



**DECISION OF**

Lady Poole

**IN THE APPEAL**

Aberdeenshire Council, Legal and People Department, Woodhill House, Westburn Road, Aberdeen,  
AB16 5GB

Appellant

- and -

CD, c/o Iain Nisbet - Cairn Legal, 1st Floor Regent House, 113 West Regent Street, Glasgow, G2 2RU

Respondent

FtT Case reference: FTS/HPC/AR/22/0124

27 September 2023

**Decision**

The decision of the First-tier Tribunal for Scotland dated 14 November 2022 is quashed. The case is remitted to the FTS to proceed as accords.

**Reasons for decision**

**Background**



1. About a third of pupils in Scotland are recorded as having additional support needs, so they can benefit from education. Some pupils with relatively high levels of additional support needs require a co-ordinated support plan (“CSP”). A CSP plans what additional support is needed and who will provide it. The CSP specifies a particular person who is responsible for co-ordinating support for the pupil, on behalf of an education authority. There are specific statutory duties which arise where there is a CSP, and if disputes arise there can be references to the First-tier Tribunal for Scotland (“FTS”).
2. This appeal is about the criteria which must be satisfied for a CSP to be required. CSPs benefit pupils for whom they are necessary, but they also place burdens on education authorities with finite resources. The appeal is brought by Aberdeenshire Council, the education authority responsible for the education of CD. CD’s additional support needs arise from ADHD, autistic spectrum condition, dyslexia, hypermobility, tremors and bullying. The FTS decided, after hearing evidence, that CD required a CSP. However, before that evidential hearing, in a decision of 14 November 2022, the FTS had determined a preliminary point of law. The FTS granted permission to appeal its decision of 14 November 2022, on the basis it raised a point of law of wider public interest about the correct interpretation of the eligibility criteria for CSPs.
3. For reasons set out below, I have decided the FTS erred in law in its decision of 14 November 2022 by misinterpreting section 2(1)(d) of the Education (Additional Support for Learning) (Scotland) Act 2004 (the “2004 Act”), failing to follow authority, and failing properly to have regard to the Code of Practice as required by section 19(7) of the 2004 Act.

## **Governing law**



4. The 2004 Act, as its long title says, makes provision “for additional support in connection with the school education of children and young persons having additional support needs”. Section 2(1) of that Act sets out criteria for when a CSP is required, as follows:

“(1) For the purposes of this Act, a child or young person requires a plan (referred to in this Act as a “co-ordinated support plan”) for the provision of additional support if–

- (a) an education authority are responsible for the school education of the child or young person,
- (b) the child or young person has additional support needs arising from–
  - (i) one or more complex factors, or
  - (ii) multiple factors,
- (c) those needs are likely to continue for more than a year, and
- (d) those needs require significant additional support to be provided–
  - (i) by the education authority in the exercise of any of their other functions as well as in the exercise of their functions relating to education, or
  - (ii) by one or more appropriate agencies (within the meaning of section 23(2)) as well as by the education authority themselves”.

“Appropriate agencies” are defined in section 23(2) to include other local authorities, health boards, and other persons specified in an order made by the Scottish Ministers.

5. Section 27(1) of the 2004 Act makes provision for Scottish Ministers to publish a statutory Code of Practice. The relevant Code of Practice is now in its third edition and is called “Supporting Children’s Learning: Statutory Guidance on the Education (Additional Support for Learning) (Scotland) Act 2004”. Under section 19(7) of the 2004 Act the FTS:

“must take account, so far as relevant...any code of practice published by the Scottish Ministers under section 27(1)”.



6. There was no real dispute between the parties about the principles of statutory interpretation to be applied when interpreting provisions of the 2004 Act. The aim is to give effect to legislative intention and legislative purpose. A provision should be construed according to the ordinary meaning of the words used. The text of a provision should be construed in context, both of the statute in which it appears and the wider context, including the mischief the provision was enacted to address.

## **The issue**

7. It is not in dispute that CD met the criteria for a CSP set out in section 2(1)(a)-(c) of the 2004 Act. The focus of the appeal is the criterion in section 2(1)(d).
8. By way of background to section 2(1)(d), additional support may be provided to a pupil by the education authority exercising its education functions, for example sessions in school with a learning support teacher. But support may also be provided by others. Examples might be the local authority's social work department supporting travel to and from school, or a health authority providing speech and language therapy to a pupil. In general terms, where there are providers of support in addition to the education authority, a pupil may benefit from co-ordination of support.
9. A CSP is a particular way of co-ordinating support, where the responsibility for co-ordinating support is placed on the education authority. The availability of CSPs is limited by section 2(1)(d) of the 2004 Act to situations of "significant additional support". It is also limited to situations where there are providers of support in addition to the education authority exercising its education functions. What is less clear from section 2(1)(d) is which bodies the "significant additional support" requirement applies to. Both parties lodged detailed written arguments with supporting authority and made helpful submissions, arguing different approaches. The education authority argues that both the education



authority exercising its education functions, and other providers mentioned in sections 2(1)(d)(i) and (ii), separately must provide “significant additional support”. The FTS took a different approach, which is argued in this appeal on behalf of CD. The FTS found that section 2(1)(d) is satisfied if the combination of the support required from all providers (including the education authority) amounts to “significant additional support”. This second approach would mean more pupils qualify for CSPs.

10. My decision is that the FTS ought to have concluded that in order to meet the criterion in section 2(1)(d), as well as the pupil requiring significant additional support from the education authority, the pupil also had to require significant additional support either from the local authority exercising functions other than education or from one or more appropriate agencies. I have set out the reasons for this conclusion below. In reaching it, I have applied the principles of interpretation set out in the governing law section above, followed previous authority, and had regard to the Code of Practice.

### **Application of principles of statutory interpretation**

11. I accept that the construction adopted by the FTS is a possible interpretation of the section 2(1)(d) of the 2004 Act. However, I find that when accepted principles of statutory construction are properly applied, it is not the correct interpretation.
12. Provisions have to be construed in their context, so I start with background context. The mischief the provisions in the 2004 Act about CSPs was designed to address can be ascertained from the Policy Memorandum with the bill, statements by the Ministers during the passage of the bill, and the Explanatory Notes to the Act (Bennion, *Statutory Interpretation* 8<sup>th</sup> edition paragraph 24.12). The Policy Memorandum at paragraph 26 indicates that CSPs were intended for children with additional support needs who required support from a range of providers. Their aim was to plan long-term and strategically for the



achievement of educational outcomes, and to foster co-ordination across the range of services, both within and without the authority, required to support this. During the Stage 2 Education Committee and the Stage 3 Plenary session, the Minister indicated that CSPs were aimed at the group of pupils who had the most extensive additional support needs and who required the most extensive support, and not a wider group. The focus was intended to be on those with extensive support needs rather than those with much lesser needs. The purpose was to co-ordinate services from across agencies over the long term for the most vulnerable children and young people, to provide the most effective package of support for the pupil. The Explanatory Notes to the 2004 Act explain at paragraphs 5 and 7 that CSPs are for those with enduring complex or multiple needs that require support from outwith education services. From these materials, the mischief sought to be addressed was the lack of proper planning and co-ordination of support services, within and without the education authority, for pupils with the most extensive support needs. (For completeness, I was not satisfied that the *Pepper v Hart* criteria were met to entitle me to have recourse to Parliamentary materials to adopt a particular construction of section 2(1)(d). There was no sufficiently clear statement from the Minister promoting the bill about the interpretation of section 2(1)(d)).

13. Section 2 also has to be construed in the context of the 2004 Act in which it appears. The purpose of the Act in the long title is to make provision for additional support in connection with school education. The 2004 Act frequently distinguishes between pupils who have additional support needs, and pupils who have additional support needs who also require a CSP (for example sections 6(1), 7(2) and (6), 12(1) and 13(1)). There are obligations on education authorities in relation to all pupils with additional support needs (for example sections 5 and 6), but those who qualify for a CSP have additional rights (see below). The Code of Practice, which the FTS must take into account where relevant, explains that CSPs are only one of a number of types of planning for the meeting of a child's needs (chapter 3 paragraphs 82 to 91). There can for example be Child's Plans and Individualised Education



Plans, which may be used where pupil needs are not as extensive as those of pupils requiring CSPs. Where there is no CSP, section 16 of the 2004 Act provides for a dispute resolution procedure for disputes about the educational authority's additional support needs functions.

14. Continuing with the context of the 2004 Act, where a CSP is required, the 2004 Act sets out duties the education authority must perform. These are more specific than the general duties in relation to additional support needs found elsewhere in the 2004 Act. Sections 9 to 11 govern contents and review of CSPs, and obligations in relation to provision of additional support identified in a CSP. Disputes arising can be taken to the FTS under section 18, rather than the dispute resolution route in section 16. Before pupils with additional support needs have the benefit of the extra obligations incumbent on an education authority which arise when there is a CSP, they must satisfy the gateway criteria in section 2.
15. Moving to the words of section 2 itself, the second and third conditions in sections 2(1)(b) and (c) assist in giving effect to the policy intention that CSPs are for pupils with more serious needs. The additional support needs must result from one or more complex factors or multiple factors, and be likely to continue for more than one year. Section 2(1)(d) is directed more at the need for co-ordination, but also the extent of the provision required. It introduces a requirement that in addition to the education authority exercising its functions relating to education, other support providers are needed.
16. The key words in section 2(1)(d) for present purposes are the words "as well as", which appear in both sections 2(1)(d)(i) and (ii). In my opinion, the normal meaning of these words is that the education authority has to provide significant additional support as well as the other provider(s) before a pupil requires a CSP. In other words, both the education authority exercising education functions and the other source of support require to provide significant additional support. The words between the education authority and the other



source type of support are not “and” or “in combination with” or “cumulatively with”, but “as well as”. It is therefore insufficient that overall there is significant additional support; there must be significant additional support beyond that provided by the education authority.

17. That interpretation is consistent with the mischief I identified above. It ensures that CSPs are directed to the pupils with the most extensive needs for co-ordination of support services, within and without the education authority. It is also consistent with the context of the Act, which differentiates between pupils with additional support needs and those with additional support needs who also require CSPs. It is not sufficient for a CSP that co-ordination of services by an education authority would be helpful. It may be that co-ordination of services would be of assistance, even if services provided by a body external to the education authority are not “significant” within the meaning of section 2(1)(d) (*JT v Stirling Council* 2007 SC 783 paras [24]-[25]). An element of co-ordination between services provided solely by an education authority may also be useful. But CSPs, as a means of providing co-ordination of additional support, were intended by Parliament for those with the most extensive co-ordination and support needs, so resources are targeted towards that particular group of pupils. The wording of section 2(1)(d) directs attention to the significance of the support. A requirement that significant additional support is required from both the education authority and also significant additional support provided beyond those functions as an education authority is likely to channel CSPs to cases where there is an increased need to co-ordinate services from different providers. Not all pupils with additional support needs will meet the criteria for a CSP. But that is the legislative intention, the legislature having made different provision for pupils with additional support needs and pupils with those needs who also require a CSP. While sympathies are naturally with a child who needs support, the wording of section 2(1)(d) balances the public interest in the efficient provision of services at public expense (*JT v Stirling Council* 2007 SC 783 at paragraph [24]). It restricts availability of CSPs to a particular group of pupils receiving





significant additional support from the education authority, and significant additional support to enable them to benefit from school education from another source.

### Previous authority

18. The interpretation of section 2(1)(d) of the 2004 Act that I have reached is consistent with previous authority. There have been a number of appeals to the Inner House of the Court of Session about eligibility for CSPs. In two of those there are clear dicta to the effect that for section 2(1)(d) to be satisfied, significant additional support must be required from the education authority exercising its education functions, and also significant additional support from another source. In *WA's Representative v Highland Council* 2008 SC 289 the court said at paragraph [21] that the correct issue for the tribunal was whether the child required:

“significant long-term additional support beyond that provided by the respondents purely as an education authority”.

In *City of Edinburgh Council v K* 2009 SC 625 the court said at paragraph [17]:

“the test to be met in sec 2(1)(d) is not confined to the significance of the additional support to be provided by the education authority in the exercise of their education function. It is clear from the terms of sub-paras (i) and (ii) that in addition to satisfying the requirement that there must be significant additional support by the education authority exercising their education function, there must also be significant additional support from another source. That other source must either be the education authority exercising any of their other functions or one or more of the appropriate agencies defined in sec 23(2). Furthermore it is clear from sec 1 of the Act



that the purpose of the provision of additional support to a child is to enable the child to benefit from school education provided to him or her”.

19. Other cases have also applied this interpretation of section 2(1)(d). In *JT v Stirling Council* 2007 SC 783 there was no dispute that the pupil required significant additional support to be provided by the education authority. The court upheld the tribunal’s approach of going on to consider whether the child required significant additional support from other appropriate agencies. Although the child needed speech and language therapy provided by an external agency, this was found not to be significant and the child was not eligible for a CSP. In *City of Edinburgh Council v ASNT* [2012] CSIH 48 an appeal against the decision of a tribunal was allowed because, although there were significant additional support needs found to be met in a special school, the tribunal had failed properly to consider whether there was significant additional support given by providers other than the educational authority exercising its educational functions. In both of these cases, eligibility for a CSP was contingent on significant additional support being required separately from the educational authority and other provider(s). The FTS interpretation of section 2(1)(d) is inconsistent with the outcomes of these cases.
20. It was argued that this authority should not be followed, because the precise point of interpretation in issue in this case had not been directly argued. All there had been was an assumption that there must be significant additional support from both source types in Section 2(1)(d)(i) and (ii), instead of cumulatively. I do not find this to be a good reason to depart from dicta which, at the very least, are highly persuasive. If there has been an assumption in these cases, it is a consistent assumption common to all of them, which has endured since shortly after the 2004 Act came into force. That suggests the approach taken is the most obvious and natural meaning arising from the words used. It is appropriate that this clear and consistent body of caselaw is followed, rather than the FTS taking a different approach.



## Code of Practice

21. The FTS also did not properly take into account the Code of Practice, as it was required to do under section 19(7) of the 2004 Act. The Code of Practice is laid before Parliament in draft before it is published (section 27(4) of the 2004 Act). In *JT v Stirling Council* 2007 SC 783 at paragraph [25] the court found that the tribunal was bound to use the Code of Practice as an aid to construction.
22. The FTS recognises at paragraph 27 of its decision that the Code of Practice does not support the interpretation it adopted, referring to Chapter 5 paragraph 19 and the chart on page 74. The FTS was correct to find an absence of support for its construction in the Code of Practice. The box referred to by the FTS is in a flow chart to help people work out when a CSP is required, and suggests an approach of looking for significant additional support provided by the education authority **and** significant additional support from another appropriate agency/agencies and/or the local authority in terms of its non-educational functions. Paragraph 19, which the FTS also refers to, is about support from appropriate agencies, and is drafted on the basis that it must amount to significant additional support for a child to be eligible for a CSP.
23. There were other relevant parts of the Code of Practice not referred to by the FTS. Paragraph 20 of chapter 5 refers to annex C, which provides a number of cases studies to help work out eligibility for a CSP. These worked examples proceed on the basis the support from the educational authority is significant, but then go on to list and consider whether the support from agencies involved other than education is also significant.
24. The Code of Practice does not have the force of law, and in an appropriate case it may be permissible for a tribunal to depart from its provisions if there is good reason to do so.



However, in this case, the FTS did not take into account all of the relevant parts of the Code of Practice. Also, although the FTS gives reasons for preferring the construction of section 2(1)(d) it adopted, it did not address why it decided to depart from the relevant parts of the Code of Practice. That was an error of law. People who are not lawyers are primarily responsible for putting the provisions of the 2004 Act into practice. The Code of Practice is intended to help them do that. It sets out an approach to the application of section 2(1)(d), consistent with the Inner House authority already referred to. In my view, insufficient reasons are available in this particular case to depart from the relevant parts of the Code of Practice.

## **The decision of the FTS**

25. It follows that the FTS erred in law in reaching its decision. While the approach of the FTS was one possible reading of Section 2(1)(d), it was not the correct construction of that provision, because the FTS failed to follow earlier authority, paid insufficient regard to the Code of Practice, and did not properly apply all relevant interpretative principles. Its decision of 14 November 2022 must be quashed under section 47(1) of the Tribunals (Scotland) Act 2014. I will remit to the FTS to proceed as accords. Because an evidential hearing has already been held in this case, at which I am told the FTS found CD qualified for a CSP on both possible constructions of section 2(1)(d) considered by the FTS on 14 November 2022, I do not consider it appropriate to make any further directions. If CD's case comes back before the FTS at the time of review, the findings of this cases about the interpretation of section 2(1)(d) of the 2004 Act will be available to the FTS.

## **Additional comments**

26. There are statutory obligations incumbent on the Scottish Ministers to collect and publish information about pupils with additional support needs (section 27A of the 2004 Act). The



appellant referred to the Pupil Census Scotland (available on the Scottish Government website) during the course of the hearing. In 2022 there were over 705,000 pupils in Scotland. Just over 241,000 of those pupils had additional support needs (a little over one third). Of pupils with additional support needs, only 1401 had CSPs, which was said to be about 0.2% of total pupils. The appellant contrasted this 0.2% with an estimate given by the Scottish Executive at the time of the Parliamentary passage of the 2004 Act. The estimate was said to be that 1% of pupils would be entitled to a CSP once the Act was in force, although no document containing that figure was before me.

27. Under the 2004 Act, education authorities have obligations in relation to all pupils with additional support needs. Although CSPs are only available to a particular group of children with additional support needs, Parliamentary intention is that CSPs should be available to pupils who meet the statutory criteria in section 2(1). CSPs can be of great benefit to a person with additional support needs and their families, so it is important the statutory criteria are applied properly. In that regard, I wish to make three points. First, the wording of section 2(1)(d) is:

“those needs **require** significant additional support to be provided” (bold added).

Section 2(1)(d) does not stop at support currently being provided, because Parliament asks for consideration of what needs “require”. The FTS may have before it evidence about support currently being provided to a pupil. But an approach that analyses only support that has in fact been provided, rather than what needs “require”, may in some cases be too narrow. Second, while Parliamentary intention is that “significant” additional support has to be required, significant is not intended as an impossibly high standard. Ultimately CSPs are intended to facilitate co-ordination where there are multiple support sources. *JT v Stirling Council* 2007 SC 783 sets out an approach where significant is to be judged by reference to the need for co-ordination, with attention being paid to frequency, nature,



intensity and duration of the provision of support, and the extent to which the support is necessary for achievement of educational objectives (paragraph [24]). Third, in determining whether there is significant additional support from sources external to the education authority, the Code of Practice suggests a cumulative approach is appropriate (chapter 5 paragraph 19). The totality of support required from providers external to the education authority exercising education functions should be considered, in order to determine if it amounts to significant additional support.

Lady Poole

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*