

16 December 2020

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FILE REF: SHA/24434

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DECISION MAKING BODY: NHS COMMISSIONING BOARD
(NORTH EAST AND YORKSHIRE AREA TEAM)
("NHS ENGLAND")

PHARMACIST: INTRAHEALTH PHARMACY LTD
("THE APPELLANT")

PREMISES: 6 BLUE HOUSE BUILDING
HIGH STREET
BELMONT
DURHAM
DN1 1AR

THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL SERVICES) REGULATIONS 2013

**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

1 Outcome

1.1 The appeal is granted and, pursuant to paragraph 25(3)(c)(ii), no direction is issued.

Advise / Resolve / Learn

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THE NATIONAL HEALTH SERVICE (PHARMACEUTICAL AND LOCAL PHARMACEUTICAL SERVICES) REGULATIONS 2013 ["THE REGULATIONS"]

**SCHEDULE 4 [Terms of Service of NHS Pharmacists]
PART 3 [Hours of Opening]**

DIRECTION OF ADDITIONAL CORE OPENING HOURS

1 Introduction

1.1 Relying on Paragraph 25 of Schedule 4, NHS England has requested that the Appellant open from 15:00 – 17:00 on Friday 25 December 2020.

1.2 The Appellant seeks to appeal to NHS Resolution.

2 Consideration

Rights of appeal

2.1 Where NHS England has directed a pharmacist to provide pharmaceutical services for its premises at set times and on set days in accordance with paragraph 25 of Schedule 4 of the Regulations, paragraph 25(7) provides a right of appeal to the Secretary of State for Health and Social Care ("the Secretary of State").

2.2 The Secretary of State has directed NHS Resolution to determine such appeals. As an authorised officer of NHS Resolution, I have considered the appeal and have determined it, in accordance with my delegated powers.

Opening hours

- 2.3 A pharmacy's opening hours may be categorised as:
- 2.3.1 'core' opening hours (days on and times at which the pharmacy is obliged to be open), which may incorporate a direction of NHS England requiring fewer or greater than 40 hours; or
 - 2.3.2 'supplementary' opening hours (other days on and times at which the pharmacy undertakes to provide pharmaceutical services, as notified to NHS England).

Alteration of 'core' (including 'directed') opening hours

- 2.4 In accordance with paragraph 1(7)(c) of Schedule 2 to the Regulations, the pharmacy must provide, as part of an application for entry in the pharmaceutical list, the proposed core opening hours in respect of the premises during which it will be obliged to provide pharmaceutical services under paragraph 23(1) of Schedule 4 to the Regulations. These may be subject to a direction under paragraph 23(1)(c), (d) or (e)

Alteration of 'supplementary' opening hours

- 2.5 Other days or times at which services are to be provided (as set out in the original application for entry in the pharmaceutical list pursuant to paragraph 23(3) of Schedule 4 as "supplementary hours") may be altered by giving notice to NHS England, in accordance with paragraph 23(6)(a) without the need to make an application.
- 2.6 Notices under paragraph 23(6)(a) are not subject to review by NHS Resolution

NHS England's Request

- 2.7 NHS England wishes the Appellant to open from 15:00 – 17:00 on Friday 25 December (Christmas Day), a day on which it would otherwise be closed.

Information provided by parties

- 2.8 In a letter to the Appellant dated 24 August 2020, NHS England stated:

Re: Determination of core opening hours at the above-named pharmacy

- 2.8.1 "We consider that the current core opening hours for pharmacies may not meet the needs of people in the area or other likely users of the pharmacy premises during the Christmas festive period.

- 2.8.2 We are carrying out an assessment as to whether to issue a direction pursuant to paragraph 25(1) of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 requiring you to provide pharmaceutical services at the following dates and times:

2.8.2.1 **Christmas Day, Friday 25 December 2020**, between the hours of **15:00-17:00**, for which you will be remunerated.

- 2.8.3 **Rationale for Direction:** According to our records, since the inception of NHS England in 2013, your pharmacy has never provided pharmaceutical services on a bank / public holiday. You are being asked to open on this day at this time, as no other pharmacies are open in the Durham/Chester-Le-Street area and it is possible that patients will require access to a pharmacy during this 2-hour period. Additionally, you are also a stockist of End of Life medication, to which access may also be required. If you wish to make written representations about the proposed changes, they should be sent to me at the above address within 30 days of the date of this letter, i.e. by **23 September 2020**.

- 2.8.4 **Saturday 26 December 2020 – reminder:** I would also like to take this opportunity of reminding you that Saturday 26 December 2020 (Boxing Day) is a normal working day and if your pharmacy usually opens on a Saturday, then it must do so on this day, unless you have submitted either a change of core hours application or a notification of a change to supplementary hours.”
- 2.9 In a letter to the Appellant dated 22 October 2020, NHS England stated:
- 2.9.1 “Further to my letter of 24 August 2020, NHS England North - (North East and Yorkshire) has concluded its assessment as to whether or not the provision of pharmaceutical services during Bank Holidays, including Christmas Day, meets the reasonable needs of patients and members of the public in the County Durham (Durham Chester le Street) Health and Wellbeing Board Area. Pursuant to paragraph 25(1) of Schedule 4 of the NHS Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, as amended, the following direction is now issued.
- 2.9.2 This is to notify you, the contractor, of NHS England’s proposed changes to the days on which and times at which your premises are to be open.
- 2.9.3 Your pharmacy is directed to be open on Friday 25 December 2020 between the hours of 15:00-17:00, for which you will be paid £209.30 per hour. To claim your payment, please complete the attached audit form and submit this within 28 days of providing the service.
- 2.9.4 Any direction that is issued will meet the requirements of paragraph 25, schedule 4 or paragraph 15, schedule 5 of the NHS Pharmaceutical Services regulations 2013.
- 2.9.5 You have the right of appeal to the Secretary of State against our direction, in accordance with Schedule 4, Part 3, regulation 7 of the NHS Pharmaceutical Services Regulations 2013. Should you choose to appeal, then you should send in writing a concise and reasoned statement of the grounds for your appeal, within 30 days of the date of this letter (i.e. 17 November 2020) to: appeals@resolution.nhs.uk or to: Primary Care Appeals, 4th Floor, Arena Point, Merrion Way, Leeds, LS2 8PA”
- 2.10 In an email to NHS Resolution dated 16 November 2020 the Appellant stated:
- 2.10.1 “I am writing to appeal against the direction to open issued to our pharmacy at Belmont in Durham.
- 2.10.2 My reasons for appeal are set out as below;
- 2.10.3 I am aware that the NHS area team informed the LPC of its intention to issue directions to open but did not enter into effective dialogue or consultation with the LPC. NHS Pharmaceutical Services Regulations 2013 states "25.â€”(1) [sic] Where it appears to the NHSCB, after consultation with or having considered the matter at the request of the Local Pharmaceutical Committee".
- 2.10.4 I was unable to give my feedback on the initial notice of intention to direct the pharmacy to open as it had been sent to a shared mailbox which had been overlooked. In all previous instances these matters have been dealt with by post through Royal Mail, which was not the case on this occasion. The email came to light after the initial period for feedback.
- 2.10.5 One of the emails received from the Area team states that "Rationale for Direction: According to our records, since the inception of NHS England in 2013, your pharmacy has never provided pharmaceutical services on a bank / public holiday. You are being asked to open on this day at this time, as no other

pharmacies are open in the Durham/Chester-Le-Street area and it is possible that patients will require access to a pharmacy during this 2-hour period." We have only taken over the contract for this pharmacy on 31st March 2020 and while we are not able to corroborate this for Christmas Day opening, the pharmacy was directed to open under national direction on Good Friday and Easter Monday which it did. We are aware though that the previous owner of this pharmacy, Leaks Chemist, were directed to open on Christmas Day last year December 25th 2019 but successfully appealed the direction. I feel that the pharmacy is being asked to open this year as a direct result of the successful challenge last year.

2.10.6 There are no prescribing centres open near to the pharmacy on Christmas Day. The nearest is University Hospital of North Durham which has its own dispensary services and an out of hours GP service on the other side of the city 6.5 miles away. With no public transport on Christmas Day both would be out of reasonable walking distance. I am doubtful that there would be any demand for the pharmacy services at Belmont, especially at the time of day chosen when most will be eating Christmas Lunch."

2.11 In an email to NHS Resolution dated 24 November 2020 NHS England stated:

2.11.1 "Thank you for your email with its associated attachments pertaining to the Appeal lodged by Intrahealth against their Christmas direction to open. We would like to make the following comments and I have tried to follow the format set out in Mr Arnett's email, for ease of reference.

2.11.2 The NHS team did indeed share with the LPC of its intention to issue directions for pharmacies to open (Enc 1). The LPC did have the opportunity to raise any queries with our team, and Mr Greg Burke, the Chair subsequently did (Enc 2). Our team meets with all LPCs (the Pharmacy Local Liaison Group) around 6 times per year, and Bank Holidays is always a topic of discussion. The LPCs were originally involved in the process we follow, they have the same 30 day period in which to make comments on the intentions and receive feedback on the use of pharmacies over Christmas and Easter periods. We therefore disagree with the statement in Mr Arnett's letter, as we believe that we have fulfilled the requirement to have "considered the matter at the request of the Local Pharmaceutical Committee."

2.11.3 The letter of intention is attached, for your information (Encs 3, 4 & 5). Please note the letter had to be resent as there was an error in the email address (hence the two emails).

2.11.4 All pharmacies were offered 30 days in which to provide comments on our intentions (Enc 3). For a long time now, all pharmacies have been aware that NHS England only communicates by nhs.net email, it being the only recognised secure method of transmitting information. Unfortunately we cannot be held responsible for the pharmacy's failure to monitor their generic inbox and thus miss the deadline for comments. That said, if Mr Arnett had contacted us after the deadline, we would have considered his comments, but at no time did the pharmacy raise any issue over the Direction with our team. We disagree with the statement in Mr Arnett's letter that "in all previous instances these matters have been dealt with by post through Royal Mail, which was not the case on this occasion." Our team always sends out its intentions to direct by email. The Direction itself does usually go by post, however, under Covid, as in many other organisations, our team's own offices in Darlington and Newcastle have not been open to staff and therefore all correspondence since March 2020 has been sent electronically, as individual staff members are all working from home and therefore have no access to NHS England printers, letterhead and postal franking machines.

- 2.11.5 The Direction letter (and delivery receipt) is also attached (Enc 6a-c).
- 2.11.6 The rationale provided to the pharmacy (in the intention letter) is accurate. What is equally true is that all pharmacies were under a national direction by NHS England to open on Good Friday and Easter Monday, some pharmacies honoured their local direction and undertook the national 3 hours' direction in addition to the existing local one.
- 2.11.7 Unfortunately, the Christmas Day intentions had already been sent (Enc 3)) before the paragraph in question in the letter was subsequently amended to explain that pharmacies to be directed were being identified, who had never previously opened under local direction – a letter (Enc 7 – the pharmacy details have been redacted) is attached for your information and the phrase highlighted in yellow. I also attach a copy of the spreadsheet (pharmacy details removed) which documents the history of the dates on which pharmacies have been asked to open in County Durham; including the Appellant (Enc 8) - it is for this reason alone that the pharmacy is being asked to open, not because of the challenge last year, as suggested by Mr Arnett.
- 2.11.8 The starting point for the directions process is to first undertake a gap analysis; this takes into account the opening times of the various bodies that provide advice / generate FP10s over the festive period and the pharmacies which already intend to open (or close). The gap analysis is done for each of the geographical locations within the CNE footprint. These are:
- 2.11.8.1 County Durham (Durham Chester le Street)
 - 2.11.8.2 County Durham (Durham Dales)
 - 2.11.8.3 County Durham (Durham Derwentside)
 - 2.11.8.4 County Durham (Durham Easington)
 - 2.11.8.5 County Durham (Sedgefield)
 - 2.11.8.6 Cumbria Allerdale (2 slots)
 - 2.11.8.7 Cumbria Carlisle & District (2 slots)
 - 2.11.8.8 Cumbria Copeland (2 slots)
 - 2.11.8.9 Cumbria Eden Valley (2 slots)
 - 2.11.8.10 Gateshead (2 slots)
 - 2.11.8.11 Newcastle - Central
(Fawdon/Kenton/Blakelaw/Fenham/Wingrove)
 - 2.11.8.12 Newcastle - East (Dene/ N&S & High Heaton/N. Jesmond/S
Jesmond/Ouseburn/Walkergate/Byker/Walker)
 - 2.11.8.13 Newcastle - North (Castle/Parklands/W&E Gosforth/Brunton)
 - 2.11.8.14 Newcastle - West &
(Woolsington/Newburn/Westerhope/Denton/Lemington/Benwell
Scotswood/Elswick/Westgate// Ponteland/Darras Hall/Cowgate)
 - 2.11.8.15 North Tyneside

- 2.11.8.16 North Tyneside (Coast)
- 2.11.8.17 North Tyneside (NW)
- 2.11.8.18 Northumberland - Alnwick/Shilbottle
- 2.11.8.19 Northumberland – Ashington
- 2.11.8.20 Northumberland – Berwick
- 2.11.8.21 Northumberland – Blyth
- 2.11.8.22 Northumberland – Cramlington
- 2.11.8.23 Northumberland – Hexham
- 2.11.8.24 Northumberland – Morpeth
- 2.11.8.25 South Tyneside: Cleadon – south
- 2.11.8.26 South Tyneside: Jarrow / Hebburn
- 2.11.8.27 South Tyneside: S Shields
- 2.11.8.28 Sunderland - Washington Central, Washington East, Washington North, Washington South and Washington West.
- 2.11.8.29 Sunderland Coalfields - Copt Hill, Houghton-le-Spring, Hetton-le-Hole and Shiney Row, Chad's.
- 2.11.8.30 Sunderland (east - Doxford, Hendon, Millfield, Ryhope and St Michael', Silksworth & Sandhill, Barnes Pallion)
- 2.11.8.31 Sunderland North - Castle, Fulwell, Redhill, Southwick, St Peter's, St Anne's
- 2.11.8.32 Tees Valley – Darlington (2 slots)
- 2.11.8.33 Tees Valley – Hartlepool (2 slots)
- 2.11.8.34 Tees Valley – Middlesbrough (2 slots)
- 2.11.8.35 Tees Valley -Redcar (3 slots)
- 2.11.8.36 Tees Valley -Stockton (2 slots)
- 2.11.9 Attached is the gap analysis undertaken at the outset of the Christmas Directions process (Enc 9). The opening hours of the FP10 “generators” determine the 2-hour time slots that we commission. Out of hours, many of these “generators” offer services up to and beyond midnight – clearly it is not reasonable to expect pharmacies to open at these hours.
- 2.11.10 We then invite expressions of interest from all pharmacies (which we did this year in July) and this was also sent to the LPCs (Enc 10-to note this email was sent as “bcc” to pharmacies so their email details are not shown’ and Enc 11)
- 2.11.11 Once we have established where we have gaps and have received expressions of interest, we look at pharmacies in the individual geographical areas and consider whether they have provided (locally directed) services on

a bank holiday since the inception of NHS England in 2013 and if so, how often (Enc 8). Where there is a gap, we do try to fill these firstly with those pharmacies who have expressed an interest in being commissioned before looking to issue a direction and we try to do this on a 'take your turn' basis. Of course, this becomes difficult at times where there is a limited number of pharmacies to choose from within a locality.

2.11.12 Mr Arnett is incorrect in his statement that there are no prescribing centres open near to the pharmacy. We look at a locality as a whole – Durham is split into five areas in total as per the list above. You can see from the gap analysis that the following are open in the Durham/Chester le Street area and that other health bodies are open across the remainder of the county.

2.11.12.1 Urgent Treatment Centre (UHND): 00:00-23:59

2.11.12.2 Urgent Treatment Centre - 111 Online: Out of Hours Service (UHND): 00:00-23:59

2.11.12.3 Emergency Dept. (UHND): open all hours

2.11.12.4 GP Extended hours Hub (Ushaw Moor): 08:00-18:00

2.11.13 We disagree with Mr Arnett's statement about public transport - in our view, patients access pharmacies in many different ways, which are not limited to public transport.

2.11.14 We also disagree with the Appellant's comment on patients not requiring services on Christmas Day. I attach a further spreadsheet (Enc 12) for your attention for County Durham, the figures (Christmas Day 2019) are collated from the audit forms that each directed pharmacy is asked to complete and return (see Enc 6b) – this then generates remuneration of the agreed fee. You will see there are no figures for Durham Chester Le Street for 2019 – as Mr Arnett says, Leaks Chemist successfully appealed their direction – this meant we were unable to find an alternative pharmacy to open instead. The NHSLA of course will also be aware of the unfortunate complaint which arose as a result of Leaks' chemist being closed and an end of life patient being unable to access urgent medication on Christmas Day. The health body which raised the complaint stated however, that they "did appreciate the improved opening this year for the Durham City area over Christmas and New Year BH periods." We believe the figures and the complaint provide demonstrable need for a pharmacy to be open in the Durham / Chester-Le-Street area during the festive period."

2.12 No observations on the representations were received by NHS Resolution.

Assessment

2.13 I note the reference in NHS England's letter of 22 October to paragraph 25(1) of Schedule 4 of the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 therefore NHS England is directing the Appellant to open for the hours in question in accordance with paragraph 25 of Schedule 4.

2.14 I have considered paragraph 25 of Schedule 4 (Determination of pharmacy premises core opening hours instigated by the NHSCB), which reads as follows:

1. *Where it appears to the NHSCB, after consultation with or having considered the matter at the request of the Local Pharmaceutical Committee for the area in which the premises are situated, that the days on which or times at which pharmacy premises are or are to be open for the provision of pharmaceutical services will not, or no longer, meet the needs of—*

- (a) *people in its area; or*
- (b) *other likely users of the pharmacy premises,*

for the pharmaceutical services available at or from those premises, it must carry out an assessment as to whether to issue a direction requiring the NHS pharmacist (P) whose premises they are to provide pharmaceutical services at the pharmacy premises at set times and on set days (which may include Christmas Day, Good Friday and bank holidays).

2. *Before concluding the assessment under sub-paragraph (1) the NHSCB must—*

- (a) *give notice to P of any proposed changes to the days on which or times at which the pharmacy premises are to be open; and*
- (b) *allow P 30 days within which to make written representations to the NHSCB about the proposed changes.*

3. *When it determines the outcome of its assessment, the NHSCB must—*

- (a) *issue a direction (which replaces any existing direction) which meets the requirements of sub-paragraphs (4) and (5);*
- (b) *confirm any existing direction in respect of the times at which P must provide pharmaceutical services at the pharmacy premises, provided that the existing direction (whether issued under regulation 65, this Part, the 2012 Regulations, the 2005 Regulations or the 1992 Regulations) would meet the requirements of sub-paragraphs (4) and (5); or*
- (c) *either—*

(i) revoke, without replacing it, any existing direction in respect of the times at which P must provide pharmaceutical services at the pharmacy premises (whether issued under regulation 65, this Part, the 2012 Regulations, the 2005 Regulations or the 1992 Regulations), or

(ii) in a case where there is no existing direction, issue no direction,

in which case, by virtue of whichever of paragraph 23(1)(a) or (b) applies, the pharmacy will need to be open for 40 hours each week or for at least 100 hours each week.

4. *Where the NHSCB issues a direction under sub-paragraph (3) in respect of pharmacy premises that are to be required to be open—*

- (a) *for more than 40 hours each week, it must set out in that direction—*
 - (i) *the total number of hours each week for which P must provide pharmaceutical services at the pharmacy, and*
 - (ii) *as regards the additional opening hours, the days on which and the times at which P is required to provide those services during those hours,*

but it must not set out in that direction the days on which or times at which P is to provide pharmaceutical services during hours which are not additional opening hours; or

- (b) *for less than 40 hours each week, it shall set out in that direction the days on which and times at which pharmaceutical services are to be provided at the pharmacy premises.*

5. *The NHSCB must not issue a direction under sub-paragraph (3) that has the effect simply of requiring pharmacy premises to be open for 40 hours each week on set days and at set times (that is, the direction must have the effect of requiring pharmacy premises to be open for either more or less than 40 hours each week).*

6. *The NHSCB must notify P of any direction issued or any other action taken under sub-paragraph (3), and where it sets new days on which or times at which P is to provide pharmaceutical services at pharmacy premises, it must include with the notification a statement of—*

- (a) *the reasons for the change; and*

(b) *P's right of appeal under paragraph (7).*

7. *P may, within 30 days of receiving notification under sub-paragraph (6), appeal in writing to the Secretary of State against any direction issued or any other action taken under sub-paragraph (3) which sets new days on which or times at which P is to provide pharmaceutical services.*

8. *The Secretary of State may, when determining an appeal, either confirm the action taken by the NHSCB or take any action that the NHSCB could have taken under paragraph (3).*

9. *The Secretary of State shall notify P of the determination and shall in every case include with the notification a statement of the reasons for the determination*

10. *If the days on which or times at which P is to provide pharmaceutical services at pharmacy premises have been changed in accordance with this paragraph, P must introduce the changes—*

a. *if P has not appealed under sub-paragraph (7), not later than 8 weeks after the date on which P receives notification under sub-paragraph (6); or*

b. *if P has appealed under sub-paragraph (7), not later than 8 weeks after the date on which P receives notification under sub-paragraph (9).*

11. *This paragraph does not apply where regulation 65(5) to (7) applies*

2.15 I am mindful that paragraph 23(12) of Schedule 4 states:

For the purposes of calculating the number of hours that a pharmacy premises are open during a week that includes Christmas Day, Good Friday, Easter Sunday or a bank holiday, it is to be deemed that the pharmacy premises were open on that day at the times at which they would ordinarily have been open on that day of the week.

2.16 I am of the view that the pharmacy would normally be closed on Christmas Day and that this would be in accordance with the Regulations.

2.17 I am conscious that paragraph 25(1) and (2) require that before an direction is made, an assessment must be undertaken and that, before the assessment is concluded the pharmacist providing services from the premises must be given notice of the proposed changes and given 30 days to make written representations about the proposed changes.

2.18 I note that NHS England wrote to the Appellant by letter dated 24 August 2020 sent by email on 27 August 2020 as part of its consultation process. I note that the Appellant did not make any representations to NHS England in respect of the proposed direction.

2.19 I note the comments from the Appellant that they were unable to give their "feedback" as the correspondence had been sent to a shared inbox rather than by Royal Mail. I note however that there is no dispute that the email was received by the Appellant and further that the Appellant did not respond to the email. I note the comments from NHS England that if a response had been received after the deadline, consideration of the response would still have been given. I also note the comments from NHS England that they have communicated with the pharmacies in the past by email and further I note the email from NHS England advising all pharmacies that due to the current working arrangements, emails will continue to be the preferred form of communication. I am of the view that given the current situation with regard to COVID-19 and the different ways of working, it is proportionate and reasonable for NHS England to communicate with the Appellant by email.

2.20 I am mindful that by having appealed against the decision of NHS England the Appellant has now had the opportunity to make representations.

- 2.21 In its appeal the Appellant states *“I am aware that the NHS area team informed the LPC of its intention to issue directions to open but did not enter into effective dialogue or consultation with the LPC.”* In response to this, NHS England has provided a copy of the email sent to the LPC’s on 26 August 2020 in which NHS England set out its intention to issue directions for pharmacies to open and gave the LPC’s 30 days in which to provide representations. I further note the comments from NHS England that they have regular discussions with the LPC’s in the area throughout the year and Bank Holidays are always a topic of discussion. From the information provided, I am of the view that NHS England did enter into consultation with the LPC.
- 2.22 I am mindful that NHS England is required by paragraph 25(6) of Schedule 4 to provide reasons for its decision. In my view, these reasons should set out the basis of any determination that days and times of opening will no longer be such as they will meet the pharmaceutical needs of relevant persons and (if they are, such that a direction *may* be made) the assessment that led to the direction, taking into account any written representations from the pharmacist.
- 2.23 I note that in their representations, NHS England provided information with regard to the assessment that they undertook. I note the analysis of the hours needed which showed that there were no pharmacies in the County Durham/Chester le Street area open on Christmas Day. The same analysis showed that the Urgent Treatment Centre, Urgent Treatment Centre – 111 online, Out of Hours service, the Emergency Department (all located at the University Hospital of North Durham) and a GP Extended hours Hub (Ushaw Moor) are all open on Christmas Day and are therefore a source of prescriptions.
- 2.24 I note the undisputed comment from the Appellant that it is located 6.5 miles away from these services and *“with no public transport on Christmas day both would be out of reasonable walking distance”*. In response, I note that NHS England state that they have looked at the locality as a whole; Durham is split into 5 areas and that for the Durham/Chester le Street area there are 4 GP hubs/Urgent Care Centre/Emergency departments open. I also note the statement from NHS England that *“patients access pharmacies in many different ways, which are not limited to public transport.”*
- 2.25 I note that I have not been provided with any information (either in written form or in the form of a map) to show the location of this pharmacy in relation to the GP Hubs/Urgent Care Centres that are providing services. Whilst there may be a need for pharmaceutical provision on Christmas Day, I am of the view that there is nothing in the paperwork provided which demonstrates why the Appellant’s pharmacy is best placed in terms of access, geography or any other factor to meet any demand for such services.
- 2.26 I note that NHS England states in its representations that *“Once we have established where we have gaps and have received expressions of interest, we look at pharmacies in the individual geographical areas and consider whether they have provided (locally directed) services on a bank holiday since the inception of NHS England in 2013 and if so, how often (Enc 8). Where there is a gap, we do try to fill these firstly with those pharmacies who have expressed an interest in being commissioned before looking to issue a direction and we try to do this on a ‘take your turn’ basis. Of course, this becomes difficult at times where there is a limited number of pharmacies to choose from within a locality”*.
- 2.27 I note the comments from both parties with regard to the current pharmacy opening previously on other Bank Holidays throughout 2020. I also note the comments from parties with regard to the pharmacy (under a different ownership) successfully appealing a Direction for Christmas 2019. I note that there is no dispute between parties that the Appellant’s pharmacy has not provided services on Christmas Day in the last few years. I further note that NHS England state that the direction of pharmacies is on a rota basis and is based on those that have not opened previously. However I am mindful that the direction from NHS England to open a pharmacy should

be based on the assessment of the needs, in terms of providing pharmaceutical services to patients, that should be assessed in the first instance and should not be reliant on which pharmacies have opened in previous years. I take no view on previous bank holidays in which the pharmacy was open, whether that was voluntary, a national directive from NHS England or a local direction.

- 2.28 I consider that whilst NHS England has provided some information to support the conclusion reached, it has not set out the reasoning that lies behind the direction to this particular pharmacy, which is a requirement of the Regulations.
- 2.29 On appeal, I may (in accordance with paragraph 25(8) of Schedule 4) either confirm the action of NHS England or take such other action as it could have taken.
- 2.30 The letters dated 24 August 2020 and 22 October 2020 provide me with no information which I consider sufficient to provide reasons on the basis of which I can confirm the decision, nor information upon which I might rely to make a direction for alternative reasons.
- 2.31 On the basis of the information available to me, I am not satisfied that NHS England has demonstrated that the needs of people in its area or other likely users of the pharmacy for pharmaceutical services will not be met on 25 December 2020.

3 Determination

- 3.1 The appeal is granted and, pursuant to paragraph 25(3)(c)(ii), no direction is issued.

Head of Operations, Primary Care Appeals