EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Education (Additional Support for Learning) (Scotland) Bill introduced in the Scottish Parliament on 28 October 2003. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 11–EN.

POLICY OBJECTIVES OF THE BILL

Move from special educational needs to additional support needs

2. The purpose of the Education (Additional Support for Learning) (Scotland) Bill is to modernise and strengthen the system for supporting children’s and young persons’ additional support needs to enable them to draw benefit from school education. It proposes a change to the legislative framework, to encompass not just those with the most severe needs, but all children and young persons who face a barrier to learning. By moving away from the term “special educational needs”, introduced by the Education (Scotland) Act 1980 (“the 1980 Act”) as amended by the Education (Scotland) Act 1981, this Bill aims to ensure that the needs of all children and young persons who have difficulties in accessing and progressing in learning are identified and addressed. In doing so, it also aims to strengthen parents’ involvement in decisions affecting their child’s education, to support children’s and young persons’ participation in their own learning, to promote interagency working, and to safeguard the rights of those with the most significant and enduring needs.

3. The 1980 Act places a general duty on education authorities to secure adequate and efficient provision of school education for their area, including provision for those with special educational needs. Section 1(5)(d) of the 1980 Act defines children and young persons as having special educational needs if they have a learning difficulty which calls for educational provision for special educational needs to be made for them. In general terms, a learning difficulty is said to be present if children and young persons have significantly greater difficulty in learning than the majority of those their age, or if they suffer from a disability which prevents or hinders them from making use of educational facilities. Under section 60 of the 1980 Act an education authority has to establish whether a child or young person has “pronounced, specific or complex
special educational needs which are such as require continuing review” and therefore requires a Record of Needs. In practice, a relatively small number of children or young persons are identified as requiring a Record of Needs, and there is no consistency in the manner in which authorities interpret and apply this duty: around 2.1% of pupils have a Record of Needs, according to the September 2002 School Census, but the recording rate varies across authorities from 0.8% to 3.6%.

4. The term “special educational needs” does not encompass the particular learning needs of able or gifted children or young persons, nor those for whom English is an additional language. In fact, the latter are specifically excluded from the definition of learning difficulty. The application of the term “special educational needs” that the 1980 Act endorses applies principally to intellectual and cognitive learning difficulties. Consequently, some children or young persons with social, emotional and behavioural difficulties are also not considered by education authorities to have special educational needs. However these children and young persons may, in practice, require considerable support in education.

5. The Bill seeks to address the needs of all children and young persons, whatever the reason for the needs, by encompassing them within the term “additional support needs”. Additional support needs might be thought of as a continuum that ranges from those needs that are relatively mild and temporary through to those that are complex and more enduring. Additional support needs, as defined in the Bill at section 1, means a requirement for provision, to help a child or young person benefit from education, that is additional to or different from that which other children or young persons of the same age normally receive. This builds upon the definition of “school education” which is set out in section 1 of the Education (Scotland) Act 1980 and which, by section 2(1) of the Standards in Scotland’s Schools etc. Act 2000, must be “directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential”. This refined duty clearly signals that a more holistic system of school education must be developed - one that identifies the educational needs of all children and young persons whenever they occur, supports those needs and promotes an inclusive culture that welcomes diversity.

6. The Bill therefore introduces a duty on education authorities to identify and address the additional support needs of all pupils for whom they are responsible. A specific duty is owed to each child and young person to ensure that their needs and the adequacy of provision to meet those needs are kept under consideration. In this way the Bill aims to set up a simple, systematic framework for the identification and support of learning needs, whether those needs arise from factors relating to social, cognitive, linguistic, disability, or family and care circumstances. This framework allows for diverse interventions to meet all types of support needs, and aims to accommodate, rather than duplicate, other assessment and intervention systems. The Bill reflects the change in culture and attitudes that has occurred since the 1980 Act was passed.

7. The importance of revising the current assessment and recording process was highlighted by the responses to the 1999 Riddell Advisory Committee Report into educational provision for children with severe low incidence disabilities. Following this, the Scottish Executive published the Special Educational Needs Programme of Action, in May 2000. This announced that the National SEN Advisory Forum would review the current assessment and recording process and consider the ways in which it could be improved and updated.
8. Arguments for and against the current system were also heard during evidence submitted to the Parliament’s Education, Culture and Sport Committee’s *Report on Inquiry into Special Educational Needs*, which reported in February 2001 (3rd Report, 2001, SP Paper 264). The Committee’s report underlined the requirement for Record of Needs procedures to be reviewed, suggesting that the National SEN Advisory Forum should consider the options of either replacing the system or revising it substantially. A draft Bill and consultation paper were published by the Scottish Executive in January 2003. The Bill has been informed by the public consultation that followed these recommendations.

*Alternative approaches: legislation or guidance?*

9. It could have been possible to continue working within the current system and updating its guidance, rather than modifying its legislative foundation. That a significant cultural shift has taken place since the concept of special educational needs was first enshrined in the 1980 Act, however, has been reinforced by the observations of both the Education, Culture and Sport Committee and the National SEN Advisory Forum. While the introduction of the concept of “special educational needs” was at the time a positive move away from the unhelpful labelling of those previously often considered ineducable, opinions and perceptions, policies and practice have all moved on since then. The term “special educational needs” serves to isolate a minority of children and young persons, and itself now carries with it a degree of stigma that does not sit comfortably with current policies on the development of inclusive education within an inclusive society.

10. Further related legislation has been enacted since the early 1980s, and policies have moved on. In 1991, the UK government adopted the United Nations Convention on the Rights of the Child, undertaking to bring UK law, policy and practice into line with the Convention’s articles. This undertaking acknowledges that children are entitled to protection from ill treatment and harm, participation in decisions affecting them, and provision of services to meet their needs. The Convention has informed both legislation and policy development.

11. Relevant legislative developments include:

- the Children (Scotland) Act 1995, which has an emphasis on child-centred principles. The Act explains the responsibilities of parents to their children including: safeguarding their health, development and welfare, providing direction and guidance, maintaining regular contact, and acting as a legal representative. Local authorities also have a duty to provide support to disabled children and their families under this Act.

- the Standards in Scotland’s Schools etc. Act 2000, which requires education authorities to provide education for all children and young persons in mainstream schools, other than in exceptional circumstances. It also places a duty on education authorities where they are providing school education, “to secure that the education is directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential”, and imposes a requirement to have regard to the views of the children or young persons, where they wish to express them, in decisions that affect them significantly. Notably, the underlying approach of this legislation is the importance of learning outcomes rather than inputs.
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- the Special Educational Needs and Disability Act 2001, which extended the Disability Discrimination Act 1995 to education services. It imposes duties on education providers not to discriminate unfairly against pupils and prospective pupils on the basis of their disabilities, to make reasonable adjustments to policies and practice ensuring that disabled pupils are not put at substantial disadvantage, and to take appropriate alternative steps where adjustments are not possible.
- the Education (Disability Strategies and Pupils’ Educational Records) (Scotland) Act 2002 imposes duties on all bodies responsible for school education to plan progressively to improve access to education for pupils with disabilities. This includes access to the curriculum, and access to information, as well as access to the physical environment of the school.

12. In terms of policy development, a wider integrated services agenda has been taken on. The Scottish Executive report *For Scotland’s Children* highlighted the importance of an integrated approach to service delivery. The Children and Young Persons Delivery Group is driving forward this agenda. The Changing Children’s Services Fund has provided local authorities, the NHS, the voluntary sector and other interested parties with resources to re-orient their services in a more integrated way. Guidance on more integrated planning for children’s services has been issued. Other initiatives include developing more integrated approaches to assessment, enabling those from different professions to share information and jointly decide upon action, and studies of workforce issues.

13. In 2002, the Scottish Executive undertook a National Debate in Education with pupils, parents, teachers, employers and others with an interest in the future of school education. More than 20,000 people directly participated in the Debate with over 800 events taking place. The Debate revealed wide support for comprehensive education and the highly professional and committed teachers who make the system work. Many responses supported the principle of inclusion in mainstream schools where this was properly planned and resourced. However, some parents of children who require additional support said that they often had to fight for the support their children need. Generally, the Debate showed that there is a need for more flexibility and choice in the curriculum so that schools can best meet the needs of individual pupils.

14. In light of all these developments, the Scottish Ministers considered that new legislation is required to establish a new framework for supporting children and young persons with additional support needs. The vision and principles underlying the framework are a key part of plans for education of Scotland’s children following on from the National Debate.

15. Consultation, which began in May 2001 when the Scottish Executive asked for responses to the document *Assessing our children’s educational needs: The Way Forward?*, has broadly supported this aim. New duties on education authorities to identify and address the additional support needs of children advance existing legislative provision, and further support section 2 of the Standards in Scotland’s Schools etc. Act 2000. However, the introduction of such duties will allow the flexibility of developing (and updating) an intervention framework through a code of practice. The code of practice will be developed in collaboration with service users and providers. It will set minimum standards, and will assist in the implementation of the duties set out in the Bill, aiming to promote a culture of joint-planning and partnership-working between
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children, young people, parents, education, health, social work services and voluntary sector professionals.

**Extending the legislative framework to encompass more children**

16. While introduction of the current system was an important development for children and young persons with significant special educational needs, criticism of the system has grown over the years. These criticisms have largely focused on problems with the Record of Needs. Concerns have been expressed that the Record only addresses the needs of a limited few, that it is simply a means (for parents with the tenacity to fight the system) of securing resources; that it is too time-consuming and bureaucratic to operate, and is not a working document; that it focuses on a child’s or young person’s weaknesses, and does not set targets for what a pupil is expected to learn; that it does not document children’s views; that the statements in the Record are too vague to provide useful advice to teachers, and that Part V of the Record, which states provision to meet the needs, cannot be appealed by parents.

17. In response to these criticisms, the Bill provides for additional support to be provided for all children and young persons who have difficulties in progressing with their learning, no matter what the contributing factors, nor how enduring. For instance, additional support may be required for a young person who is being bullied, or for a child with behavioural difficulties; for a young person who is a parent, or one who is a child of a parent with a drug or alcohol addiction; for a child who has a sensory or mobility impairment, or for a child who is particularly gifted, or a child who is at risk. Such examples will be elaborated upon in the code of practice.

To be responsive to these many and diverse needs, the Bill proposes a more streamlined intervention system: a system that moves away from the current deficit model, towards one that is more responsive to the pupil’s circumstances. Its emphasis is on outcomes, so that progress towards targets for the child’s or young person’s education may be monitored and evaluated through both statutory and non-statutory planning mechanisms. In some cases, this will necessitate effective joined-up planning and provision of services by education authorities, schools, social workers and health professionals.

18. Under the Bill, education authorities will not have to subject children and young persons with the most significant and enduring needs to compulsory, generic, assessments, as the current system demands. Rather than insisting on a compulsory series of assessments, which may not be suitable in every instance, the Bill allows for an approach that is more responsive to the individual child’s or young person’s circumstances. Where information has been gathered already, further assessments may not need to duplicate this. Where observation might be more appropriate than a formal assessment, there is scope in the Bill to allow for this. However, education authorities will be expected to take steps to ensure that the reasons for a child’s or young person’s lack of progress are identified and appropriate action is taken.

19. The duty to identify and address additional support needs will apply to those children or young persons for whom education authorities provide, or are likely to provide, school education, either directly or indirectly. This encompasses pupils at local authority schools and nurseries, and all those pupils whose education is being funded by education authorities, for example, at independent special schools, independent nurseries or in places outwith schools such as on a traveller site.
20. For children and young persons outwith the public sector system, legislation already provides safeguards to ensure they are provided by their parents with suitable education appropriate to their age, ability and aptitude, either by their parents at home, or at an independent school. However, to ensure that these children and young persons are not excluded from all education authority services, the Bill introduces a power for education authorities to assist in the identification and support of their needs, where they come to their attention. This power also extends to those under age 3.

21. Where identifying and addressing the needs for additional support requires input from the authority exercising functions other than education or from other agencies, the Bill aims to promote integrated working. Services may be required from health bodies, other local authority services (such as social work services), the voluntary sector, further education and training agencies. This may entail support by occupational therapists, speech and language therapists, physiotherapists, social skills support and respite care. The Bill therefore introduces a duty for other agencies, such as health authorities, to help education authorities, on request, where their support is required for children and young persons with additional support needs. It also obliges authorities to consider their own powers outwith education which they might use to assist in the carrying out of functions under the Bill. In each case the provisions in the Bill take account of obligations, some of which are statutory, which the authority or these other agencies already have in relation to children and young persons. The aim is for the provisions to be realistic in their approach in order to achieve and promote more integrated, efficient and effective provision for pupils with additional support needs.

Alternative approaches: legislation to include those outwith the public sector?

22. Questions were raised during the consultation about the possibility of extending the scope of the Bill to introduce duties beyond the public sector. Parents wishing to educate their children at home have a statutory right to make the choice to do so and responsibility for the child’s education then rests with the parents. Furthermore, it is not considered reasonable to expect education authorities to be responsible for children and young persons with additional support needs in independent schools (unless placed there by the authority, in the case of independent special schools).

23. Independent schools, like public sector schools, are subject to inspection by Her Majesty’s Inspectorate of Education (HMIE). In terms of section 66 of the 1980 Act, the Scottish Ministers have the power to have any educational establishment inspected whenever they consider such an inspection to be desirable. In addition, the 1980 Act provides for registration of independent schools and for regulation through a complaints route, which ultimately allows the Scottish Ministers to intervene where the proprietor fails to take action to remedy matters.

24. For those pupils placed at independent schools by their parents, or who are being educated at home by their parents, the education authority may provide, on request, information and advice to the parents about the additional support needs of their child or to the young person about their additional support needs. The education authority may also assist with the educational provision for the child or young person, although they will not be obliged to do so. In opting out of public provision for the education of their child, the responsibility rests with the parents to ensure that their child is provided with education appropriate to their “age, ability and aptitude” under section 30 of the 1980 Act. If the right to a co-ordinated support plan was to be
extended to these children and young persons, the parents rather than the education authority would be responsible for delivering the outcomes in the plan.

25. Current legislative provision is sufficient to ensure that parents work together with the education authority where it is deemed that adequate provision is not being made for the child, and that the authority has power to take action if they do not. The Bill will not prevent informal, non-statutory planning mechanisms being operated for these children or young people if the education authority is willing, based on the power to assist in addressing the additional support needs of children and young persons brought to their attention. This will also apply to those under age 3 where provision of such assistance will be encouraged.

Co-ordinated support plans – promoting integrated working

26. As well as introducing a duty on education authorities to identify and address additional support needs, the Bill introduces a statutory co-ordinated support plan (CSP). The CSP is for those children and young persons with enduring additional support needs arising from complex or multiple factors for whose school education the education authority are responsible, who require support from a range of providers. The aim of the CSP is to plan long-term and strategically for the achievement of a child’s or young person’s educational outcomes, and to foster co-ordination across the range of services, both within and outwith the authority, required to support this. Services additional to education could, for example, be therapy services provided by NHS or respite care from social work services. Establishment of the need for a CSP will not entail the compulsory educational, psychological and medical assessments which the 1980 Act introduced as a test for eligibility for a Record of Needs. Instead, such assessments, including those carried out by social work services, should only be used when appropriate and necessary. This should enable better targeting of resources and should cause less distress for children and young persons who may be, under the current system, required to undergo assessments which are not appropriate for them.

27. The CSP will ensure that a co-ordinated and coherent approach is taken to supporting children and young persons to meet specified individual educational outcomes. The CSP has been designed specifically to move away from the Record of Needs model, which does not relate the educational support and provision to expected educational outcomes. Each individual plan will be overseen by a CSP co-ordinator and there will be a person for the parents or young persons to contact for advice and information. The duty rests with the education authority to coordinate the provision of support detailed in the plan. However, this task may be delegated outside the education authority where that appears to the authority to be more appropriate, such as to a health worker who may have involvement with the wider family.

28. The CSP will complement other existing non-statutory educational plans, as well as linking with plans in health and social work services, aiming to avoid duplication of information across agencies. It is designed to be used collaboratively between agencies, so that it should cover all the learning and development needs of the individual child or young person. Most importantly, the CSP is a “working” document; one that informs provision of support and can be adapted according to the child’s or young person’s changing needs and progress. It will be available, with the parents’ or young person’s consent, to all those involved in providing the necessary support to the individual and in monitoring their progress.
29. Parents will have a right to request the education authority to consider their child for a CSP and young persons, unless they are incapable, will have the right to make such a request on their own behalf. The education authority will be able to refuse a request if they consider it to be unreasonable. They would have to have grounds for doing so and will have to give reasons to the person making the request. Others will be able to draw to the attention of the education authority the need for a child or young person to be considered for a CSP, for example, head teachers or other school staff in education authority schools, health professionals, or social workers.

30. Only children and young people educated within the public sector, but including those whose education is being funded by the education authority, will be eligible to have a CSP prepared. Managers of independent or grant-aided schools will be able to request that a child or young person for whom they are responsible be considered by the education authority to see whether, if the child or young person was within the public sector they would require a CSP. The education authority may offer advice where such a request is made. This is because it would not be appropriate to expect an education authority to co-ordinate services to support learning when they are not responsible for the education of the child.

31. The education authority will need to inform the child’s parents or the young person of their intention to consider a pupil for a CSP and will need to carry out the appraisal within a time period to be specified in regulations. The authority will then need to inform the parents or young person of the outcome of the appraisal and whether a CSP is appropriate or not, in the individual circumstances. Preparing the CSP will then involve school staff, other staff in the authority, other agencies and also the parents and child or young person.

32. Further details of the form and content of the CSP will be set out in regulations. It is intended that it will contain biographical information about the child or young person, record information about why additional support is needed, what outcomes it is planned to achieve (both short term and long term), detail the support required to achieve these and who will provide this, specify the nominated school, name the person responsible for co-ordinating the plan and the person to provide information and advice, note the parents’ views and child’s or young person’s views, and also the proposed date of next review. Long term target outcomes are expected to be projected for a minimum of 12 months and ideally for 2 to 3 years (or longer) where practicable and realistic. Short term targets will detail the steps to be taken to achieve the long term targets.

33. It is expected that the authority will work in partnership with the other agencies throughout the preparation, implementation and review of the CSP. The education authority will also have to ensure that the CSP is maintained for as long as it is necessary and that the content is up to date and relevant. Throughout this process, the emphasis should be on collaborative working and on ensuring that the CSP is a constructive and relevant document for the child or young person it should serve.

34. The Bill states that the CSP will be reviewed annually. However, the education authority will be able to carry out an earlier review if the parents or the young person request an early review or if there has been a significant change in circumstances, for example, progress towards the educational outcomes has not been as anticipated. If a parent or young person requests an
early review and the education authority is unwilling to review early, then they must inform the parents or the young person of this giving their reasons in writing. The parents or the young person will then be able to have recourse to mediation and to appeal to the Tribunal if they wish to dispute the education authority’s decision. If parents or the young person disagree with the holding of a review, then the authority will have no power to force them (or the child) to participate, though this will not prevent the review going ahead without them. The parents or young person will be notified if the child or young person still requires the CSP or not, and if so, whether any amendments are required and notification will include details of appeal rights.

35. If the CSP is not required and there is no appeal, the CSP will be discontinued and preserved for a length of time to be specified in regulations. Education authorities should discontinue the CSP if directed to do so by an Additional Support Needs Tribunal. It should also be discontinued once the young person is no longer receiving school education.

Alternative approaches: improve the Record of Needs system or introduce a new system?

36. The Record of Needs is a statutory planning document to record the identification of the pronounced, specific or complex special educational needs of the child or young person such as require continuing review. It was introduced with a view to bringing more method and stability to the provision of education for those children or young persons through monitoring and review. The Record is made up of nine parts:

- Part I: details of the child or young person and information about the transfer, discontinuance or preservation of the Record
- Part II: details of the parents and named person
- Part IIIA: assessment profile
- Part IIIB: summary of impairments
- Part IV: statement of the special educational needs of the child or young person
- Part V: measures proposed by the education authority to meet the special educational needs of the child or young person
- Part VI: nomination of the school to be attended
- Part VII: views of the parent or young person
- Part VIII: summary of reviews of the Record
- Part IX: information about disclosure of the Record.

37. Parents’ and young persons’ views, but not children’s, are noted in the Record (although the authority is required to have regard to the views of the child where the child wishes to express them, under the Standards in Scotland’s School etc. Act 2000). Under the 1980 Act, parents and young persons have the statutory right of appeal against an authority’s decision on non-recording, against the terms of Parts IIIB and IV and against Part VI, the nominated school.

38. A series of questions were posed for consideration regarding the assessment and recording process and the Record of Needs itself when the Scottish Executive asked for responses to the document Assessing our children’s educational needs: The Way Forward? (May 2001). Views on the Record of Needs system expressed in the 148 responses varied, but there was general agreement that it should be updated or improved. The most common complaint was that the Record is too inflexible, bureaucratic and cumbersome to open and review; that the information contained within it is often vague and unhelpful, and not tied to a child’s or young person’s expected educational outcomes, and that the provision it states cannot be appealed.
Consequently, the options that presented themselves were to maintain the “Record of Needs” name while altering the process, to continue with the same process under a new name, or to discontinue both the process and the name to reflect a move to a new and better system. The Scottish Ministers considered the third option to be the best: that the Record of Needs system should be replaced, to provide a more comprehensive system for all those with additional support needs, whilst still protecting those with the most significant and enduring needs.

39. The decision to develop the CSP reflects the importance of maintaining a statutory document for those with enduring needs arising from multiple or complex factors who require the co-ordination of services within the local authority and/or from other agencies. The CSP was advanced as a new legal mechanism in *The Way Forward?*, aimed at ensuring that extra safeguards would exist within a new system for those at the severe end of the spectrum of needs. Whilst some professionals consulted did not consider that the CSP should necessarily be a statutory document, provided that the whole system for supporting children and young persons would be strengthened, parents felt the statutory nature of the CSP to be particularly important. Responses generally were that all parts of the CSP should be subject to appeal, including provision, and that there should be a place to record the child’s, as well as the parents’ or young person’s views. Importantly, though, the CSP should include learning outcomes, and progress towards them should be monitored, to ensure that it continues to be a relevant and constructive document. This would be a significant departure from the Record of Needs system which does not focus on outcomes and in which many respondents had lost confidence.

40. There will be some children and young persons who currently have a Record of Needs, who will not be eligible for a CSP. This should not be to the detriment of these children and young persons, since the fundamental principle of meeting the needs for all those who require additional support is enshrined in the Bill. New duties to identify and address additional support needs should ensure that children and young persons with less complex or shorter-term needs have those needs adequately met and kept under review. Meanwhile, those children and young persons with long-term difficulties who require support from a variety of service providers will benefit from the comprehensive co-ordination of those services.

**Parent and family involvement and support**

41. The Bill encourages a constructive partnership to be fostered between parents or young persons and the education authority when addressing the individual’s needs for additional support. In response to requests principally from parents, the Bill requires an education authority to name a contact officer, within the authority, to provide parents and young persons with advice and information about provision available for additional support needs. Further to this, where the child or young person has a CSP, details will be given of another individual who will act as the CSP co-ordinator from whom the parents and young person can obtain information and advice about the CSP and the child or young person’s progress. While it is the education authority’s ultimate responsibility to oversee the preparation and implementation of the CSP, the CSP co-ordinator role may be delegated to a member of staff from another relevant agency, such as a social worker, in instances where this is deemed more appropriate. The code of practice will allow parents and young persons to have a supporter of their choice to help them in their contact with the education authority, for instance, in making telephone calls or attending meetings. This will provide a more flexible arrangement than the current named person stated in the Record of Needs, since a different supporter may accompany parents and young persons at each meeting.
This flexibility was called for during initial consultation on proposals to change the current system.

42. The Bill supports the right of all children and young persons, including those with complex needs, to be able and enabled to take part in the various decision-making processes that occur throughout their education. The code of practice will set out in more detail the ways in which education authorities should enable parents, young persons and children to participate in the system, and these should be specified in the arrangements for provision of additional support needs that the education authority must publish.

Alternative approaches: extend appeal rights to children?

43. There had been some support during consultation on the draft Bill – particularly from children’s organisations – to use the new legislation to extend rights of appeal to children. However, it was felt that the nature of the matter before the tribunals (involving long term complex factors) weighted against making children decision-makers in this regard. The importance of ensuring that the child’s voice is heard if he or she wishes to express a view is recognised and provided for within the Bill, for instance, at section 10(2). The Bill sits alongside other avenues which allow children to express their views on significant matters, such as to their parents under the Children’s (Scotland) Act 1995. Significantly though, when children and young persons were consulted on the proposals in the draft Bill, while they emphasised that they wanted to be listened to, they did not consider that they should necessarily be the decision-maker.

New mediation services

44. In order to promote partnership-working between parents or young persons on the one hand and education authorities on the other, the Bill introduces a duty for education authorities to make provision for independent mediation services. The purpose of mediation is to offer a means of resolving disagreements between authorities and parents or young persons about the way authorities exercise their functions under the Bill.

45. Although mediation services will be established, it is expected that informal approaches at school or education authority level would continue to be tried first. The education authority or school staff should aim to resolve disputes at an early stage through meetings or discussions with parents or young persons. If informal efforts fail, mediation will be available, at the request of either the parents or young persons, or the authority. The Bill introduces a duty for education authorities to publish their arrangements for meeting additional support needs, and this will include information for parents and young persons about recourse to mediation.

46. Mediation is a process in which a mediator, who is an impartial third party, facilitates the resolution of disputes. Either party will be able to request the service, and participation will be voluntary. Participants are encouraged to reach a voluntary agreement. The mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The mediator does not impose his or her views on the participants or take sides, but facilitates discussion.
47. The Bill is not prescriptive about the way in which mediation services are to be provided, except to stipulate that services should be independent of both parties and should be free of charge to parents and young persons. Mediators must be impartial and autonomous, and if they are employed by an education authority, they must not be part of decision-making structures in the education authority regarding its functions under this Bill and must be independent from those involved in the identification or provision for children and young people with additional support needs. The duty on education authorities to provide a mediation service offers flexibility for authorities to purchase the service from national or UK organisations, or local voluntary sector organisations, or to provide the service directly. It also offers the flexibility to allow the service to fit in with existing services and for the possible future development of the service beyond education, for example, to include all children’s services, or even all local authority services in an area. The code of practice will set out minimum standards for mediation services to promote consistency in those services provided across Scotland.

48. Whether or not parents or young persons have tried mediation, their rights of appeal will not be affected, nor will the outcome of any appeal be influenced.

49. Education authorities must publicise their mediation services, informing parents and young persons that the service is available. Mediation will be for parents or young persons in the authority’s area. Those pupils who access, for example, the educational psychological service, but who are being home educated or are at an independent school, will still be able to refer any dispute with the education authority concerning the exercise of functions under the Bill to mediation. The education authority will not be under an obligation to provide mediation service to the managers of an independent school or any other organisation. However, where the child is at a pre-school centre run in partnership with the authority, or a pupil is placed in an independent special school under arrangements by the authority, mediation would be available.

Alternative approaches: provision of advocacy?

50. Consultation revealed that some respondents felt that the Bill should make provision for the establishment of advocacy services. Advocacy services provide someone to speak on behalf of children, young people or parents, helping them put their views to the education authority. Parents, particularly, often appreciate having a person on whom they can rely to put forward their concerns.

51. However, the policy informing the Bill aims to promote a culture of collaboration; a partnership between parents or young persons and the education authority. The underlying reason for support for advocacy seems to be the general mistrust some parents have of authorities, and the perception that they have to “fight” for additional support for their child. In many ways, advocacy service provision would address only the symptom, and not the cause of this mistrust. It is the underlying lack of trust that must be overcome, and all implementation work, subject to the Bill’s enactment, will be directed to address this.

52. The provision of independent mediation services is one step in encouraging better dialogue between parents or young people and the education authority. Mediators can be employed to help avoid the parties becoming entrenched in their opposing views. For this reason, it has been considered that making provision for mediation services is more constructive. There is, of course, nothing to prevent education authorities also providing advocacy services, if they
considered such services to be appropriate. Nor is there anything in the Bill to prevent parents or young persons bringing an advocate of their choosing as a supporter to any meetings with the education authority.

53. In response to calls during the consultation, regarding children and young persons with additional support needs but not requiring a CSP, a new dispute resolution process will be established to enable parents and young persons to have cases reviewed formally. This will be of particular help to those who currently have a Record of Needs but who will not have a CSP, because it will ensure that parents of these children and young people have access to procedures which will enable the provision being made to be reviewed impartially. Similar to the referral system for social work functions, the aim of the process will be to come to a resolution in the best interests of the child or young person. Details of this process will be developed in partnership with stakeholders and set out in secondary legislation.

**New appeal mechanisms and the Additional Support Needs Tribunal**

54. Where a parent or young person wishes to appeal a decision by the education authority regarding placing requests (where a CSP is not at issue) or exclusions for children or young persons with additional support needs, appeals will be directed to the education authority appeal committee, as at present. A further appeal against the decision of the education authority appeal committee may be made to the sheriff court.

55. Where a parent or young person wishes to appeal a matter that relates to a CSP, the Bill establishes independent, expert Additional Support Needs Tribunals for Scotland. The Tribunals will hear cases relating to an education authority’s decision to prepare or not to prepare a CSP, the information contained in a CSP, and failures by an authority to carry out certain actions in respect of a CSP within time limits to be prescribed by regulations. The introduction of Additional Support Needs Tribunals had been supported during initial consultation on proposals to change the current system. Tribunals were favoured because they are considered to bring an independent and expert judgement to bear on cases relating to additional support needs. In functioning at a national level, they were also expected to promote consistency in decision-making across the country.

56. References to a Tribunal may include a decision to refuse a placing request where there is a CSP or where it has been established that a CSP is required by the child or young person or where there is already a dispute over the need for a CSP which has been referred to a Tribunal. There are specific provisions in the Bill to transfer appeals on placing requests, not yet determined by an appeal committee or a sheriff, where the question of the need for a CSP arises, to a Tribunal. This is because the Tribunals are deemed best able to hear appeals relating to those with the most complex needs. Provision is also made for transfer from a Tribunal, where the Tribunal decides that a CSP is not required and deems it appropriate for an Appeal Committee to consider the matter of the placing request.

57. Only one reference relating to a refused placing request can be made to a Tribunal in any twelve month period, unless a review of a CSP has been carried out in the intervening months, or where the CSP has been amended upon direction of a Tribunal. This latter case allows a refused placing request, made in light of any changes to the information contained in the CSP, to be
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referred to a Tribunal. A twelve month period has been deemed suitable because it is in keeping with that set in other placing request appeals, but the flexibility is there to deal with the situation where the circumstances surrounding the CSP have changed.

58. The Bill provides for appointment of a President of the Tribunals, who will be a senior legal figure responsible for the administration of the Tribunal. The Scottish Committee of the Council on Tribunals will approve any rules of procedure and generally monitor the work of the new Tribunals to ensure that they are functioning justly and fairly.

59. Tribunals will sit in amenable locations across Scotland to make them accessible to families. The intention is that venues such as hotels should be used, so that the hearing is less intimidating than a more traditional court setting. It is expected that the hearing should be conducted around a table and that parties will be guided through discussions by Tribunal members. Representation for either party will be permitted, whether legal representation or otherwise, though use of legal representation is not expected to be a regular occurrence.

60. Each Tribunal will consist of three members: the convener will be legally qualified and will sit with two other members who have relevant knowledge or experience in additional support needs for learning. Members will be appointed by the Scottish Ministers for a period of up to 5 years and the normal procedures for public appointments will be followed.

61. Members will be expected to be impartial and will participate in appropriate training to ensure the requisite degree of knowledge as well as sensitivity in approach and objectivity in judgement. Training will be looked into closely once the Bill has completed its Parliamentary passage. Members will receive allowances for preparing for, and attending, hearings.

62. Tribunal hearings are normally held in public so that they may be seen to operate with openness and transparency. However, rules of procedure will allow for a hearing to be held in private where this is appropriate. The rules will also provide for the attendance of others who are not parties to the hearing, including the child and allow for the use of, for example, hearing-aidloops, interpreters and disabled access, as required by anyone who may be attending.

63. Parties to any appeal will have an opportunity to submit documentary evidence and to have witnesses at the Tribunal hearing. The Tribunals will have powers to commission specialist advice in appropriate cases, depending on the nature and complexity of the additional needs of the child or young person. The Tribunals will be able to compel witnesses to attend to give evidence, or to produce any document, if these are required to enable them to reach a fair decision. During consultation on the draft Bill, parents particularly were keen to be reassured that the Tribunals would have meaningful powers, and so were supportive of the compulsion of witnesses proposal.

64. The Tribunals will have powers to confirm or overturn a decision of an education authority and to require an education authority to take any appropriate action in the circumstances of any individual case. The Tribunals will only have jurisdiction over education authorities because it is the education authority which is responsible for the preparation and maintenance of the CSP. Where any decision of the Tribunal relates to provision of services or support from another
agency, then such an agency will have to consider its duties under this Bill to assist the education authority when requested to do so.

65. An appeal against a decision of a Tribunal to the Court of Session will be available to each party, but on a point of law only because during the consultation on the initial proposals to change the current system it was strongly emphasised that any appeals process should not be unnecessarily protracted. Judicial review may also be an available remedy for parties if they considered that the Tribunal had failed to follow proper procedures in making its decision.

66. The President will publish an annual report which will be laid before Parliament, and this will contain data about appeals, including the types of appeal, and the outcomes. The Report is also expected to include a breakdown of appeal numbers by education authority, or groups of authorities if small numbers mean confidentiality may be breached. This latter procedure should protect individuals from being identified, but will allow interested parties to investigate the most common areas of appeal, and the success of particular types of appeal. Again, this provision has been included to ensure that the Tribunals operate with transparency.

67. The appeal rights provided to parents and young persons in the Bill will not affect the existing remedies where they consider that an authority has failed to properly carry out their functions, such as judicial review proceedings, or complaining to the Scottish Ministers under section 70 of the 1980 Act. Throughout, parents and young persons also will have access to their local councillor or MSP, and to voluntary organisations, to obtain support, advice and information.

Alternative approaches: establish new Tribunals, or strengthen existing appeal mechanisms?

68. Rather than opting to establish a new Tribunal system, it would have been possible to strengthen available appeal mechanisms within the existing framework. However, recent reviews of the Record of Needs system, and its appeal mechanisms, suggest that there is a need for a new approach. In June 2000, the Scottish Committee of the Council on Tribunals undertook a review of Education Appeal Committees in Scotland which drew attention to, and favoured, the dedicated Special Educational Needs Tribunal in England and Wales. The National SEN Advisory Forum, in its review of Record of Needs procedures in February 2001, also recommended the establishment of an independent expert appeal mechanism similar to the tribunal system in England and Wales.

69. The Special Educational Needs and Disability Tribunal in England and Wales, which also considers disability discrimination cases, has been well received and is considered to function fairly. Lay members bring a specialist expertise to bear on the case, while the legally qualified chair oversees that the case is conducted justly.

70. The establishment of a new Tribunal system in Scotland will allow cases involving children or young persons with enduring needs arising from multiple or complex factors, who require a range of services, to be heard by an expert panel. The Tribunals will help encourage a consistency of decision-making across Scotland regarding cases which can have significant resource implications.
71. The Tribunals, along with the other mechanisms for resolving disputes, which are provided for in the Bill (mediation and the additional support needs dispute resolution system) will safeguard the needs of all those children and young persons with additional support needs. The thrust of the new system will be to resolve disputes, and ensure that an outcome is arrived at which is in the best interests of the child or young person.

**Planning for transitions**

72. All transitions into, out of and between schools can present challenges for pupils with additional support needs. The Bill, with the accompanying secondary legislation, will seek to address all these transition stages. Regulations will make provision for transitions before a pupil leaves school, detailing both the procedures for notification of a pupil’s additional support needs, and for joint planning and preparation to take place, where appropriate. These two elements must be addressed in order to ensure that a transition is successful. The Bill also makes specific provision for transition to post-school arrangements, to enable the exchange of relevant information prior to the young person leaving school.

73. Current statutory provision under the 1980 Act, by which education authorities must consider what provision all young people with a Record of Needs should receive after they leave school, takes the form of a multi-agency Future Needs Assessment (FNA). In practice, the FNA meetings are normally held to coincide with reviews of pupils’ Records of Needs but there are often difficulties in getting all the necessary professionals to attend FNA meetings.

74. The Bill proposes that planning and preparation for post-school transitions should be extended to all those pupils with additional support needs who may have significant difficulties at this stage, not just the 2.1% with a Record of Needs. The FNA will be discontinued, in order to allow a more streamlined, flexible process which is less likely to involve large, formal meetings. With an emphasis on planning and preparation, a continuum of support for the young person should be encouraged.

75. This planning process should start at least one year (in practice this may in some cases be two, especially if the pupil is likely to go on link courses at a further education college or equivalent) before the pupil reaches school-leaving age and continue until the pupil leaves school. The education authority should involve other relevant agencies as well as considering in what way they may be involved in providing for the child or young person in exercising functions other than those relating to education. They should take into account any information available through this process both in keeping under consideration the adequacy of the additional support being provided to the pupil, and also to inform others who may be involved in providing support post-school about the pupil’s needs, to enable those others to take those needs into account. The post-school transition process is intended to be less formal with the focus on joint planning and preparation rather than assessment.

76. The code of practice to be issued by the Scottish Ministers will encourage those involved to ensure that the views and ambitions of the young person are taken into account, since these are central to the planning process, and as a matter of good practice, a pupil should be able to take along a supporter to any meetings. Parents should always be encouraged to be involved in the
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process and to attend meetings, although authorities will require to be aware that they may not share their child’s views.

**Alternative approaches: a more flexible approach or continue with a statutory FNA?**

77. Consultation responses received since May 2001 have suggested that in many instances the statutory FNA is not working well. For some young people, it may involve a distressing and unnecessary medical assessment. For others, it may involve an intimidating meeting with a room full of professionals who have had little – or no – direct contact with the individual prior to that time. While the FNA sometimes offers reassurance that the post-school transition is a serious issue to be considered, consultation comments have suggested that FNAs are often distressing, and at best, superfluous, since the resultant piece of paper is in no way binding once the young person leaves school.

78. Rather than re-enact a single statutory assessment process, the significant element of transition, the future planning and preparation, is strengthened. The Bill therefore facilitates the exchange of information between authorities and agencies, and within authorities, to assist the education authority in its preparation for a young person’s transition. This highlights the needs of the young person, enabling co-operation and collaboration between all concerned, and so aiming to ensure a successful transition.

**Placing requests**

79. The Bill provides for placing requests to be made by parents of children with additional support needs and by young people with additional support needs in relation to an education authority mainstream or special school or to an independent special school or grant-aided special school. At present, only parents of children with a Record of Needs or young persons with a Record of Needs can request a place at an independent special school or grant-aided special school. This restriction is removed and all parents of children with additional support needs and young persons with additional support needs will be able to make placing requests to independent special schools and grant-aided special schools.

80. The education authority will have to comply with a placing request unless the specified circumstances in which the duty does not apply are applicable. For example, in the case of an independent special school this could be where the child or young person does not have the appropriate additional support needs for that school or where the education authority is able to make provision for those support needs in a school under its own management or by other arrangements. Appeals against the decision of the education authority on a placing request will continue to be to the education authority appeals committee in the first instance, and then to Sheriff Court, unless the child or young person has a CSP, or where the authority has established that the child or young person needs a CSP but has yet to prepare it, or where the decision of the authority not to prepare a CSP has been referred to a Tribunal.

81. Where a child or young person has a CSP, education authorities will have to consider the parents’ or young person’s views on their preferred school as part of the process of preparing or reviewing the plan. If, after discussion, the school proposed by the education authority is not the preferred school, the parents or young person will be able to make a placing request, which, if refused, may be appealed to a Tribunal.
Alternative approaches: direct all additional support needs placing requests to the Tribunal?

82. The Scottish Ministers are committed to the establishment of new Additional Support Needs Tribunals for Scotland. The Bill enables any parent of a child with additional support needs or a young person with additional support needs to make a placing request. The option has been considered to enable all appeals on refusals of placing requests to be heard by a Tribunal, since at least two members of the Tribunal would have expertise in additional support needs. However, given that there could be a significant number of pupils with additional support needs, were a Tribunal to hear all such placing request appeals, it would be very likely to be overwhelmed with appeals, slowing down the whole process for everyone involved. Furthermore, additional support needs may be transitory, so the child or young person may no longer require additional support by the time the appeals process has run its course. It is considered more appropriate, therefore, that a Tribunal will only hear appeals relating to those with enduring needs arising from complex or multiple factors requiring the co-ordination of services: those requiring CSPs.

Transitional provisions

83. Transitional arrangements for the move to the new system will be made by Order. It is anticipated that the changeover for those currently with a Record of Needs will take approximately two years to bring them into the new system. Prior to this, one of the first tasks will be the establishment of the Additional Support Needs Tribunals, so that CSPs may be introduced once a viable appeal system is in place and those involved appropriately trained. A code of practice will be issued during this time to support education authorities in the implementation of their new duties.

CONSULTATION

84. In February 2001, the Education Culture and Sport Committee of the Parliament began an inquiry into special educational needs. Following this, in May 2001, public consultation began, as the Scottish Executive invited responses to its publication Assessing our children’s educational needs: The Way Forward? The consultation continued until the end of August 2001, by which time 148 written responses had been received, from individuals, professionals, and various children’s and young people’s organisations. The Scottish Executive then published its outline proposals, and held three further consultation events to discuss the responses to The Way Forward. These were attended by over 300 delegates from across Scotland, including education authority representatives, teachers, educational psychologists, parents, college staff, health professionals, social workers and voluntary organisations.

85. The theme that emerged from an early stage showed that the majority of parents and professionals felt that the concept of special educational needs was too narrow. Objections were raised about the negative labelling of children and generally it was felt that special educational needs should be redefined. Four focus groups followed involving professionals from education, social work services and children’s organisations. Some felt that because the assessment and recording legislation in the 1980 Act addresses the needs of a small group of children (those requiring a Record of Needs) resources are skewed and it is detrimental to too many other children whose needs can be overlooked. Many also felt that the Record of Needs is too focussed on the child’s deficits and weaknesses, and takes insufficient account of learning outcomes. The organisation Children in Scotland was also commissioned to undertake research
involving 6 groups of children and young people. Some expressed concern about their lack of involvement in the whole recording process and disquiet that their views were not taken into account. Indeed, some were unaware that they had a Record of Needs.

86. The Scottish Executive has benefited greatly from this dialogue, which has been instructive in developing the proposals in the Bill. A draft Bill was published on 17 January 2003 with over 7000 copies being distributed for consultation along with details of the 14 consultation seminars that were being held in 6 towns and cities across Scotland. These were held both during the day and in the evening, to explain and promote understanding of the proposals and to encourage responses to the consultation from parents and professionals and other interested parties. Everyone who requested a place was allocated one and 1,210 people participated. In addition, the draft Bill was posted on the Scottish Executive’s website, the Parentzone website and the Special Educational Needs Forum website.

87. Standard procedures for consultation were followed as set out in Scottish Executive guidance. All local authority primary, secondary and special schools as well as all independent schools, independent special schools and grant-aided schools received copies. Head-teachers were encouraged, in the letter that accompanied the draft Bill, to make their staff, pupils and parents aware of the consultation and the seminars. In addition, copies were sent to 3,106 parent teacher associations as well as to the Scottish School Board Association. Copies were also sent to 38 national voluntary and non-statutory organisations that represent parents and children with special educational needs. Many of these organisations consulted with their members before submitting their written responses to the Executive and, where possible, members of the Bill team in the Scottish Executive responded to invitations by talking about the draft Bill at events organized by some of these organizations.

88. A number of focus group meetings were also held targeting specific groups, namely: education officers from education authorities, health representatives, finance representatives, educational psychologists, representatives from further education and Careers Scotland, and representatives from social work services and children’s organisations.

89. Children in Scotland was again commissioned to undertake a consultation with children and young people, involving 105 participants between the ages of 11 and 20. Suggestions were made about how to make involvement in decision-making more effective for children and young people. These will be taken up in the code of practice.

90. The consultation period on the draft Bill ran until the 28 March 2003. There were 252 written responses received from parents and individuals, education authorities, educational psychologists, NDPBs, schools, colleges, voluntary organisations, trade unions, professional organisations, health bodies and other interest groups. A consultation report has been issued to all those who have taken part in the consultation, and this details the changes made to the draft Bill as a result of the consultation. Principal among these has been the move to establish a dispute resolution process for parents of children with additional support needs but no CSP, the strengthening of the post-school transition process, the introduction of the right of parents to request a particular type of assessment for their child, and the refining of the co-ordination role of the CSP contact person.
91. Since the formal consultation period on the draft Bill, several further discussion groups have taken place involving some of the key respondents to the consultation on the draft Bill. Generally during these discussions, a broad consensus of support for the proposals in the Bill has emerged. Wherever possible, any concerns have been addressed, and some of suggested amendments have been incorporated into the Bill.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

92. The Scottish Executive is committed to promoting equality of opportunity for all. The enactment of the Bill will have a positive effect on equal opportunities because it will help to ensure that children and young persons with any type of additional support need can benefit from the same quality of education as all their peers. Equality of opportunity in school for children and young persons who require additional support for learning is essential to develop their potential. In this way, they should be enabled to progress beyond school to further or higher education or into employment, and from there, to develop successful careers.

93. The measures contained in the Bill will improve the support available to children and young people with additional support needs across all Scottish communities. Particular needs associated with gender, ethnicity, sexual orientation, age and religion or faith will be considered by the Scottish Ministers before they issue a code of practice relating to meeting the needs of those who require additional support.

Human rights

94. The Executive is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights.

Island communities

95. Rurality is obviously a factor in the provision of specialised services. However, while national minimum standards for provision will be detailed in a code of practice, the Bill has been designed to be responsive to local structures and systems.

Local government

96. The Bill will have an impact on local government in terms of the new duties placed on education authorities. The costs involved in managing the new system of co-ordinated support plans, dispute resolution and mediation services are detailed in the Financial Memorandum.

Sustainable development

97. The enactment of this Bill will have no negative effects on sustainable development. Its effects will be positive as it will promote social inclusion by increasing the opportunities for children who require additional support for learning.