

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Education (Additional Support for Learning) (Scotland) Bill introduced in the Scottish Parliament on 6 October 2008:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 16-PM.

EXPLANATORY NOTES

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. 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 includes the following adjustments to the 2004 Act:

- 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.
- 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 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 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 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 (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.

18. 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.

19. Subsection 8(d)(ii) inserts a new subsection (1A) to section 7 of schedule 1 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.

20. 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.

21. 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

22. 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

23. 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

24. 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.

25. 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

26. 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.

27. 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 6: References to Tribunal in relation to co-ordinated support plan

28. 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 7: Power to make rules in respect of Tribunal practice and procedure

29. As detailed in **paragraph 28** 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.

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

Section 8: Ancillary provision

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

Section 9: Orders

32. 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

33. 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.

FINANCIAL MEMORANDUM

INTRODUCTION

34. This document relates to the Education (Additional Support for Learning) (Scotland) Bill introduced in the Scottish Parliament on 6 October 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

35. The Education (Additional Support for Learning) (Scotland) Bill amends the Education (Additional Support for Learning) (Scotland) Act 2004 ("the 2004 Act"), which came into force in November 2005 with the aim of creating a stronger, better system for supporting children's learning. The 2004 Act, inter alia, places new duties on education authorities to make adequate and efficient provisions for the additional support needs of every child and young person for whom they are responsible and who requires additional support for learning. Education authorities must identify, support and keep under review the needs of all children with additional support needs.

36. The original policy intention behind the 2004 Act was to allow young people with additional support needs, and parents of children with additional support needs, including those with co-ordinated support plans (CSPs) to make out of area placing requests. However, this was called in to doubt by an Inner House, Court of Session ruling by Lord Macphail on 11 October 2007. Lord Macphail's ruling held that the 2004 Act did not make, and should not be construed as making, any provision in respect of a child with additional support needs, who required a CSP, for the making of a placing request to any education authority who were not responsible for the child's/young person's education. The ruling also inferred that young people with additional support needs and parents of children with additional support needs could not make out of area placing requests. Prior to Lord Macphail's ruling, local authorities were considering out of area placing requests for children with additional support needs, including those with co-ordinated support plans. Therefore, the estimated number of future out of area placing requests contained within this memorandum is likely to be fairly accurate.

37. The Convention of Scottish Local Authorities (COSLA) and 6 of the 32 local authorities in Scotland participated in a survey to assist the Scottish Government with the calculations contained within this Financial Memorandum. The six authorities were Dumfries and Galloway Council, Dundee City Council, East Ayrshire Council, Highland Council, City of Edinburgh Council and West Lothian Council. These authorities represent a good cross section of all authorities in Scotland.

38. The survey indicates that each are involved in only a small number of cases which would be affected by this Bill per year and that cases vary considerably in their complexity and length. As

such, the estimated cost of dealing with a case also varies, with a wide range of estimated cost per case both between and within local authorities.

39. Estimates used in this Memorandum are based on an examination of the data gathered with ranges given and representative averages chosen to indicate the likely scale of the impact. The estimates below should be treated as an indicative average only.

40. It is important to note that given both the very small number of cases involved and the large variability in cost due to the individual nature of cases, it is not possible to assess precisely either the number of cases or the cost involved. Both number and cost are likely to vary from year to year. However, the small number of cases means the total overall additional cost to **all** of the 32 local authorities as a result of this Bill is likely to be below **£55,000** a year.

41. The funding originally allocated to education authorities for CSPs was based on the information contained in the Financial Memorandum that accompanied the 2004 Act, which stated that *“It is expected there will be around 11,200 to 13,700 CSPs at any one time. The number of new CSPs being prepared each year could range from 1,700 to 2,500. This estimate is drawn from a model based on an assumption that 50% of children who currently have Records of Needs will have such needs that require a CSP plus an additional proportion of the school population (0.3-0.6%) who will also have such needs but who do not currently have a Record”*. However, the National Statistics publication *“Pupils in Scotland, 2007”* shows that only 1881 pupils had a co-ordinated support plan (CSP) at September 2007. Education authorities have therefore already received excess funding for their work in this area.

42. COSLA provided the Scottish Government with the following statement *“COSLA and 6 of our councils have been involved in the preparation of the draft Financial Memorandum and we believe that the cost estimates reflect the outcomes from these discussions.....”*.

COST ON LOCAL AUTHORITIES

Extending the jurisdiction of the Tribunal to hear all placing request appeals involving a co-ordinated support plan (CSP)

43. Currently, the 2004 Act makes provision for the transfer of a placing request appeal from the Education Appeal Committee (EAC) or the sheriff to the Additional Support Needs Tribunals for Scotland (the Tribunal) only in respect of the situation where the education authority has decided that no CSP is appropriate and that decision has been referred to the Tribunal.

44. The Bill extends the jurisdiction of the Tribunal to include consideration of any placing request appeal where a CSP has been prepared or is being considered, at any time before final determination by an EAC or sheriff (as appropriate). An example would be where the education authority is in the process of establishing whether a CSP is required.

45. The National Statistics publication *“Placing Requests in Schools in Scotland, 2006/2007”* states that of the 28,645 placing requests received for all pupils, 529 were appealed to the Education Appeal Committee (EAC), and 5 of those subsequently appealed to the sheriff. From a total school population of 692,227, the percentage of school pupils identified as having additional support needs who have a CSP, an individualised educational programme and/or with provision levels set by a

Record of Needs pre-dating the commencement of the 2004 Act is currently 5.3% (36,518). Only 5.2% of those pupils identified as having additional support needs have a CSP (1,881). Therefore, based on these percentages, it is estimated that the number of placing request appeals referred to the Tribunal from the EAC or sheriff because a CSP has been prepared or is being considered will increase by no more than 2 or 3 cases per annum. Conversely, this will also mean a decrease in the number of placing request appeals heard by the EAC or sheriff by 2 or 3 cases per annum.

46. There is considerable variation in the estimated cost of a Tribunal which includes an oral hearing, both between individual cases within the same authority and between local authorities - the cost for a Tribunal case with representation ranges between £500 and £18,000. On the basis of information received, an indicative average cost per case is around £5,000. Therefore, the total cost to all authorities for Tribunals cases with representation at an oral hearing is estimated to be **£15,000** per annum (3 x £5,000).

47. On the other hand, the survey indicates that the cost of a sheriff Court appearance ranges between £2,700 and £25,000. An indicative average cost per case is around £9,000. The cost of an appeal to EAC ranges between £350 and £4,800. An indicative average cost per case is around £2,000. Therefore the savings incurred by authorities for those cases that are transferred from either the EAC or sheriff to the Tribunal is estimated to range between £6,000 (3 cases from the EAC at £2,000 each) to £27,000 (3 cases from the sheriff at £9,000 each). Depending on the make up of cases, this could result in either an increase in cost or a saving for local authorities. Assuming the reduction in cases is more likely to be an EAC appeal rather than a Sheriff Court appearance, this suggests an indicative saving of **£13,000** per annum (2 EAC cases at £2,000 each + 1 sheriff case at £9,000)

Out of area placing requests

48. As detailed in **paragraph 36**, the original policy intention behind the 2004 Act was to allow young people with additional support needs, and parents of children with additional support needs, including those with co-ordinated support plans (CSPs) to make out of area placing requests. However, this was called into doubt by Lord Macphail's ruling.

49. The Bill will amend the legislation to make it clear that young people with additional support needs, and parents of children with additional support needs, including those with CSPs, are able to make a placing request to an education authority outwith the local authority area in which they live. Additionally, where a CSP has been prepared or is being considered, an appeal against a decision to refuse an out of area placing request can be referred to the Tribunal.

50. There is considerable variability among the authorities who responded to our survey on the reported cost of an out of area placing request – this ranged between £450 and £12,500. An indicative average cost is around £3,600. Following Lord Macphail's ruling, the Scottish Government contacted COSLA in March 2008 to establish the extent of the impact of Lord Macphail's ruling on authorities. COSLA confirmed that in their work with the Association of Directors of Education in Scotland (ADES), they could not find any evidence to suggest that authorities were refusing to accept placing requests for children with additional support needs who were resident in another authority's area. As a result, there is unlikely to be any increase in cost to local authorities in processing out of area placing request for children with additional support needs (excluding those with a co-ordinated support plans). The National Statistics publication "*Placing*

Requests in Schools in Scotland, 2006/2007” states the total number of “out of area” placing requests received for all pupils is 3008. The number of pupils identified as having a co-ordinated support plan, as detailed in **paragraph 45** above is 1881 (5.3% of the total pupil population have been identified as having additional support needs (36,518) and of those, 5.2% have a CSP). Therefore, the estimated number of out of area placing requests for pupils with a CSP is estimated to be around 9 per annum (5.3% of 3008 = 159, 5.2% of 159 = 9). The total estimated cost to **all** authorities for processing out of area placing requests for pupils with co-ordinated support plans is **£32,400** per annum (9 x £3,600).

51. It should also be noted that under section 23(2) of the Education (Scotland) Act 1980, where an education authority has provided school education, with or without other services (excluding mediation or dispute resolution), for any pupil, child or young person belonging to the area of some other authority, or have provided additional support within the meaning of the 2004 Act for any such pupil, the education authority, may, if a claim is made, recover from that other authority such contributions in respect of such provision as may be agreed between the authorities or as the Scottish Ministers may determine. As such, successful placing requests are cost neutral overall.

52. The National Statistics publication “*Placing Requests in Schools in Scotland, 2006/2007*” states the total number of “out of area” placing requests received for all pupils is 3008. Of those, 2249 (75%) were granted. As detailed in **paragraph 45**, 5.3% of pupils have been identified with additional support needs, including those with CSPs. Therefore, the estimated number of out of area placing requests for pupils with additional support needs, including those with CSPs is 159 (5.3% of 3008) and the estimated number granted is 119 (75% of 159). Based on these figures there could be a maximum of 40 (159 minus 119) appeals to either the EAC or the Tribunal for children with additional support needs/CSPs respectively. If only 5.2% of all pupils identified with additional support needs have a CSP, we would expect two of those cases (5.2% of 40) to be cases of children with a CSP. Those cases would go to the Tribunal and the remaining 38 cases could be appealed to the EAC. However, as only 19% of refused placing requests are actually appealed, the numbers could be as little as 1 appeal per annum to the Tribunal and 8 appeals to the EAC. There is considerable variation in the estimated cost of a Tribunal case with representation at an oral hearing, both between individual cases within the same authority and between local authorities - the cost for a case ranges between £500 and £18,000. On the basis of information received, an indicative average cost per case is around £5,000. The results of the survey indicate that the cost of an appeal to EAC ranges between £350 and £4,800. An indicative average cost per case is around £2,000. Therefore, the estimated total increase in cost to all authorities for placing request appeals is around **£21,000** per annum (1 x £5,000 plus 8 x £2,000).

Mediation and dispute resolution

53. The Bill provides that 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. It will also provide that following a successful out of area placing request, the duty to provide mediation and dispute resolution services will lie with the new “host” authority. Any costs associated with providing these services to the parents of a child or a young person who does not belong to the authority’s area will not be recoverable under section 23(2) of the Education (Scotland) Act 1980.

54. To date, there have **not been any** cases in which a home authority has been required to provide mediation or dispute resolution for a child being educated in another authority’s area as a

result of a placing request. Therefore, the cost to authorities is likely to be minimal. Of the 6 local authorities who responded to the survey, 5 authorities purchase mediation services from the voluntary sector using either a service level agreement or a case by case basis, and 1 authority provides mediation services in house. For those authorities that purchase mediation services from the voluntary sector this cost could range from £0 to £1790 per case depending upon whether they have a service level agreement or purchase services on a case by case basis.

55. The 6 local authorities who responded to the survey estimated the cost of staff time for mediation at around £800 per case. Scottish Ministers have set the fee payable by authorities to an Independent Adjudicator for dispute resolution at £355 per case. This excludes the cost of staff time estimated at around £850. If parents or young persons were to request mediation from the host authority in 1% – 5% of the estimated 159 out of area placing requests for pupils with additional support needs/CSPs (see **paragraph 52**), this could result in an increase of between 2 to 8 mediation cases per annum. If parents or young person were to request dispute resolution from the host authority in 1% - 5% of the estimated 119 out of area placing requests granted for pupils with additional support needs/CSPs (see **paragraph 52**), this could result in an increase of between 2 to 6 dispute resolution cases per annum. The total cost to all authorities per annum for providing mediation and/or or dispute resolution services to pupils belonging to another authority's area is estimated to range between **£1,600** (2 x £800) for mediation only to **£22,770** (6 x (£1,790+£800+£355+£850)) for provision of mediation and dispute resolution.

Reviewing a co-ordinated support plan (CSP) following a successful out of area placing request

56. Section 10 of the 2004 Act provides for reviews of CSPs. The 2004 Act states that education authorities have a duty to keep under consideration the adequacy of any co-ordinated support plan prepared for a child or young person belonging to their area. The education authority must therefore review each plan every 12 months. It may be reviewed earlier if there has been a significant change in the circumstances of the child or young person, for example if their needs change or the level of additional support provided changes. In practice, it is likely that an authority would review a co-ordinated support plan when a child changes school, particularly if the new school was based in another local authority's area.

57. Where an education authority accepts a placing request for a child who does not belong to its area, that authority will assume responsibility for the child's education and will be required to review any CSP as soon as is reasonably practical after the date of transfer. The cost of reviewing a CSP in the Financial Memorandum which accompanied the 2004 Act was calculated at £440. The current estimated cost for reviewing a CSP is around £800 per plan. The estimated number of out of area placing requests granted for children with additional support needs is 119 and of those, only 5.2% are likely to have a CSP, indicating that there will be approximately 6 cases per annum. Total cost to authorities for reviewing a co-ordinated support plan following a successful out of area placing request is estimated to be around **£4,800** per annum (6 x £800).

58. It is useful to note that under section 23(2) of the Education (Scotland) Act 1980, these costs can be recovered from the home authority.

Two new Tribunal reference categories - education authorities exceed specified timescales

59. Parents will be able to submit references to the Tribunal in relation to two new procedural failures by local authorities to take action within specified timescales. The first is where an authority fails to acknowledge (within a specified time to be stipulated in secondary legislation) a request from a parent of a child with additional support needs or a young person with additional support needs to establish whether the child/young person requires a CSP. The second is where an authority has notified a parent or young person that it will establish whether their child/young person requires a CSP and after a specified period of time (to be stipulated in secondary legislation), the authority has not made a decision either way. **It is important to note that authorities can avoid references under these new categories by involving parents/young people in the process, keeping parents/young people abreast of the situation and taking action within the specified timescales.** Furthermore, with regard to the second new appealable failure, the 2004 Act currently enables a local authority to write out to a parent or young person to advise them that it requires an extension to the timescale. The extension cannot exceed 24 weeks starting from the date the authority issued its proposal to establish whether a CSP is required. It is estimated that these two new reference categories will result in a 5% to 10% increase per annum in the number of referrals to the Tribunal (4 – 8 cases). The costs of these extra cases are set out below in paragraph 60.

Expedited Tribunal paper based decision making process

60. The Bill will make possible a new expedited Tribunal paper based decision making process for those references in which authorities have exceeded any specified timescales. This will include the two new reference categories detailed in **paragraph 59** above and those cases that are currently appealable under the 2004 Act (where it has been established by the authority that a child/young person requires a co-ordinated support plan and the authority fails to prepare a plan by the time specified in regulation (16 weeks, or 24 weeks if the authority has written to the parent or young person notifying them that it cannot meet the 16 week timescale). While the cases that are currently appealed under the 2004 Act could result in an oral hearing, experience to date indicates that these references have been decided without the need for an oral hearing. The reason for this is that these references have not been opposed or subject to dispute in terms of facts. As mentioned in **paragraph 59**, authorities have the power to avoid appeals made under these categories by involving parents/young people in the process, keeping parents/young people abreast of the situation and taking action within the specified timescales. The new expedited paper based decision making process will enable the Convener of an Tribunal to consider such cases alone and this will keep the cost to authorities to a minimum – estimated to be around £2,800 per case. The total cost to all authorities for these new reference categories is estimated to range between £11,200 (4 x £2,800) - £22,400 (8 x £2,800). Using the mid range of 6 cases the cost is estimated to be **£16,800** per annum.

Enabling the Tribunal to review its decisions

61. The Bill will enable the Tribunal to review, vary or revoke its decisions in certain circumstances which will be specified in regulations. Currently the 2004 Act enables any person who has made an appeal to the Tribunal, and the relevant education authority, to appeal the decision of the Tribunal to the Court of Session. Such an appeal to the Court of Session may only be made on a point of law. Therefore, if a Tribunal considered it appropriate to review its decision based on a point of law, this could result in possible savings for authorities as fewer cases will need to be referred to the Court of Session. The local authority cost of an appeal to the Court of Session ranges between £9000 and £28,000. An indicative average cost is around £14,000. The indicative

average cost of a Tribunal case with an oral hearing is around £5,000. This would save authorities approximately £9,000 per case. Since the commencement of the 2004 Act, 5 cases per annum have been referred to the Court of Session on a point of law. Therefore, **the total saving to all** authorities in cases where the Tribunal reviews its decision on a point of law is estimated to be around **£45,000** (5 x £9,000).

TOTAL ESTIMATED COSTS PER ANNUM ON ALL LOCAL AUTHORITIES:

	Increase in cost	Saving
Coordinated support plan appeals - Tribunal cases with representation at an oral hearing (paragraph 46)	£15,000	
Cases transferred from the EAC or sheriff to the Tribunal (paragraph 47)		£13,000
Processing out of area placing requests (paragraph 50)	£32,400	
Increase in placing request appeals (paragraph 52)	£21,000	
Providing mediation and/or dispute resolution (paragraph 55)	£22,770	
Reviewing a co-ordinated support plan (paragraph 57)	£ 4,800	
Expedited Tribunal paper based process (paragraph 60)	£16,800	
Tribunal reviews its decision on a point of law (paragraph 61)		£45,000
Total	£112,770	£58,000

COST ON THE SCOTTISH ADMINISTRATION

Additional Support Needs Tribunals for Scotland

62. The main on-going direct cost to the Scottish Government associated with the 2004 Act and the Bill will be the Additional Support Needs Tribunals for Scotland (the Tribunal), which the Scottish Government directly funds.

63. The Tribunal hears and decides appeals made by parents against the decisions or failures of education authorities about co-ordinated support plans. Reference to the Tribunal may also be made regarding the refusal of a placing request in certain circumstances. The Tribunal's statutory functions, decisions and dealings with its users and the public are independent of government, national and local.

64. In the original Financial Memorandum that accompanied the 2004 Act, it was estimated that there would be around 300 appeals per annum to the Tribunal and that the cost of running the Tribunal in 2003/04 would be £760,000 per annum. This figure included staffing, members' fees and expenses, training, travel, accommodation and central service overheads.

65. The actual annual cost of running the Tribunal since the commencement of the 2004 Act has been 2003/2004=£453,000; 2004/2005=£680,000; 2005/2006=£843,000 (this included £150,000 for the purchase and set up of a records management system); 2006/2007=£541,000; and 2007/2008=£402,000. The cost of running the Tribunal in 2008/2009 is expected to be around £542,000.

66. As at 25 July 2008, the total number of appeals received since the commencement of the 2004 Act is 141, broken down as follows: 2005/06 = 2; 2006/07 = 42; 2007/08 = 76; 08/09 = 21.

67. It is expected that the overall changes contained in this Bill will generate an increase of no more than 12 to 18 references to the Tribunal per annum (16% to 24%) The estimated cost of a Tribunal hearing ranges between £1,250 and £8,200. Using the mid ranges of 15 references and a cost of £4,725 per hearing, this will result in an increase in cost to the Tribunal of **£70,875**. However, it should be noted that the Tribunal should be able to deal with any increase in the number of appeals as part of its day to day work.

68. The Tribunal has estimated that the new paper based expedited process will cut the Tribunal cost of a paper based hearing from £1050 per case to £310 – a 70% savings. As detailed in the third annual report of the President of the Tribunal, 10 references were decided by paper based process i.e. without the need for an oral hearing. Saving the Tribunal **£7,400** (10 x (1050- 310)).

69. The Bill will not require the appointment of any additional Tribunal staff, members or conveners

70. However, it is useful to note that if the changes contained in this Bill were to generate any increase in the running costs of the Tribunal, these additional costs could be contained within the current portfolio budget.

TOTAL ESTIMATED COST TO THE SCOTTISH ADMINISTRATION:

	Increase in cost	Saving
20% increase in the number of cases referred to the Tribunal	£70,875	
Introduction of a new paper based Tribunal expedited process		£7,400

Scottish Court Service

71. Currently a small number of cases a year go to the Sheriff Court or Court of Session and this number is likely to be reduced as a result of this Bill. Due to the small number of cases involved, the considerable variability of the individual cases in terms of length of case and resources required, it has not been possible for the Scottish Court Service to estimate the likely savings to the courts as a result of fewer cases. However, as there have been fewer than 11 cases per annum (in 2007 there were 5 placing request appeals referred to the sheriff in respect of all pupils in Scotland, plus 5 Tribunal decisions referred to the Court of Session on a point of law as detailed in the President of the Tribunal's annual report), the potential savings will be low and will not impact on the operation of the Courts.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Parents

72. Cost implications of the Bill for individuals rest primarily with parents. There are no duties placed on parents that will result in them having to incur additional costs. Appeals to the Tribunal

may be supported by legal representation if the parent wishes, but the Tribunals are intended to be a family-friendly process where legal representation will not be a necessity. Parents may also wish to seek their own legal advice and may wish to obtain independent assessments and reports of their child. These are optional costs that exist at present and are not a result of the Bill.

73. The Bill will enable the Tribunal to review, vary or revoke its decisions. It is anticipated that this provision will only be used where the Tribunal considers it appropriate to review its decision based on a point of law. This could result in fewer cases being referred to the Court of Session on a point of law and as a result, create a possible saving for parents who will no longer be required to secure legal representation to handle their case.

Other bodies and businesses

74. The Bill has no direct cost impact on businesses, charities or voluntary bodies. Therefore, there was no need for a Regulatory Impact Assessment to be completed. Independent schools have no new obligations placed on them by the Bill.

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

75. On 6 October 2008, the Cabinet Secretary for Education and Lifelong Learning (Fiona Hyslop MSP) made the following statement:

“In my view, the provisions of the Education (Additional Support for Learning) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

76. On 2 October 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Education (Additional Support for Learning) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

These documents relate to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

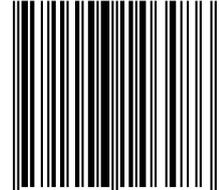
EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

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