

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Education (Additional Support for Learning) (Scotland) Bill as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill as amended at Stage 2. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND TO THE BILL

4. The Bill amends the Education (Additional Support for Learning) (Scotland) Act 2004 ("the 2004 Act") which came into force on 14 November 2005. The 2004 Act introduced a new system for identifying and addressing the additional support needs of children and young persons who face a barrier to learning. References to young persons are to those aged 16 or 17 who are still receiving school education.

5. The 2004 Act sets out how children with additional support needs should be provided for by education authorities ("EAs"), supported, where necessary, by appropriate agencies, such as Health Boards, Careers Scotland and other local authorities.

6. The 2004 Act made provision for the establishment of new independent Additional Support Needs Tribunals for Scotland (“the Tribunal”). The Tribunal hears and decides appeals made by parents against the decisions by or failures of EAs in relation to a co-ordinated support plan (“CSP”). Reference to the Tribunal may also be made regarding the refusal of a placing request in certain circumstances.

7. In determining all its decisions and directions, the Tribunal must take account of the code of practice published by the Scottish Ministers. The 2004 Act also provides for the Tribunal to be governed by rules of procedure and regulations separate from the code of practice.

8. Her Majesty’s Inspectorate of Education (“HMIE”) conducted a 2 year inspection programme into how local authorities were implementing the 2004 Act. An interim report of their findings was published in October 2006 and the final report was published on 14 November 2007. The report highlighted that authorities did not always provide sufficient information for parents, children and young people about their rights under the new legislation.

9. There have been two recent Court of Session judgements which concerned the interpretation of the 2004 Act:

- *Gordon, Appellant* 2007 FamLR 76, in which Lady Dorrian accepted the appellant’s argument that none of the circumstances described in section 18(4)(a) to (c) existed on the day on which the placing request was refused, namely:
 - Section 18(4)(a): a CSP has been prepared (and not discontinued) for the child or young person,
 - Section 18(4)(b): no such plan has been prepared, but it has been established by the education authority that the child or young person requires such a plan, or
 - Section 18(4)(c): the education authority have decided that the child or young person does not require such a plan and that decision has been referred to a Tribunal under subsection (1).

Therefore, as a result, the Tribunal did not have the jurisdiction to hear the placing request appeal.

- *WD v Glasgow City Council* 2007 SLT 1057, held that the Tribunal does not have jurisdiction to hear appeals in relation to out of area placing request decisions and that parents of children with a CSP cannot make out of area placing requests. The ruling also infers that parents of children with additional support needs cannot make out of area placing requests.

10. This Bill amends the 2004 Act in light of the HMIE reports, recent Court of Session rulings, the annual report from the President of the Additional Support Needs Tribunals for Scotland and informed observations in light of practice.

11. The Bill makes the following adjustments to the 2004 Act:

*This document relates to the Education (Additional Support for Learning) (Scotland) Bill
as amended at Stage 2 (SP Bill 16A)*

- it permits parents of children with additional support needs and young people with additional support needs, including those with CSPs, to make out of area placing requests.
- following the refusal of an out of area placing request, a parent or young person will be able to appeal the decision to refuse the request to the Tribunal.
- following the submission of an out of area placing request, a parent or young person will be able to access mediation from the potential host authority regarding the placing request.
- following a successful out of area placing request, parents or a young person will be able to access mediation and/or dispute resolution from the host authority regarding that authority's functions under the 2004 Act.
- following a successful out of area placing request for a child or young person with a co-ordinated support plan, the new host authority is under a duty to seek and take account of information and advice from the education authority from which the CSP was transferred as well as any agencies or persons involved in providing support under the CSP prior to its transfer.
- it enables the decision of an education authority refusing a placing request in respect of a place in a Scottish special school to be referred to the Tribunal and also allows the decision of an education authority refusing a placing request in respect of a place in a school in England, Wales and Northern Ireland which is a school making provision mainly or wholly for children or young people with additional support needs to be referred to the Tribunal.
- it provides that when hearing a placing request appeal in respect of a place in a special school, the Tribunal has the power to confirm the decision of the authority or overturn the decision of the authority and specify when the placing request should commence and make any amendments to a CSP.
- it extends the power of the Tribunal, when considering a placing request appeal, to enable it to specify a time scale for placing the child in the school specified in the placing request.
- it ensures that any reference transferred back to the Sheriff from the Tribunal will be treated as if it were an appeal made directly to the Sheriff in the first instance.
- where a child is being educated outwith the area in which he or she lives as a result of a successful out of area placing request, it prevents the EA (the host authority) from recovering the cost of providing any mediation and/or dispute resolution services from the authority for the area in which the child lives (the home authority).
- where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, responsibility for the child's or young person's education and carrying out all of the duties under the 2004 Act transfers to the host authority.
- where a child is being educated outwith his or her home authority as a result of arrangements made or entered into by the authority for the area to which the child or young person belongs with another authority, responsibility for the school education of the child or young person will remain with the authority for the area to which the child belongs.
- it clarifies the definition of additional support by specifying that it is not limited to support provided in an educational environment.

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- it extends the rights of parents of children with additional support needs and young people with additional support needs to enable them to request a specific assessment, such as an educational, psychological or medical assessment, at any time.
- it automatically deems children and young people within certain specified groups to have additional support needs without requiring regard to be had to whether the child needs additional support to benefit from education.
- it provides that if a child under school age (generally under 5 years old), who belongs to the authority's area, is brought to the attention of the authority as appearing to have additional support needs arising from a disability, then the authority must provide additional support as appropriate.
- it requires education authorities to provide parents of children with additional support needs (and young persons with additional support needs) with all the information authorities are required to publish under section 26 of the 2004 Act.
- it places authorities under a duty to ensure that a summary of the published information is available, on request, from each place in the authority's area where school education is provided and in any handbook or other publications provided by the school that is for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and on any website maintained the school or the authority for that purpose.
- it extends the list of matters on which authorities are required to publish information to include any procedures established for the resolution of disputes.
- it permits the Tribunal to consider any placing request appeal, where a CSP has been prepared or is being considered, at any time before final determination by an education appeal committee ("EAC") or sheriff.
- it extends the circumstances in which the decision of an education authority to refuse a placing request can be referred to a Tribunal, to include those decisions where an EA has issued its proposal to establish whether a CSP is required.
- it extends the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs.
- it extends the jurisdiction of the Tribunal to allow it to consider references in relation to an authority's failure to comply with its duties in terms of post-school transitions.
- it enables Scottish Ministers to make rules to allow a convener sitting alone to consider certain references and to allow the Tribunal to review its decisions in certain specified circumstances.
- it provides that following a decision of a Tribunal that requires an education authority to do anything, the President of the Tribunal will have the power to require the authority to provide him or her with information about the authority's implementation of the Tribunal decision.
- it provides the President of the Tribunal with the power to refer the matter to Scottish Ministers where he or she is satisfied that the authority is not complying with the Tribunal decision.
- it ensures a right of recovery where an education authority have provided additional support for any pupil belonging to the area of another authority.

- it clarifies the definition of “a child or young person for whose school education an education authority are responsible”.

THE BILL – SECTION BY SECTION

Section 1: Placing requests

12. Section 1 of the Bill enables parents of children with additional support needs and young persons with additional support needs including those with CSPs to make requests for their children or themselves (as appropriate) to attend a school outwith the local authority area in which the child or young person lives. It does this by amending paragraph 2 of schedule 2 to the 2004 Act to ensure that the description of the EA which is to consider a placing request is not restricted to the EA which is currently responsible for the child or young person’s education (see subsection (8)(a)). It also extends the jurisdiction of the Tribunal to enable it to hear appeals on refusals of such out of area placing requests by amending section 18(3)(e) of the 2004 Act to allow referral to the Tribunal of a placing request decision by an EA which is not the EA responsible for the child (or young person) (see subsection (6)(a)(iii)).

13. The other provisions in section 1 make amendments that relate to placing requests to ensure the existing system continues to operate in a logical manner. They also ensure the system properly accommodates the possibility of an “out of area” placing request being made.

14. For children or young persons with additional support needs who are attending a school outwith the area in which they live following a successful out of area placing request, section 1 also transfers the duty to keep under review any CSP from the original home authority to the new host authority (see subsection (4)(a)). New subsection (5A) is inserted to section 10 of the 2004 Act which places a duty on the new host authority to carry out a review of the co-ordinated support plan as soon as possible after the date of any transfer of the CSP from the home authority to the host authority (time limits for conducting this review will be specified in secondary legislation).

15. Section 1 of the 2004 Act defines what is meant by the term “additional support needs”. Subsection (2) amends the basis on which additional support needs are assessed to accommodate out of area placing requests. It provides that a child’s or young person’s additional support needs will be assessed against the provision made for children or young people of the same age in schools run by the education authority that is responsible for his/her education. Where no education authority is responsible for the child’s or young person’s education e.g. the child or young person is home or privately educated, his/her additional support needs will be assessed against the provision made for children or young people of the same age in schools run by the education authority in which he/she lives.

16. Section 7 of the 2004 Act enables a request to be made to an EA to establish whether a child or young person belonging to that EA’s area, but for whose education the EA are not responsible, has additional support needs or requires a co-ordinated support plan. This allows the education authority for the area to which the child belongs (the home authority) to comply with such a request where the child or young person is home educated, privately schooled or attending school under the management of another authority (a host authority). Subsection (3)

amends section 7 of the 2004 Act to restrict a home authority from complying with such a request in relation to children and young people for whose school education *any* education authority are responsible. The effect of this is that where a successful out of area placing request is made, the child or young person will be covered by the provisions in section 6 of the 2004 Act and will be unable to utilise the provision in section 7.

17. Subsection (5A) inserts new subsection (3A) into section 12 of the 2004 Act and provides that, where a child or young person with a CSP moves from a school in one authority area to a school in another authority (e.g. following a change of residential address or a successful out of area placing request for a child or young person with a CSP), the new host authority is under a duty to seek and take account of information and advice from the education authority from which the CSP was transferred as well as any agencies or persons involved in providing support under the CSP prior to its transfer.

18. Section 18(3) of the 2004 Act lists the matters that can be referred to the Tribunal. Subsection (6) inserts a new paragraph (da) into section 18(3) to enable the decision of an education authority refusing a placing request in respect of a place in a Scottish special school to be referred to the Tribunal. It also allows the decision of an education authority refusing a placing request in respect of a place in a school in England, Wales and Northern Ireland which is a school making provision mainly or wholly for children or young people with additional support needs to be referred to the Tribunal.

19. Section 18(3)(e) of the 2004 Act enables a decision of an education authority refusing a placing request to be referred to the Tribunal in cases where a CSP has been prepared or is being considered. Subsection (6)(a)(ia) provides that where a placing request to a special school (including those in England, Wales and Northern Ireland) is submitted on behalf of a child or young person with additional support needs who has a CSP on the horizon, there is only one appropriate appeal route in place under section 18(3)(da). Without this amendment there would be two different appeal routes: one for children with additional support needs wanting to go to a special school and the other for those that have a CSP on the horizon.

20. Section 18(7) of the 2004 Act provides that references to the Tribunal on the refusal of a placing request can only be made once in each 12 month period unless the CSP has been reviewed in that period, or a Tribunal has ordered a CSP to be amended or prepared. Subsection (6)(d) will extend the provisions in section 18(7) to prevent repeated references to the Tribunal under section 18(3)(da). A period of 12 months will have to lapse before another reference can be submitted to the Tribunal under section 18(3)(da).

21. Section 19 of the 2004 Act specifies the powers that a Tribunal has in relation to references. Subsection (7)(za) inserts new subsection (4A) into section 19 of the 2004 Act to give the Tribunal powers in relation to the new decisions referable under section 18(3)(da). It provides that when hearing a placing request appeal in respect of a place in a special school, the Tribunal has the power to confirm the decision of the authority or overturn the decision of the authority and specify when the placing request should commence and make any amendments to a CSP.

22. Subsection (7)(a) amends subsection 19(5)(b)(i) to extend the power of the Tribunal, when considering a placing request appeal, to enable it to specify a time scale for placing the child in the school specified in the placing request.

23. Subsection (6)(b) inserts new paragraph (f) into section 18(3) of the 2004 Act to provide that a decision made by an EAC to refuse a placing request may be referred to the Tribunal if, before the expiry of the time limit for appeal to the sheriff court (28 days), a CSP is involved or being considered.

24. Section 18(4) of the 2004 Act sets out circumstances which indicate (for the purposes of the 2004 Act) when a CSP is involved or is being considered. Subsection (6)(c)(ii) adds a new circumstance to that list. The new circumstance is that the EA have advised the parent or young person that they will establish whether a CSP is required. The effect of this amendment is that a decision by an EA referred to in section 18(3)(e) of the 2004 Act or by an EAC referred to in section 18(3)(f) of that Act refusing a placing request can now be referred to the Tribunal if the EA have advised the parent that they will establish whether a CSP is required.

25. Subsection (8)(d)(ii) inserts a new sub-paragraph (1A) to paragraph 7 of schedule 2 to ensure that where a child or young person has a CSP or is being considered for a CSP, appeals regarding placing requests should be referred to the Tribunal rather than to the sheriff.

26. Subsection (8)(c)(ii) and (d)(iii) extend the circumstances in which a placing request appeal must be transferred from the EAC or sheriff to the Tribunal from being limited to the event described in section 18(4)(c) of the 2004 Act to include the things described in the other paragraphs of section 18(4) (as amended by this Bill). The effect of this extension, and subsection (6)(c)(i) (which removes the words “at the time the placing request is refused” from section 18(4) of the 2004 Act), is that if, at any time before the EAC or sheriff has made their final decision on a placing request appeal, a CSP is being prepared or is being considered, the appeal is to be transferred to the Tribunal. Subsection (8)(d)(iv) inserts a new sub-paragraph (12) into paragraph 7 of schedule 2 to ensure that any reference transferred back to the Sheriff from the Tribunal will be treated as if it were an appeal made directly to the Sheriff in the first instance thus ensuring the Sheriff has the power to deal with such a reference.

27. Subsection (7) extends the circumstances in which a placing request appeal can be transferred from the Tribunal to the Education Appeal Committee (see subsection (7)(a)(i)). This section also provides the Tribunal with the discretion to transfer placing request decisions back to the EAC or sheriff where it has been decided that no CSP is required (see subsection (7)(a)(ii)).

Section 2: Mediation services

28. Section 2 amends section 15 of the 2004 Act. Section 15 places a duty on EAs to arrange for independent mediation services in relation to the exercise of the EA’s functions under the 2004 Act to be provided, free of charge, to parents of children or young people belonging to its area. Mediation aims to bring parties together to discuss the issues and to help broker a way forward. Section 2 removes the requirement for the child or young person to belong to the authority’s area. This will allow parents of children or young persons who have submitted an out

of area placing request or are being educated in an authority outwith the authority in which they live as a result of a successful out of area placing request, to access the mediation services provided by the host authority.

Section 3: Dispute resolution

29. Section 3 amends section 16 of the 2004 Act. Section 16 enables Scottish Ministers, by regulations, to require EAs to put in place arrangements to resolve disputes between the authority and any parents or young persons belonging to that authority's area in relation to the EA's functions under the 2004 Act. Dispute resolution is carried out by an independent third party who considers the facts of the case and makes recommendations to the EA. As with section 2, section 3 removes the requirement for the child or young person to belong to the authority's area. This will allow parents of children or young persons who are being educated in an authority outwith the authority in which they live as a result of a successful out of area placing request, to access the dispute resolution services provided by the host authority.

Section 4: Contributions not recoverable in respect of certain services

30. Section 23 of the Education (Scotland) Act 1980 (c.44) ("the 1980 Act") provides that where a child or young person is being educated outwith the authority in which he or she lives, the EA for the area in which the child or young person is being educated (the host authority) may recover from the home authority contributions in respect of provision of the child's/young person's school education and/or other services, including additional support under the 2004 Act.

31. Section 4 of the Bill amends section 23 of the 1980 Act to prevent the "host" authority from recovering the cost of providing any mediation or dispute resolution services under the 2004 Act for pupils being educated in their area as a result of a successful out of area placing request.

Section 5: Arrangements between education authorities

32. Section 29(3) of the 2004 provides the definition of "a child or young person for whose school education an education authority are responsible". However Lord Brailsford's Court of Session ruling, *RB v. a decision of an Additional Support Needs Tribunal* [2007] CSOH 126, which concerned a child who was being educated at home, stated that if, as a matter of fact, a particular authority controlled the education of the child, then that authority was responsible within the terms of section 29(3). 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 is the responsible authority.

33. A successful out of area placing request does not involve any arrangements being made between authorities. Therefore, where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, the host authority will be the EA with responsibility for the child's or young person's education and carrying out all of the duties under the 2004 Act (see section 29(3)(a) of the 2004 Act).

Section 5A: Additional support

34. Section 5A amends section 1(3)(a) of the 2004 Act and provides clarification on the definition of “additional support” by making explicit that it is not confined to educational support but also includes multi-agency support such as health, social work, voluntary agencies etc.

Section 5B: Assessments and examination

35. Section 5B inserts section 8A into the 2004 Act to extend the rights of parents of children with additional support needs and young people with additional support needs to enable them to request a specific assessment, such as an educational, psychological or medical assessment, at any time.

36. Education authorities are required to comply with the assessment request unless the request is unreasonable.

37. The process of assessment or examination will be carried out by such person as the education authority consider appropriate. Education authorities are not required to arrange for examinations or assessments to be carried out by named individuals or organisations requested by the parent or young person.

38. Authorities must take into account the results of the assessment or examination when considering the additional support needs of the child or young person and the adequacy of the additional support provided.

Section 5C: Additional support needs etc.: specified children and young people

39. Subsection (1) deems specified groups of children and young people to have additional support needs regardless of whether they require additional support to enable them to benefit from education. Therefore, all the provisions of the 2004 Act relating to children and young persons with additional support needs apply to children and young people in these specified groups.

40. The groups of children who are automatically deemed to have additional support needs are:

- looked after and accommodated children and young people;
- children or young people who are carers;
- children or young people who have a mental disorder;
- children or young people who are deaf or partially deaf;
- children or young people who are blind or partially sighted; and
- children or young people who are (any or all) deaf, partially deaf, blind or partially sighted.

41. Subsection (2) requires that every education authority should consider whether children belonging to these specified groups, where the education authority are responsible for their education, require co-ordinated support plans.

Section 5D: Functions of education authority in relation to certain pre-school children with additional support needs

42. Section 5 of the 2004 Act requires an education authority to provide additional support to certain disabled pre-school children in their area, normally those who are under 3 years old. This duty applies where such children have been brought to the attention of the education authority by an NHS Board as having, or appearing to have, additional support needs arising from a disability within the meaning of the Disability Discrimination Act 1995. Section 5D broadens the persons who have the ability to bring such a child to the attention of the authority to enable any organisation or person (including a parent) to undertake this role. Section 5D also provides that the duty to provide such children with additional support will not apply in cases where the child's parent does not give his or her consent.

Section 5E: Provision of published information to certain persons

43. Under section 26 of the 2004 Act, education authorities are under a duty to publish and keep up-to-date certain information. Section 5E requires education authorities to provide all parents of all children with additional support needs (and young persons with additional support needs) with all the information authorities are required to publish under section 26. This duty extends to children and young people for whose school education EAs are not responsible.

Section 5F: Availability of published information

44. Section 5F inserts new subsection (aa) into section 26(1) of the 2004 Act and places authorities under a duty to ensure that a summary of the information published under section 26 of the 2004 Act is available, on request, from each place in the authority's area where school education is provided, regardless of whether the school is under the management of the education authority.

45. New subsection (aa) also requires education authorities to provide this summary in any handbook or other publications provided by any school in the authority's area, that is provided by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority on any website maintained by any such school or the authority for that purpose.

Section 5G: Publication of information on dispute resolution

46. Section 5G inserts new subsection (ea) into section 26(2) of the 2004 Act to extend the list of matters on which authorities are required to publish information in section 26(2) of the 2004 Act to include any procedures established in accordance with section 16 of the 2004 Act for the resolution of disputes.

Section 6: References to Tribunal in relation to co-ordinated support plan

47. Section 6 extends the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs. It provides that where parents or young persons have requested that the authority establish whether the child or young person requires a CSP and the authority have not responded to that request within a specified period of time (set out in regulations), the failure so to respond is treated as if it were a decision by the EA that no CSP was required. It also provides that where an authority have notified a parent or young person that they will establish whether the child or young person requires a CSP but, after a specified period of time (set out in regulations), the authority has not made a decision on the matter either way, that failure is to be treated as if it were a decision of the EA that no CSP is required. Decisions of an EA that no CSP is required can be referred to the Tribunal.

Section 6A: References to Tribunal in relation to duties under section 12(6) and 13

48. Section 6A inserts new subsection (g) into section 18(3) of the 2004 Act to extend the jurisdiction of the Tribunal to allow it to consider references in relation to an authority's failure to comply with its duties in terms of post-school transitions under sections 12(5) and (6) and 13 of the 2004 Act.

Section 7: Power to make rules in respect of Tribunal practice and procedure

49. As detailed in paragraph 47 above, the Bill will extend the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs. These new circumstances relate to an authority's failure to take action within a specified period of time. Section 7 enables Scottish Ministers to make rules regarding the ability of Convener of a Tribunal to sit alone to consider references where they relate to failures by EAs to comply with specified time scales.

50. Section 7 will also allow Scottish Ministers to make rules to allow the Tribunal to review its decisions in certain circumstances.

Section 7A: Power to monitor implementation of Tribunal decisions

51. Section 7A inserts new paragraph 11A into schedule 1 of the 2004 Act to provide that following a decision of a Tribunal that requires an education authority to do anything, the President of the Tribunal may require the authority to provide him or her with information about the authority's implementation of the Tribunal decision. It will also provide the President with the power to refer the matter to Scottish Ministers where he or she is satisfied that the authority is not complying with the Tribunal decision.

Section 7B: Provision by education authority for education of pupils belonging to areas of other authorities: recovery of costs where pupil has additional support needs

52. Section 7B inserts a new section 27A into the 2004 Act to ensure a right of recovery where an education authority have provided additional support for any pupil belonging to the area of another authority.

Section 8: Ancillary provision

53. This section enables the Scottish Ministers to make further provision, by order, which is consequent upon the Bill.

Section 9: Orders

54. This section makes general provision about orders made under the Bill by Scottish Ministers. They will be made by statutory instrument. The section also specifies the Parliamentary procedure for an order under section 8.

Section 10: Short title and commencement

55. This section allows the Scottish Ministers to set different dates to commence different provisions of the Bill by order, other than sections 7, 8 and 9 which will come into force on Royal Assent.

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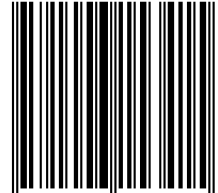
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