

**Health and Education Chamber**  
**First-tier Tribunal for Scotland**



**Additional Support Needs**

**DECISION OF THE TRIBUNAL – Preliminary Decision**

**Reference**

The Reference is brought by the Appellant on behalf of the child on the basis the Appellant requested an assessment by the Respondent in terms of section 6 of the Education (Additional Support for Learning)(Scotland) Act 2004 (hereinafter referred to as “the 2004 Act”) as to whether or not the child requires a co-ordinated support plan. That request was refused by the Respondent on the basis that responsibility for considering such a request rested in their view with the local authority rather than the Respondent.

**1. The Decision**

The Reference is dismissed.

**2. Preliminary Issues**

Parties’ agents were in agreement that as a preliminary matter I should consider whether the Respondent is responsible for assessing the child’s needs following a request under s6 of the 2004 Act. Parties’ agents were also in agreement that this preliminary matter should be considered on the basis of written submissions which were received. Parties were entitled to respond to the other party’s submissions and a response was received from both agents. The written submissions and responses are contained in the bundle. Further a telephone conference call was also held during which parties’ agents answered various questions that I had regarding their submissions.

**3. Factual Matters**

As there was no evidential hearing I did not require to make any findings in fact. However parties were agreed that there was no dispute on any of the factual matters before me and in order to write and understand this decision there are a number of agreed or not disputed facts detailed below which were considered:-

1. The child is a looked after child within the meaning of the Children (Scotland) Act 1995 and is looked after by the local authority by virtue of a permanence order granted on April 2013.
2. The Appellant and his wife are foster parents and the child has been placed with them by the local authority in August 2011. They live in the Respondent’s local government area.
3. On 16 March 2018 the permanence order was varied to vest certain ancillary rights jointly between the local authority, the Appellant and his spouse. The right to regulate the child’s residence is held by the local authority.
4. The Appellant and his spouse enrolled the child in his local catchment primary school and in August 2015 he transferred to his local catchment secondary school.
5. The Respondent and the local authority have entered into arrangements in respect of the child’s education; the additional costs associated with the child’s education are covered by the local

authority. Joint meetings are held in respect of the child and particularly in respect of his school education. The meetings relating to education are chaired by an officer of the Respondent but the local authority has the final say in respect of any specialist provision.

6. The Appellant's request for an assessment was ultimately rejected by the Respondent by email dated May 2018 wherein the Respondent's agent confirmed that the Respondent was of the view that the local authority is responsible.

#### 4. Legislation

In considering this matter there were a number of pieces of legislation that I required to consider:-

### Education (Additional Support for Learning) (Scotland) Act 2004

#### ***"6 Children and young persons for whom education authority are responsible***

*(1) Every education authority must make such arrangements as they consider appropriate for identifying–*

*(a) from among the children and young persons for whose school education they are responsible–*

*(i) those who have additional support needs, and*

*(ii) those having additional support needs who require a co-ordinated support plan, and*

*(b) the particular additional support needs of the children and young persons so identified.*

*[*

*(1A) Without prejudice to the generality of subsection (1), every education authority must in particular consider whether each child or young person falling within section 1(1A) for whose school education they are responsible requires a coordinated support plan.*

*]*

*(2) Where an education authority receive from a person specified in subsection (3) a request to establish whether any child or young person for whose school education the authority are responsible–*

*(a) has additional support needs, or*

*(b) requires a co-ordinated support plan,*

*the authority must, in accordance with the arrangements made by them under subsection (1), comply with the request unless the request is unreasonable.*

*(3) The persons referred to in subsection (2) are–*

*(a) in the case of a child, the child's parent,*

*[*

*(aa) in the case of a child who has attained the age of 12 years and who the authority is satisfied has capacity to make the request, the child,*

*]*

*(b) in the case of a young person–*

*(i) the young person, or*

*(ii) if the authority are satisfied that the young person lacks capacity to make the request, the young person's parent.*

#### **8 Assessments and examinations**

*(1) Where–*

*(a) an education authority propose–*

*(i) in pursuance of any provision of this Act, to establish whether a child or young person has additional support needs or requires, or would require, a co-ordinated support plan, or*

*(ii) to review under section 10 any such plan prepared for any child or young person, and*

*(b) the appropriate person makes a request that the education authority arrange for the child or young person to whom the proposal referred to in paragraph (a) relates to undergo, for the purposes of the proposal, a process of assessment or examination (such a request being referred to in this section as an "assessment request"), the education authority must comply with the assessment request unless the request is unreasonable.*

*(2) In subsection (1)(b), "the appropriate person" means–*

*(a) where the proposal referred to in subsection (1)(a) arises from a request referred to in section 6(2), 7(1) or 10(4), the person making the request,*

*(b) in any other case–*

*(i) where the proposal relates to a child, the child's parent, [*

*(ia) where the proposal relates to a child who has attained the age of 12 years, the child,*

*(ii) where the proposal relates to a young person, the young person or, where the authority are satisfied that the young person lacks capacity to make the request, the young person's parent.*

*(3) Where a child or young person is to undergo a process of assessment or examination in pursuance of an assessment request, the process is to be carried out by such person as the education authority consider appropriate.*

*(4) In subsection (1)(b), the reference to assessment or examination includes educational, psychological or medical assessment or examination.*

## **29 Interpretation**

*(3) In this Act [ and subject to subsection (3A)] , references to a child or young person for whose school education an education authority are responsible are to any child or young person being, or about to be, provided with school education–*

*(a) in a school under the management of the education authority, or*

*(b) in pursuance of arrangements made or entered into by the authority.[*

*(3A) For the purposes of this Act, where arrangements are made or entered into by an education authority in respect of the school education of a child or young person with another education authority, the authority responsible for that school education is the authority for the area to which the child or young person belongs despite the education being, or about to be, provided in a school under the management of another authority.*

*(4) In this Act, references to a child or young person belonging to an area are to be construed in accordance with section 23(3) of the 1980 Act.*

Section 27 makes provision for a statutory code of practice to be laid before parliament which by virtue of s27 (8) Education Authorities must in exercising their functions under the 2004 Act have regard to. Section 19 (7) provides that the Tribunal must also take account, so far as relevant, of the code. Section 29 also provides that “parent” will have the same meaning as in the Education (Scotland) Act 1980

## **Education (Scotland) Act 1980**

Section 23 (3) makes provision to the effect that the child for the purpose of the 2004 Act deemed to belong to the area in which his parent is ordinarily resident and section 135 (1) defines parent as including “*guardian and any person who is liable to maintain or has [parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, or has care of] a child or young person.*”

## **5. Reasons for Decision**

The starting point for considering this matter is s6 of the 2004 Act which in section 6(2) gives an education authority responsibility for complying with a request to consider whether the child requires a co-ordinated support plan (hereinafter referred to as a “CSP”) where the Education Authority is responsible for the child’s school education.

Section 29(3) of the 2004 Act provides that subject to subsection 3A references to a child or young person for whose school education an education authority are responsible are to any child, or young person being, or about to be, provided with school education in a school under the management of the education authority or in pursuance of arrangements made or entered into by the authority. Further assistance is then provided by section 29(3A) of the 2004 Act where it provides that for the purposes of the Act where arrangements are entered into by an education authority in respect of the school education of a child with another education authority, the authority responsible for that school education is the authority for the area to which the child or young person belongs despite the education being provided in a school under the management of another authority.

So it seems to me that for the local authority to be the responsible authority I would have to conclude that arrangements have been made by that authority in respect of the child’s school education at his current school within the Respondent’s area. The appellant’s representative argues that the local authority cannot be said to have made or entered arrangements with the Respondent as the child attends “his local mainstream school” and is enrolled in the normal way. On the other hand the local authority have chosen the child’s

residence, he is looked after by that authority, they have the power to change that residence and the position of both the Respondent and the local authority is that the local authority have entered into arrangements for the child's school education. Further the local authority has been paying the additional cost of the child attending the school in the Respondent's area. Looked after child meetings take place in relation to the child and are chaired by a representative of the local authority, a sub-group meets in relation to education matters which a representative of the Respondent chairs but which is attended by the "virtual Head Teacher," education psychologist and social worker from the local authority. While the appellant's representative accepted that the two authorities had been working alongside each other in relation to the child's education this does not amount to "being provided with school education" in his submission.

On this point I find in favour of the Respondent, that the child is being provided with school education in pursuance of arrangements made or entered into by the local authority. I have come to this conclusion based on the arguments put forward by the Respondent, particularly that the child only attends his current school because of where the local authority have placed him, thereafter the local authority have paid for any additional costs of the child's education and have the final say in relation to the provision of any specialist education provision.

However this is not the end of the matter. Following the appellant's representative's submissions, having come to this conclusion the next matter to be determined in terms of s29 (3A) is the area to which the child belongs. Section 29 (4) of the 2004 Act refers us to section 23(3) of the 1980 Act which, as stated above, provides to the effect that the child belongs to the area where his parent is ordinarily resident. The problem is then, of course, the extremely wide definition of parent in s135 of the 1980 Act (which applies to the 2004 Act by virtue of section 29(2) thereof), extending to persons liable to maintain the child, having parental responsibilities for the child and having care of the child. Consequently a number of people may be considered to be the parent of a child at the same time and given the parents as defined in s135 may not reside in the same area this view of the legislation leads to a suggestion that a child can belong to more than one area. Indeed both parties accepted that the local authority having parental responsibilities for the child could be a parent within in terms of s135 as the act does not restrict "persons" to natural persons only. There is no doubt that the Appellant is a parent within the said meaning and the Appellant's Solicitor accepts that the child may, as well as belonging to the Respondent's area may also belong to the local authority but argues that I do not need to decide that because effectively all that matters is the child belongs to the Respondent, section 29(3) & (3A) not placing a limit of one education authority as being responsible for the child's school education.

The Solicitor for the Respondent argues that Education Authorities are under a duty to have regard to the Statutory code of practice published under authority of s27 of the 2004 Act, the duty deriving from s27(8). The Tribunal must also take account of the code by virtue of s19 (7) of the 2004 Act.

This code is contained in the "Supporting Children's Learning: Statutory Guidance on the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) – third edition 2017 (hereinafter referred to as "the code"). The code on this point is very clear on which authority has responsibility (at page 58:-

*"a particular child or young person may be being looked after away from home and placed with foster parents in another local authority and attending a school in that local authority, and that includes, for example, a child or young person placed with foster parents outwith Scotland. 14. In all these circumstances, the home education authority retain responsibility for the child's or young person's school education even though the child or young person is being educated in a school in another education authority. Decisions about additional support needs are made by considering the provision, whether or not educational, which is additional to, or otherwise different from, the educational provision made generally for children or young people in schools (not special schools) under the management of the home education authority which are responsible for the child's or young person's education."*

The foregoing parts of the code seem explicitly clear to me that when applied to the circumstances of the present case that the local authority are responsible for the child's education, the circumstances described above being synonymous with the circumstances in the present reference. The code does not in answering this question concern itself with where the child is said to belong in terms of the 1980 Act or the definition of parents under that Act. The Solicitor for the Appellant's submission is that the code does not correctly state the law and indeed adds further confusion as in its glossary it defines home education authority as the authority for the area in which the child or young person lives and host education authority as an authority

other than the authority for the area in which the child or young person lives. He further points to the first paragraph of chapter 3 of the code which provides that “where responsibility for the school education of the child...rests with an education authority other than the home authority then the authority is referred to here as the host education authority” ( suggesting the host authority is responsible for the child’s education). I certainly agree with the appellant’s representative that the contradictions in the code add confusion.

The Solicitor for the Respondent made further submissions (PR13 paragraph 14) to the effect that local authorities require clarity in relation to their responsibilities. Without a clear structure in place determining responsibility between local authorities she submitted children and young people could be subject to unnecessary and unfair administrative delays. The Solicitor for the Appellant acknowledged difficulties could be caused but pointed out that in his view we cannot pretend the guidance gives us a neat answer. He argued that “it is therefore to the plain words of the statute, and to such limited case law as exists” that he invited the Tribunal to turn”. The only case I was referred to was *RB v Highland Council* [2007] CSOH 126 which predated section 29(3A) of the 2004 Act and while looking at section 29(3) only, considered control as being of significance.

In considering this matter I had particular regard to the terms of Section 29 (3A) of the 2004 Act. That section is drafted to bring some certainty into the law in the circumstances described in section 29(3) (b), the section persistently uses the singular, referring to “an” education authority. “**the** (my emphasis) authority responsible” and “another authority”. Its terms clearly envisage there being only one responsible authority where the circumstances in section 29 (3) apply. I am, of course, aware of the terms of the Interpretation Act 1978 to the effect that unless the contrary intention appears in the singular include the plural but it seems to me that given the purpose is to bring certainty the contrary intention does appear.

Section 29 (3A) was added to the 2004 Act by section 5 of the Education (Additional Support for Learning Act) 2009 and the Scottish Government’s Explanatory Notes, which provide an insight into the intention of the change, provide “*Section 5 amends section 29(3) of the 2004 Act to provide that where arrangements are entered into between two authorities in respect of the school education of a child or young person, it will always be the authority for the area to which the child or the young person belongs (known as the ‘home authority’) that are the responsible authority.*” The Explanatory Note clearly envisages that there will be one authority where arrangements within the meaning of section 29 (3) have been entered into.

Further, if the Appellant’s interpretation is preferred it would also lead to confusion and possible absurdity in the interpretation of section 6 of the 2004 Act in that in circumstances such as the present more than one authority would have responsibility for making arrangements for identifying children with additional support needs, those that require a CSP and identifying the particular support needs of those children. These duties (in section 6(1) and (2)) apply regardless of whether a request is received from a parent to a particular authority. Consequently more than one authority could assess the child and prepare a CSP, and the CSPs may of course differ. In my view that interpretation would be absurd and cause an enormous amount of confusion for children or young people impacted by that interpretation. Nothing in the wording of section 6 suggests to me that it was intended that more than one and possibly several authorities could be responsible and as indicated above I do not believe that the intention in the drafting of section 29 was that in certain circumstances more than one authority would have the same responsibilities for a child or young person.

Consequently I am of the view that both the intention of and the terms of section 29 of the Act envisage that there will be one responsible authority which clearly does not sit well with the proposition that as parents can reside in various areas there could be several responsible authorities. Accordingly there is a conflict within the legislation, the intention and natural meaning of the section envisaging one result (a single responsible authority) but following through the definition of parent leads to more than one authority which would allow the Appellant to make the request for a CSP to either authority. In my view it is the natural meaning which should be preferred and accordingly to use the appellant’s representative’s terminology I need one or more tie breakers to determine which authority is responsible.

For various reasons which I articulate below I have determined that the local authority is the responsible authority. Firstly I have had regard to the code (as I am obliged to), for all the confusion therein it is a statutory code, laid before the Scottish Parliament, and where it considers the same circumstances as the present reference it supports the conclusion that the local authority is responsible. Secondly having concluded that the local authority has entered into arrangements with the Respondent and it being the case that the local authority makes the decision on any additional support and pays the associated costs it would in my view be absurd for an authority other than the local authority to be the one responsible for determining

a request for a CSP and thereafter implementing the CSP. Linked to this is the local authority having control over the child's education, control being a factor the appellant's representative thought I could look at should a tie-breaker be necessary. At the simplest level the local authority determines the child's residence which in turn has determined the school the child attends and they have the final say in respect of any specialist provision. The appellant's representative argues that the Respondent has control based on the child being excluded by the Respondent's school in January 2016 and the decisions made regarding same being made by the Respondent. I am not convinced by that argument, in my view it is expected that a child follows the rules of the school attended and those responsible for managing it will be responsible for discipline within the school. I do not consider that is sufficient to mean there is a change in responsibility for the child's education.

Accordingly the reference is dismissed.