the words "at that school" but accept Mr Lawson's submission that the duty to pay the fees imposed by s.63(2) arises only in respect of fees "payable in respect of education or training" does not extend to other matters, at any rate where because of the clear statutory distinction

referred to above in relation to health care provision, it cannot be regarded as purely incidental to education or training. The fact that a nominated school may choose to procure health care services from an outsourced provider and to offer them to pupils does not alter the character of those services nor create a duty on the part of the local authority to pay for them which does not otherwise exist.

69. In the present case, the FtT reached its conclusion not because it was in denial that a statutory division between health care and educational needs an provision existed: as it recorded at [71][, "We are satisfied that the Tribunal has no jurisdiction over specification of health care needs or provision in the appeal." Rather, it concluded that all the provision for which it was ordering the local authority to pay CHS was educational provision and indeed at [76] that the local authority had accepted it as such. I turn to examining the basis for those views.

70. As to the therapies, the FtT relied (para. 72) on (a) the provision of SALT, OT and physiotherapy having been "accepted to be special educational provision by the LA" and (b) that the LA had not sought to challenge the application of s.21(5) to this case.

71. As to the nursing cost forming part of the clinical services fee to be paid to CCS, the FtT relied (para. 73) on "[n]ursing support [having] already been agreed between parties as educational provision in Section F of the EHC plan". As to medical costs within the clinical services fee it relied on evidence from the service specification between CCS and CHS which "includes management of epilepsy", something which it considered "is already agreed by parties as educational provision in section F". It considered that "Both elements of support we consider are essential in order for [L] to be educated."

72. As to the provision of support from a rehabilitation engineering service for the maintenance of equipment, in particular L's wheelchair and seating and standing arrangements, it again concluded that this too had "already been agreed between the parties as specified in Section F."

73. The working document in use at the time of the FtT reaching its decision is in evidence: version 12 of 23.09.16. In the usual way, it is marked up to show the original statement, amendments put forward by one or other party and what was, or was not, agreed, and references were provided to the evidence providing the basis for the disagreement. I also have the final version to be issued with the FtT decision.

74. From these it is evident that the SEN provision in the final plan to meet needs in the domain of "Communication and interaction") (clearly identified in the document as Section F) was text that had earlier been agreed between the parties, with only minor editorial changes.

75. In the domain entitled “Sensory and Physical (including medical)”, the “SEN provision to meet needs (Section F)” is divided into sub-sections under headings of Physiotherapy, Occupational Therapy and General Therapy Provision and Equipment Requirements. The latter sub-section deals with ”Posture Management” and “Epilepsy”. In relation to physiotherapy, the final version was not based entirely on agreed text. There were points which had been disputed by the local authority, quite apart from that relating to whether nurse involvement was needed, to which I return below. It would though be fair to say that while there may have been issues around specific features of provision (e.g. hydrotherapy, or whether a physiotherapist needed to be on site) or the quantification of provision of a type the need for which was not disputed, it was in Section F that reference needed to be made to the core physiotherapy L needed was not disputed. Again, in relation to occupational therapy, while the final form of the plan introduced matters of specification, such as that at least 30 minutes of each session should be direct therapy time with the therapist or that L requires an educational setting where there is an occupational therapist working alongside other professionals”, the presence in section F of the occupational therapy L needed was not disputed. The sub-section on Posture Management (including the role of the occupational therapist in that regard) was substantially agreed. The Epilepsy sub-section addressed not only matters which might fall within the ambit of a therapist and it was around those other matters that there was disagreement.

76. The domain for “independence and community involvement” in the final plan, which included matters of occupational therapy and speech and language therapy, was agreed text.

77. I also note that version 12 of the working document under “Health provision (including Individual Health Care Plan)(Section G)” stated (only) “Continued monitoring and review by the appropriate medical services. There was no sign of the local authority there making a positive case for some of the therapy provision to be viewed as health care provision.

78. In the submission of 4 November (thus post-dating version 12) Mr Lawson had addressed the interpretation of s.21(5), including submitting that:

> “The following are not educational provision even if carried out at school:
> …
> iii Therapy services fall to be considered on a case by case basis but to take some examples the following generally do not educate or train but seek to assist the recipient in various ways: dysphagia provision, a 24 hour postural management programme, orthotics clinics and physiotherapy intended to reduce pain or dysfunction.”

79. There is, unsurprisingly, minimal reference in Part F to any provision of an overtly medical nature.

80. For nursing provision, the relevant parts of the plan are set out in the context of Mr Lawson's submissions at [46] above.

81. For equipment, there are various references to L having the use of particular pieces of equipment; to items of equipment being subject to review at prescribed intervals, and with the possibility of adjustments being needed in the interim. Who is to carry out such a review is variously stated, but at its lowest there is the possibility that a rehabilitation engineer may be needed and in places it is stipulated that one is. Not all the amendments were agreed by the local authority but again there is no indication that it was thought that section F was anything other than the proper place for references to a rehabilitation engineering service.

82. The service level specification for the rehabilitation engineering service details the support offered in relation to the use of "assistive technologies", an expression which is apt to embrace the equipment L would need when at school. The service aims to ensure that all such equipment "is correct prescription and remains appropriate to need" and to ensure that it is "kept in good repair and comfortable and so child can maximise their time at school…" The drafting of the specification makes clear that it is assumed that items of equipment are to be used in the school environment and shared with home but that if second items are required, they will have to be separately funded.

83. Was the FtT, heavily dependent as its reasoning was on what it thought had been conceded by the local authority, entitled to reach its conclusions that such concessions had been made? Mr Lawson as noted above submitted that an EHC plan is used to fulfil a number of roles: for instance, as a procedural document for use in the classroom, as a list of what needs to happen and as a form of pleading before tribunals. I accept that it may have that multiplicity of roles and that each may have differing implications for how it is drafted. A document for use by professionals delivering services to a child or young person it may be, yet its statutory underpinning means that it also defines rights and responsibilities. While nobody would wish to see an EHC plan as a "lawyers' playground", nor can its legal implications be ignored. It is reasonable to suppose that an experienced, specialist First-tier Tribunal will have been well aware of the multiplicity of roles performed by an EHC plan and that they will have brought that awareness to bear in their approach to the document, unless there is any reason to think otherwise.

84. In the present case, the FtT was reaching its decision on the papers, without a further hearing. I consider that it was entitled to conclude that the status of the therapies as educational provision had been conceded. They had been put in section F and were either agreed or, if they were not, the disagreement did not go to the section of the plan in which they were included. No attempt had been made by the local authority to include any of the therapies in section G. This is not lawyerly nit-picking: differing duties flow. In relation to s.21(5), while Mr Lawson had provided a legal submission on s.21(5), it had been expressed in general terms and had emphasised that

the sub-section's application turned on the facts of each case. I have not been directed to anywhere where it was suggested to the FtT that specific features of the therapy provision offered to L were, in the circumstances of her case, not covered by s.21(5) and so should go within section G. To say, as did the FtT, that "At no time during the appeal have [the local authority] challenged the application of [s.21(5)] in [L's] case" does not appear misleading if it is understood with the emphasis on "application" and "in L's case". Given the less than firm boundary between educational and non-educational provision where therapies are concerned, I consider this was a concession the FtT was entitled to accept.

85. I also consider it was entitled to accept as a concession the placing of rehabilitation engineering in Part F. If the local authority was being asked to pay via its SEN budget for equipment which fulfilled no educational purpose but was to facilitate family and social life out of school, then I can see that there might be an issue, but, as the service specification makes clear, it is not. The service specification acknowledges the inevitability that there may be a degree of dual use, but it is a service fundamentally being provided in a school and for school purposes.

86. For both these categories therefore, I consider that the FtT was entitled to conclude that the local authority had accepted that the provision properly fell within section F as special educational provision, with the consequence that it would be obliged to secure its provision.

87. Health care provision is, as regards medical services, straightforward. They are statutorily the responsibility of the CCG, not the local authority. The EHC plan makes no attempt to suggest that what the consultants and supporting doctors at CHS/CCS provide, at any rate beyond "monitoring practice and procedure", is "educational provision". The local authority has no legal ability to pay for it.

88. The same goes for nursing, at any rate to the extent that it goes beyond the very limited roles stipulated in the plan. It is clear from the service specification that the role of the nurses at CHS goes beyond anything stipulated in the plan. I agree with Mr Lawson at any rate to the extent that in my view that it is not possible legitimately to infer from the one reference to nursing which was agreed by the local authority that the local authority considered all the nursing provided by CCS to be educational provision or from that one reference that section F was the appropriate place for nursing (more generally) to be included.

89. Even if medical and nursing support is, as the FtT evidently considered and as Ms Hay's submission effectively adopted, "essential for [L] to be educated", that does not of itself make it special educational provision, as the authorities cited at [48] show.

90. There is thus a mismatch between what even on the most generous view to L and her parents may properly be regarded as educational provision and the provision which would in fact be made for L, were she to attend CHS. The extent of that mismatch is, at its lowest, almost all the medical provision and a substantial part of the nursing provision, the cost of which it appears would be likely to amount between them to a high four-figure sum annually.

91. The local authority's duty by s.42 is to secure the specified special educational provision. That on the face of it is a reference to what is in section F of the plan. It is under no duty nor has any power to pay for health care provision. Nor, for the reasons at [68], does s.63(2) provide a relevant power or duty.

92. If relevant parts of the medical and nursing services had been identified as health care provision and the consent of the CCG been obtained under regulation 12(2) then the fees of CHS/CCS would have had to be met by mixed funding from the local authority and the CCG. However, they were not, and the specification by the FtT of CHS in Section I has created a situation where L cannot attend the school unless both elements of the fees are paid, but the local authority is under no obligation, and has no power, to pay the totality of those fees and the CCG has refused to fund the balance.

93. That is not merely an unworkable outcome, but in my view one which discloses an error of law on the part of the FtT. In essence, at any rate as regards the medical services and to the extent I have identified as regards the nursing services, Mr Lawson's Grounds 1 and 3 are made out.

94. As I have found there to have been errors of law even assuming that everything specified in the plan was special educational provision, I need not consider further the application of the authorities cited at [48] to individual items.

95. The outcome of the decision being unworkable, it is clearly appropriate to set it aside for the errors of law identified and for the case to be remitted to the FtT for redetermination in accordance with this decision. What is less straightforward is the composition of the panel. This is quite complex litigation and it is not easy to predict how it will go in the light of this decision. Perhaps the CCG will renew its application to be heard. The local authority may wish to refine its approach to the Plan in order to make clear that it was not conceding the things which the FtT, attempting to bring resolution to a long-running matter by deciding the case without a further oral hearing considered (up to a point, lawfully) the local authority was conceding. It may be that Glyne Gap re-surfaces as an option. I do not think there are directions I can usefully give which might limit the issues to be considered, were the case to be remitted to an identically constituted panel, so that it could build on work it had already done.

96. However, I do not see that that panel would be precluded from re-considering the case as a whole in accordance with this decision and it would have the advantage of prior knowledge. I can find nothing in its decision, or how it has expressed itself, which would lead me to think that it would not conscientiously and professionally seek to give effect to this decision.

97. On the other hand, much hard work in trying to establish the detail of the underlying arrangements has already been undertaken by the panel whose decision is before me, from which an incoming fresh panel could readily benefit.

98. What is important is the minimising of further delay. L has not been able to access school education for a considerable period and difficult issues remain to be resolved. The composition of the panel should not be allowed to be, more than is essential, a further matter contributing to the protracted timescale. Accordingly I conclude that the case may be reheard by a panel which is either entirely the same as, or entirely diferent from, the panel whose decision has been under appeal.

CG Ward
Judge of the Upper Tribunal
29 June 2017