



Additional Support Needs

**DECISION OF THE TRIBUNAL**

FTS/HEC/AR/22/0124

**Witness List:**

**Witnesses for Appellant:**

The appellant

The appellant's mother ('witness A')

**Witnesses for Respondent:**

The respondent's Quality Improvement Officer

Deputy Head Teacher, School A ('witness B')

**Reference**

1. The appellant wishes the tribunal to overturn a decision by the respondent. That decision is that the appellant does not require a co-ordinated support plan (**CSP**). The appellant argues that he requires a CSP, and so one should be prepared.
2. This reference is made under section 18(3)(b)(i) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**). The appellant asks the Tribunal to overturn the decision under section 19(2)(b) of the 2004 Act.

**Decision**

3. We overturn the decision of the respondent and require the respondent to make a CSP for the appellant by 20 February 2023, or by such other date as the parties agree, all under section 19(2)(b) of the 2004 Act.

**Process**

4. This reference was managed through a number of case management calls.
5. Following written submissions and a hearing, a decision on a preliminary matter was issued in November 2022. This decision was issued under rule 22 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366). That decision provides that a 'cumulative' approach to the meaning of

'significant' in section 2(1)(d) of the 2004 Act is the correct approach.

**[NOTE BY PRESIDENT: THE PRELIMINARY DECISION REFERRED TO IN THIS PARAGRAPH WAS QUASHED FOLLOWING AN APPEAL BY THE RESPONDENT: see Lady Poole's judgement in [Aberdeenshire Council v CD 2023 UT 28](#)]**

6. A hearing on the merits of the reference took place over two days in November - December 2022. The parties provided advance written submissions, supplemented by oral submissions on the second hearing day.
7. In addition to the oral evidence and submissions, we took into account the documents in the bundle, numbered T1 - 160, A1 - 057 and R1 - 038 (including the parties' written submissions).
8. Up until the issue of the preliminary decision, the respondent's position on the application of section 2 of the 2004 Act was as set out in its case statement, namely that the additional support provided by the respondent (as education authority) for the appellant, is significant. Given this and the respondent's concession that additional support was being provided by an appropriate agency, the cumulative approach would then inevitably lead to the test in section 2(1)(d) being met. Once the preliminary decision was issued, the respondent sought to retract that concession, so that he could argue that the support provided by the respondent is not significant. The appellant did not object to this request. We are content to treat the concession as retracted, given the outcome of the preliminary issue.
9. In line with the Chamber President's Guidance to Tribunal Members No 01/2021, *The Child, Young Person and Tribunal*, especially paragraphs 83 - 86, we considered whether to prepare a letter to the appellant briefly explaining this decision. We decided not to follow this approach. Given the appellant's engagement with advocacy services and with the tribunal during the hearing (including providing a written statement and giving oral evidence) and his evident understanding of this process and the issues, we feel confident that he will be able to understand the key points in this decision without further assistance from the tribunal. We note that the appellant has provided ongoing instructions to his representative, he has a supporter who attended the hearing and the appellant attended the whole hearing too.

### **Findings in Fact**

10. The appellant is a pupil in secondary year 3 at school A. School A is a mainstream secondary school managed by the respondent, with a roll of around 700 pupils.
11. The appellant has been diagnosed with attention deficit hyperactivity disorder (**ADHD**) and autism spectrum condition (**ASC**). The appellant has dyslexia, hypermobility and tremors.
12. The appellant does not like loud noises and can easily become distracted. He can feel self-conscious. He can become bored easily. He finds it difficult to explain how he feels. The appellant finds it difficult to make friends.
13. The appellant takes medication daily to treat his ADHD.
14. Due to the appellant's conditions, he faces certain challenges in his school education. In

order to meet these challenges, he benefits from certain resources/supports in school A and supportive strategies from school staff. The main such resources, supports and strategies are as follows:

- a. Use of a laptop and a chrome book for extended writing tasks in class work and assessments;
- b. Timetabled sessions in school A's additional support for learning base (**the base**) (as outlined below at paragraph 19);
- c. Use of write-on books;
- d. Extra time for thinking and processing;
- e. Models of good work, for use as examples;
- f. Explicit, clear, step-by-step instructions;
- g. Differentiated resources;
- h. Assistance with writing tasks;
- i. Access to quiet space in the library or research area for some of the time;
- j. Option to attend the base during tutor group time;
- k. Option to attend the base during personal and social education (**PSE**) classes for particular topics;
- l. Larger squared or lined paper, where appropriate;
- m. Opportunity to take a break when he feels overwhelmed;
- n. Assistive technology tools;
- o. Coloured jotters;
- p. Regular checking by staff for understanding;
- q. Checking for accuracy before work is submitted;
- r. Permission to leave each class 5 minutes early between classes, to avoid crowded corridors (which he does not always use);
- s. Reassurance and support with practical tasks such as cookery, which he finds difficult due to his tremor;
- t. Prompting by staff, for example to use his laptop.

15. A pupil support assistant (**PSA**) is present in almost all of the appellant's classes. The appellant can draw on a PSA's support when needed. The PSAs regularly assist the appellant by ensuring that he is focused and completes tasks appropriately, including assisting the appellant to write things down. The PSA helps the appellant to understand tasks and rephrases questions. The appellant accesses PSA support in some classes; in others he does not require to do so. In classes when a PSA is not in attendance, class teachers are aware that they should check the appellant's progress more often than would otherwise be the case.

16. The appellant sometimes finds it difficult to ask for help. This can detrimentally affect his progress in class.

17. The appellant sometimes finds it uncomfortable to discuss personal issues relating to growing up. For this reason, he does not attend all regular PSE classes.

18. The appellant has experienced bullying at school A, consisting of verbal and threatening behaviour. The appellant experienced an incident of bullying in November 2022. This is still under investigation. Due to his additional support needs, the appellant sometimes struggles to provide a clear account to assist others in clarifying the detail of these events. A previous incident of this nature occurred in March 2022.

19. The appellant's timetable provides for six lesson slots per school day, each lasting

around 50-55 minutes. During five of these slots per week, the appellant attends the base. During these slots, the number of pupils in the base will vary, but the usual number at any time is between 7 and 10 pupils. The usual number of members of staff attending in the base at any time is two teachers.

20. During his time in the base, the appellant receives targeted support with literacy skills. He also learns personal and social skills. He uses some of the time in the base to work towards a personal development award qualification. Sometimes the appellant uses time in the base to catch up with class work. The appellant also uses his time in the base to relax, for example by playing Warhammer, an online fantasy war game, or using his mobile phone.
21. The appellant's academic progress in school A is generally in line with his age group. He lacks confidence with maths and the PSA in his maths class performs a regular check on his progress.
22. The appellant has routine medical appointments each lasting around 20-30 minutes, with Dr C, consultant paediatrician, Unit Clinical Director, Combined Child Health and Lead Paediatrician for Child Protection and Adoption and Fostering. These appointments take place every 6 months. During these appointments, Dr C discusses the appellant's ADHD medication, as well as his mood, his tremor and how he is getting on at school. If the appellant's medication dosage requires to be adjusted, this can lead to additional appointments with Dr C, as happened in 2021, to ensure the optimum prescription for the appellant. Where the medication prescription is not optimised, this can negatively affect the appellant's learning and attainment. The appellant has been receiving paediatric community health support for around the last 7 years. Paediatric support is likely to continue for the appellant for the rest of his schooling.
23. Dr C is invited by the respondent to attend the appellant's Child Planning Meetings, but does not usually attend. Dr C's reports following each 6-monthly meeting are sent to school A staff. They are stored by the guidance teacher, who may pass on any information from those reports to school staff. No such information has had to be passed on to date.
24. In June 2022, a CSP review meeting for the appellant took place. Witness B chaired the meeting. Witness A and Dr C also attended (with others). During that meeting, a decision was made to recommend that a CSP is prepared since the majority view was that the statutory tests for a CSP were met. In June 2022, the respondent's CSP Advisory Group decided that a CSP is not required since the appellant did not (in the view of that group) meet the statutory tests for a CSP.

### **Reasons for the Decision**

25. The appellant has additional support needs as defined within section 1 of the 2004 Act. This was not in dispute and we are satisfied of this given our findings in fact at paragraphs 11-21 above.

#### *The tests for a CSP and the present dispute*

26. Four tests must be met before a CSP is required. Those tests are set out in section 2(1)(a)-(d) of the 2004 Act. The tests in section 2(1)(a), (b) and (c) are met in relation to the appellant. This is clear from the findings in fact in paragraphs 11-21 above. The

parties agree on this. The only point in dispute is whether or not the test in section 2(1)(d) is met. The main argument between the parties is whether or not the requirement of 'significant additional support' is met. The appellant argues that it is met and that a CSP is, therefore, required. The respondent argues that this test is not met and that a CSP is therefore not required.

### *The meaning of 'significant additional support'*

27. In considering the test in section 2(1)(d), and in particular the question of what 'significant additional support' means, we accept that there are two main authorities. Firstly, the Inner House decision of *JT v Stirling Council* 2007 SC 783 (**JT**), which, in its discussion of the relevant points, is binding on us. Secondly, the Scottish Government's Code of Practice, made under section 27(1) of the 2004 Act, *Supporting Children's Learning: Statutory Guidance on the Education (Additional Support for Learning) Scotland Act 2004 (as amended), Code of Practice (Third Edition) 2017 (Code of Practice)*. We require to take the Code of Practice into account: section 19(7) of the 2004 Act.
28. In *JT*, Lord Nimmo-Smith (delivering the opinion of the court) made a number of points about the meaning of the word 'significant' in the context in which it appears in section 2(1)(d) of the 2004 Act (the paragraph number in the *JT* decision is noted against each point):
- a. The word 'significant' means more than 'not insignificant' [23];
  - b. This word refers to the provision for the child/young person, not the needs that require the provision [23];
  - c. This word refers to the extent of the provision, not to its effect [24]; and
  - d. This word is to be judged by reference to the need for co-ordination [24].
29. In the Code of Practice, the *JT* decision is cited with approval. In considering how to measure the significance of provision, the Code of Practice refers to the 'frequency, nature, intensity and duration of the support and the extent to which that support needs to be co-ordinated' (Chapter 5, page 72, paragraph 18). The 'frequency, nature, intensity and duration' reference from an earlier edition of the Code of Practice was cited with approval by the court in *JT* (paragraph [25]). The assessment of significance through these four factors is clearly a global one. There is no suggestion (in *JT* or the Code of Practice) that significance is required in all four factors.
30. More generally, the court in *JT* refers to resources of the education authority as a factor (see the last three sentences of paragraph [24] and the final two sentences of paragraph [25]). However, the court is not suggesting that the sensible application of resources is part of the test; rather that this consideration supports the court's comments on the test as summarised by us at a.- d. in paragraph 28 above.
31. On point d. in paragraph 28 above, we do not see that as meaning that a particular level of co-ordination is required to satisfy the test in section 2(1)(d). Parliament chose to quantify the level of support, not the level of co-ordination. Indeed, it seems from the wording chosen that where the relevant support comes from at least two of the qualifying sources mentioned in section 2(1)(d)(i) or (ii), the need for co-ordination is met. The court in *JT* was not suggesting anything else, only that the context of the significance question is one in which co-ordination of that support is considered. When one considers paragraphs [24]-[25] of *JT* as a whole, it is clear that the proper focus of the meaning of 'significant' is on the extent of the provision of additional support. That is the meaning we

apply in this case.

32. The Code of Practice refers to ‘the extent to which the support needs to be co-ordinated’ (Chapter 5, paragraph 18, page 72). That wording did not appear in the original 2005 Code, which applied at the time of the *JT* decision (see Chapter 4, paragraph 16 on page 52 of the original version) and so is not mentioned by the *JT* court. That wording appeared in the second edition of the Code (in 2010) and has been carried through into the current 2017 version.
33. Looking to how section 2(1)(d) is worded and structured, what is intended is that there is a need for co-ordination where there is significant additional support provision deriving from at least two relevant support types as specified in either section 2(1)(d)(i) or (ii) (or both). In other words, the need for co-ordination is implicit in the fact that there is support of a certain level from at least two source types. The other section 2(1) tests (including the requirement in section 2(1)(d) for the provision of significant additional support) operate to limit the number of children/young persons who would qualify for a CSP. It is obvious that an aim of a CSP is to ensure that co-ordination takes place. This is why it does not make sense for co-ordination to be required as a pre-requisite for a CSP.
34. If there is a need for co-ordination before a CSP is required, we are clear that this need exists in relation to the support of the appellant. Firstly, Dr C and school A staff are in regular contact. Dr C is invited to the appellant’s child planning meetings. Although she does not usually attend, the fact of the invitation suggests a need for co-ordination. Secondly, witness B explained that reports on the outcome of Dr C’s 6-monthly reviews are sent to the school and passed to the guidance teacher, who would send the report to the relevant teaching staff, should that be needed. Thirdly, Dr C attended the recent CSP review meeting for the appellant. In addition, she expressed a view at that meeting on whether the CSP tests were met, and reiterated that view in later correspondence with the school, correspondence that was prompted by the school (see the e-mail exchange in August 2022 at R020-021). These points indicate that a level of co-ordination between Dr C (from an appropriate agency) and school A already exists. Part of the purpose of a CSP is to ensure that this co-ordination continues in the context of access to independent judicial oversight.
35. There was some discussion during the supplementary oral submissions about whether the presence of PSA support for the appellant in almost all of his classes, whether or not this support was needed in a particular class, amounted to a provision of additional support. We take the view that it does, for two reasons. The first is that the respondent accepts that the PSA in the appellant’s classes was provided partly for his support and partly for the support of other pupils. This logically amounts to provision for the appellant. Indeed, this is the only way that such provision can be made. As the appellant’s representative pointed out, it is not possible to allocate a PSA for, say, five or ten minutes of a class; the support needs to be there for the duration of each class, in order that it can be accessed when needed. Secondly, there is evidence, including from the appellant himself, that he sometimes accesses that support: when speaking to his advocate, the appellant stated that without a PSA in classes everything would be ‘a little bit more harder’ (R010, final sentence). In addition, there is evidence from the appellant’s class teachers that indicates his use of PSA support (for example in social subjects, A045, 2<sup>nd</sup> paragraph; science and technology, A045, 6<sup>th</sup> paragraph).
36. One more general point. In our analysis, we are considering only the ‘additional support’ provided to the appellant, as defined in section 1(3) of the 2004 Act. Not all support is

relevant, only that support which is 'additional to, or otherwise different from', the general educational provision made by the respondent for pupils in its schools may be considered.

37. Taking the approach explained above, we find that the test in section 2(1)(d) is met in relation to the appellant and that a CSP is therefore required. We will set out our reasons for this conclusion by answering three questions. Our answer to each of these three questions is: yes. The answers to the first two questions are necessary for our decision. The answer to the third is not, and is provided for completeness and clarity.

### *Social work support*

38. Before coming to those three key questions, we were urged by the appellant to find that support is required from the respondent council in the exercise of its social work functions (see the definition of 'education authority' adopted into the 2004 Act from section 135 of the Education (Scotland) Act 1980, via section 29(2) of the 2004 Act: this refers to 'a council').

39. There is insufficient evidence to enable us to conclude that such support is, or is likely to be, required. This support may be required, to help the appellant deal with any bullying and to help him make friends. The evidence indicated that a referral has been made by school A for an assessment of the need for such support, at witness A's request. At the date of the hearing, that assessment had not taken place. It is therefore not clear whether such support will be needed, the nature of that support or its extent. We cannot speculate on these matters. We therefore take no account of the possibility of social work support for the appellant in reaching our decision.

### **Question 1: Do the appellant's needs require significant additional support to be provided by the education authority?**

40. We are in no doubt that the answer to this question is: 'yes'.

41. On **frequency**, considering the 20 resources, supports and strategies listed in paragraph 14 above, the additional support set out there is, by its nature, provided frequently. It is the kind of support that permeates much of the school provision for the appellant, irrespective of subject. It is clear by their nature that at least some of the resources, supports and strategies would be provided in every class taken by the appellant, not just occasionally.

42. The support in the base is provided on a frequent basis, across 5 periods every week.

43. On **nature**, the range of provision type is broad and, again, applies across the appellant's learning experience. The 20 resources, supports and strategies listed at paragraph 14 are extensive and impact on the way the appellant thinks, learns and processes information. They also assist the appellant in coping with difficulties which, again, apply across the appellant's school week, such as access to quiet space, differentiated resources, breaks, assistive technology, prompting and permission to leave class early to avoid crowds. The periods the appellant spends in the base (which he finds 'relaxed and calm' in his own words) indicates that he receives focused support in a small group. This is in addition to general, ongoing support in regular classes.

44. On **intensity**, again we note that the resources, supports and strategies listed at

paragraph 14 above affect the way the appellant learns and overcomes barriers to learning, and that they apply across subjects. The need for a notable period of the appellant's week to be spent in the base, where additional support is provided in a small group with a high teacher: pupil ratio is a further indication of a high intensity support package.

45. On **duration**, the provision of additional support for the appellant has been in place for some time. For example, occupational therapy (**OT**) input (described in an OT report at A036) was required as early as 2016, when the appellant was about to turn 8 years old. The appellant's current Individualised Education Plan (**IEP**) started in August 2020. Given the nature of the appellant's conditions and the nature and extent of the support being provided, it is clear to us as a specialist tribunal that the respondent will require to continue to provide support of the kind set out in the IEP for a number of years, most likely for the rest of the appellant's school education. No argument was advanced to suggest that the duration of the provision would be short.
46. Taking all of this together, the provision of support by the education authority to meet the appellant's additional support needs is significant, in the context of section 2(1)(d) of the 2004 Act.

**Question 2: Do the appellant's needs require additional support to be provided by one or more appropriate agencies?**

47. Again, the answer to this question is 'yes'. The respondent does not argue otherwise.
48. The appellant's needs require additional medical support from the local National Health Service paediatric provision. This support includes regular specialist monitoring (by Dr C) and medication for the appellant's ADHD. The appellant's ADHD impacts on his ability to learn at school. Dr C sees her role as one that is wider than the provision and monitoring of medication: she describes her role as including ensuring that sufficient education support is in place (see the record of Dr C's view in the CSP Information Checklist at R015). This is supported by her regular, routine appointments with the appellant, of 20-30 minutes every 6 months, where medication and other matters are discussed (see the findings at paragraph 22 above).

**Question 3: Do the appellant's needs require significant additional support to be provided by one or more appropriate agencies?**

49. Given the decision to adopt the cumulative interpretation of 'significant' in section 2(1)(d) of the 2004 Act, and given our answers to questions 1 and 2, we are led to the conclusion that a CSP is required, since the test in section 2(1)(d)(ii) is met.
50. For completeness, in answering question 3, we set out below the reasoning we would have adopted had we taken the non-cumulative approach to the meaning of 'significant' in section 2(1)(d). Had we taken that approach, our answer to question 3 would have been 'yes', meaning that a CSP would have been required.
51. In reasoning to this conclusion, we adopt the same approach to 'significant' as that used above: through the four factors identified by the court in *JT* and in the Code of Practice. These factors need to be applied to the only additional support being provided for the appellant's needs by an appropriate agency: NHS paediatric support, currently from Dr

C.

52. On **frequency**, the routine appointments between the appellant and Dr C happen every 6 months, and last for 20-30 minutes. Additional appointments are sometimes needed for any changes in the appellant's medication.
53. Frequency (as with each of the four factors) should be viewed in context. The context here is a fixed twice-yearly appointment with a senior specialist consultant medical practitioner. Given the specialist nature of the provision, 6-monthly routine appointments represents frequent input.
54. Moving to **nature**, this is specialist medical input, provided on a regular and ongoing basis. Support of this nature indicates the seriousness of the needs of the appellant.
55. On **intensity**, and again viewed in context, the regular input of a specialist senior medical practitioner to treat the appellant both in terms of his medication and a general check on educational support, represents intensive support. Dr C comments on how optimising the appellant's medication 'has been a challenge' and that this may 'recur going through school'. Dr C goes on to say that this optimisation 'may affect [the appellant's] ability to focus and concentrate on his learning, and may lead to difficulty attaining'. (see Dr C's Information and Assessment Evidence Form at R018, first text box). This demonstrates the need for close attention to the appellant's medication in the context of his education, and how this is not a straightforward matter.
56. Finally on intensity, as a specialist tribunal, we are aware that the combination of the appellant's ASC and ADHD adds a layer of complexity that increases the intensity of the required health support. This is supported by Dr C's comment that both ADHD and autism affect ability to access education easily (see Dr C's Information and Assessment Evidence Form at R018, first text box).
57. Turning to **duration**, the paediatric support for the appellant has taken place for around 7 years. Dr C expressed the view that this kind of support will be needed for the rest of the appellant's school education (e-mail at R20). We accept this evidence, indeed there is nothing to suggest that this is incorrect. The support is therefore of long duration (around 10 years in total). We would add here that we are far away from the situation discussed in *JT* of a plan being prepared for co-ordination where the need for co-ordination would be gone by the time the plan is prepared (see the final sentence of paragraph [25] of the decision). We would also add that in the Code of Practice, particular emphasis is placed on the duration factor: see Chapter 5, page 72, paragraph 18, final sentence.
58. Taking all of this together, and if we had been required to decide the point, the provision of support by an appropriate agency (NHS) to meet the appellant's additional support needs is significant, in the context of section 2(1)(d) of the 2004 Act. This means that had we adopted the non-cumulative approach to the interpretation of 'significant' in section 2(1)(d), we would have required the respondent to make a CSP for the appellant, since the test in section 2(1)(d)(ii) would have been met.

### *Timing*

59. The appellant's representative, in his written submission suggests that if we order the respondent to make a CSP, a period of four working weeks (20 days) would be sufficient.

We note that the respondent has already prepared a detailed IEP, and will be able to draw from that in framing the appellant's CSP. However, given the time of year, with an imminent extended school break, and the need for the respondent to consult on the content of the CSP, we have chosen a deadline of 20 February 2023 as a reasonable one. The parties may agree a different deadline.