

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Education (Additional Support for Learning) (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 6 October 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 16–EN.

POLICY OBJECTIVES OF THE BILL

2. The Bill is an important step in the work of the Scottish Government to strengthen, as well as clarifying, the ability of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) to deliver its original policy intention, that intention being to provide for any need that requires additional support for the child or young person to learn.

3. The Bill will:

- permit parents of children with additional support needs and young people with additional support needs, including those with co-ordinated support plans (CSPs), to make out of area placing requests.
- following the refusal of an out of area placing request, enable a parent or young person to appeal the decision to refuse the request to the Tribunal.
- following the submission of an out of area placing request, enable a parent or young person to access mediation from the potential host authority regarding the placing request.
- following a successful out of area placing request, enable a parent or a young person 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 a area placing request, prevent 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).

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- where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, transfer responsibility for the child's or young person's education and carrying out all of the duties under the 2004 Act.
- 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, provide for responsibility for the school education of the child or young person to remain with the authority for the area to which the child belongs.
- permit 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.
- extend 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.
- extend the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the EAs.
- enable 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.
- clarify the definition of "a child or young person for whose school education an education authority are responsible".

CONSULTATION

4. A consultation paper, Education (Additional Support for Learning) (Scotland) Act 2004 – Amendment Bill 2008 was published on 9 May 2008 and included a draft of the Bill. Just under 4500 copies of the consultation paper were distributed, including to every school in Scotland; Scottish education authorities; public bodies; education organisations; equality organisations; health boards; and other interested parties. The document was made available on the Scottish Government's website at <http://www.scotland.gov.uk/Publications/2008/05/08135938/0>. The document was also publicised in the "Moving Forward" newsletter produced on behalf of the Scottish Government by Children in Scotland, which is circulated to approximately 10,000 professionals.

5. A total of 9 consultation events were held throughout Scotland and attended by a total of 428 professionals and parents.

6. The views of young people on the current system were sought online on the ENQUIRE web site.

7. The consultation period ran for 6 weeks from 9 May to 19 June. Late responses were accepted and in total 165 responses were received.

8. The Minister for Children and Early Years met with COSLA and key stakeholders – Scotland's Commissioner for Children and Young People, the Equality and Human Rights

Commission (EHRC), Barnardo's Scotland, Children in Scotland, National Deaf Children's Society, the Independent Specialist Education Advice (ISEA) and the Govan Law Centre on 20 May at the Scottish Parliament to discuss the proposed amendments. Officials also met on 14 May with representatives of For Scotland's Disabled Children – Capability Scotland, National Autistic Society, Downs Syndrome Scotland.

9. The report on the consultation exercise findings can be found on the Scottish Government's website at <http://www.scotland.gov.uk/Publications/2008/09/22111340/0>.

10. Most respondents were very supportive of the proposals with 77% being positive towards the proposals overall, 8% negative and 15% neutral. 89% of respondents provided additional comments on the individual proposals. Less than half of respondents were from the broad education sector (38%), less than half from individuals (23%) and a few health related stakeholders (8%). Of the 32 local authorities in Scotland, 23 responded to the consultation.

11. The key findings to emerge were that amongst the key stakeholders (a group comprising the Association of Directors of Education in Scotland (ADES), the Association of Directors of Social Work (ADSW), Educational Institute of Scotland (EIS), the President of the Tribunal, Govan Law Centre, the Scottish Consumer Council, Scotland's Commissioner for Children and Young People, Independent Special Education Advice (ISEA) and Learning Teaching Scotland (LTS)) there was little variation in the views expressed. All of these stakeholders provided additional comments on the proposals. The views expressed centred on the complexity of the appeal routes, information provision for parents, the issue of legal capacity and the interpretation of the term "significant" in relation to CSPs.

12. Most responses returned (defined as being between 75% and 90%) were in favour of making the proposed amendments contained in the consultation paper. The exceptions to this were:

- Question 7 – Access to mediation and dispute resolution via the host EA and;
- Question 13 –
 - Introduce a criminal offence punishable by a fine for anyone in breach of a restricted reporting order.
 - Enable enforcement of an award of expenses as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff court.

13. In both these cases, only the majority (defined as being between 50% and 74%) were in favour of the proposal.

14. One of the most pertinent implications from the consultation responses was the potentially adverse impact on parental rights of introducing a penalty for the breaching of a restricted reporting order as laid out in Q13 of the consultation. While on the one hand respondents were generally in favour of the proposed amendment, many qualified this position. However, a number of key stakeholders such as the President of the Additional Support Needs Tribunal (ASNT), who herself consulted all appointed members of the ASNT, was not in favour of the proposed amendment. It is instructive that this position is reflected in the views expressed by; ISEA (the main advocacy service in Scotland for parents making referrals to the ASNT); the

Equalities and Human Rights Commission; and a number of local authorities. Others such as Children in Scotland and Scotland's Commissioner for Children and Young People are uncertain about the implications and in the Commissioner's case adopts the position of deferring to "the opinions of those more intimately involved in using the system". As a result of having the issues contained in these responses brought to our attention, the decision was made not to implement the amendments proposed by this question.

15. The Bill as published in the consultation document proposed to insert two new paragraphs into section 18(4) of the 2004 Act. The first of these, which would have inserted a new paragraph (ba), has now been reconsidered in light of a response from an education authority that correctly highlighted the practical problem that would arise from the proposal.

16. As the only party involved at the stage referred to in that paragraph would be the parent the only practicable way to ensure that the requirements of paragraph (ba) were fulfilled would be to place a duty upon the parent or young person to inform the host authority about any request for an assessment for a CSP. Since the aim of the amendments proposed by question 5 are intended to extend parental rights, placing additional duties upon them was not considered to be a desirable outcome and the decision was made to drop paragraph (ba) from the Bill. The dropping of the paragraph (ba) that appeared in the consultation paper does not affect the policy intention of the Bill. As a consequence of this decision, there is still a paragraph (ba) in the Bill. However, it should be noted that paragraph (ba) was originally paragraph (bb) in the Bill that was published with the consultation document.

POLICY OBJECTIVES

Extension of the Tribunal's jurisdiction

17. Lady Dorrian's Court of Session ruling (see paragraph 9 of the Explanatory Notes) 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: a CSP has been prepared (and not discontinued) for the child or young person; 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 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.

18. The Bill amends the 2004 Act to allow the Tribunal to have jurisdiction to consider any placing request appeal where a CSP is being prepared or is being considered, whether directed to the home or host authority, at any time before final determination by the EAC or Sherriff, for example where the education authority is in the process of establishing whether a CSP is required. The amended legislation will also facilitate a transfer of a referral to the EAC or sheriff.

Out of area placing requests

19. A request was made on behalf of a child with additional support needs who lived in West Dunbartonshire to attend a school under Glasgow City Council's management (*WD v Glasgow*

City Council 2007 SLT 1057). Glasgow declined the placing request on the grounds of complying with the Standards in Scotland's Schools etc. Act 2000 which provides for the presumption of mainstreaming. West Dunbartonshire Council were in the process of preparing a CSP when the request was refused.

20. The parent of the child then submitted a reference to the Tribunal appealing Glasgow's decision. The decision of the Tribunal was that it had no jurisdiction to consider an appeal against Glasgow City Council's refusal to grant an out of area placing request. The case was subsequently referred to the Court of Session where Lord Macphail 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, regarding the submission of a placing request to any education authority who were not responsible for the child's education, or for a reference to the Tribunal of a refusal by such an authority of such a request.

21. As a result of the above, the Bill amends the legislation to allow young people with additional support needs and parents of children with additional support needs (including those with a CSP) to make out of area placing requests thereby providing them with the same rights, in respect of making out of area placing requests, as parents of children without additional support needs. Additionally, the Bill will allow the refusal of such a request to be referred to the Tribunal.

Access to mediation and dispute resolution following an out of area placing request

22. Currently where an out of area placing request has been granted in relation to a child or young person, the home authority would be required to provide mediation or dispute resolution between the parent and the host authority at the home authority's expense. Therefore, the costs of these services would be provided by an authority which at that point is not responsible for the child's school education.

23. The 2004 Act will be amended to require the host authority to provide access to mediation and dispute resolution in circumstances where the host authority has accepted an out of area placing request and is, therefore, responsible for the education of the child, and access to mediation regarding the placing request in circumstances where an out of area placing request has been submitted.

24. As the provision in question will be provided by the host authority, the Bill will amend section 23(2) of the Education Scotland Act 1980 to reflect the fact that the cost of providing any mediation or dispute resolution services will not be recoverable from the home authority. The reason for this is that the parents or young person would request mediation or dispute resolution in relation to the provision provided by, or a decision of, the host authority.

Review of a CSP following an out of area placing request

25. The 2004 Act states that every education authority must keep under consideration the adequacy of any CSP prepared (and not discontinued) for any children or young persons belonging to their area. Therefore, under the current legislation, where a child or young person has been granted an out of area placing request and has a CSP, the home authority would be

responsible for reviewing the CSP, even though at that stage, the home authority would have no responsibility for that child's school education.

26. Therefore the Bill will amend the 2004 Act to provide that, following the granting of an out of area placing request, the host authority assumes responsibility for duties in relation to reviewing the CSP, and that such a review should be conducted as soon as reasonably practicable by the host authority. The host authority will therefore assume all responsibility for the child's education by accepting a placing request. This transfer of responsibility will take place at the time the child starts at the school in the host authority.

Responsibility for a child's education

27. Where arrangements are made between two authorities as to a child being educated in an authority school which is not the authority for the area to which the child belongs, then in all circumstances the 2004 Act was based on the understanding that the "home" authority was to remain the responsible authority.

28. However Lord Brailsford's recent Court of Session ruling concerning a child who was being educated at home, stated that being responsible was down to the degree of control (*B v Highland Council* 2007 SLT 844).

29. Therefore, it was important to ensure that where arrangements are made between two authorities, the home authority remains the authority with responsibility for the child's education, the concept on which a number of Scotland's Education Acts are based. The Bill will therefore ensure that where arrangements are made or entered into by an education authority in respect of the school education of a child or young person with another education authority, the authority responsible for that school education is the authority for the area to which the child or young person belongs (regardless of whether or not the school in which the education is being, or about to be, provided is under the management of that authority).

30. Conversely where a parent or young person makes an out of authority placing request directly to another education authority, they, if that placing request is accepted by them, assume responsibility for the child or young persons education.

References to the Tribunal regarding failures of the education authority

31. Where a parent or young person requests the education authority to establish whether a CSP is required, the "*supporting children's learning code of practice*" states that the authority should notify the person making the request of its decision as quickly as possible but certainly no later than 4 weeks from when the request was received.

32. Where an education authority has issued its proposal to establish whether a CSP is required, the code of practice states that it is expected that an education authority will have reached a decision and notified the parent or young person no later than 4 weeks after informing the parent or young person of the proposal, unless it would be impracticable to do so. The 2004 Act does not currently allow for:

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- cases to be sent to the Tribunal where the parent or young person requests the authority to establish whether a CSP is required and the education authority fails to acknowledge his/her request.
- cases to be sent to the Tribunal where the education authority has issued a proposal to establish whether a CSP is required but has not taken a decision either way.

33. It has been brought to the Scottish Government's attention that a number of parents have been faced with these situations but have been unable, under the current legislative framework, to refer the matter to the Tribunal. Therefore, the Bill amends the 2004 Act to allow the situations described above to be referred to the Tribunal, with timescales being described in The Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005: <http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050518.htm>, which will be amended in due course. The Bill will introduce the following education authority procedural timescale failures:

- where the education authority, having received a request to establish whether a CSP is required, has failed to respond to the parent's or young person's request; and
- where the education authority, having indicated their intention to do so, have failed to establish whether a CSP is required.

Expedite those references in which an education authority has failed to meet a relevant timescales

34. A reference can be made to the Tribunal where it has been determined that a child or young person requires a CSP but the education authority has failed to prepare one within the appropriate timescales.

35. However, experience has shown that these references have not, so far, been opposed or subject to any dispute whatsoever on the facts. It may therefore be inappropriate that they follow the same procedure as other types of reference where careful fact finding may be necessary. It is in the interests of parties that a decision is made quickly to ensure that the local authority does not wait until just before the notified date of a hearing to indicate that its opposition has been withdrawn incurring wasteful expenses in the interim.

36. Therefore, we propose to expedite references by the introduction of a documents only Tribunal procedure for references in which authorities fail to meet statutory timescales. The Bill will enable referrals of this nature to be considered by a convener sitting alone.

The Tribunal to be given the power to review its decisions

37. As framed, the 2004 Act does not currently allow for the Tribunal to review its decisions, therefore the only way in which a decision can be legally challenged is by a referral to the Court of Session on a point of law with attendant costs.

38. It is therefore intended that the Tribunal should be given the power to review its decisions, and revoke and vary its orders and awards, in such circumstances as may be determined in accordance with the regulations. It is considered appropriate for provision to be made for the Tribunal which made a particular decision to consider whether or not it should be

reviewed, although we also intend to permit a newly convened Tribunal to review a decision at the Tribunal President's discretion.

ALTERNATIVE APPROACHES

39. On 1 November 2007 the First Minister stated in Parliament that it was the Scottish Government's intention to ensure that parents of children with additional support needs are able to make placing requests to schools outwith their local authority area. A prime aim of this Bill is to ensure consistent treatment for those with additional support needs in terms of access to out of area placing requests as those without additional support needs. The alternative is to require such requests to be made via the home authority, however this would place this group of parents on a different footing from others who are free to make out of area placing requests. Another alternative is to do nothing thereby ensuring an inequality of opportunity.

40. As explained in paragraphs 15 and 16 above, the decision was made to drop paragraph (ba) that appeared in the draft Bill as published in the consultation document.

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

Human rights

41. The Scottish Government is committed to promoting equality of opportunity for all and we are satisfied that the provisions of this Bill are compatible with, and enhance human rights. The provisions in the Bill touch on human rights specifically in respect to Article 26(2) of the United Nations Universal Declaration of Human Rights of 1948 which states that "Education shall be directed to the full development of the human personality..." In addition, the Charter of Fundamental Rights of the European Union states in Article 24(2) that: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

42. The measures contained in the Bill will improve the support available to children and young people with additional support needs across all Scottish communities.

Island communities

43. Rurality is obviously a factor in the provision of specialised services. The Bill will have however no specific effect on island communities, as it applies equally to all communities in Scotland. National minimum standards for provision are detailed in a Code of Practice, and the provisions in the Bill will be reflected in a revised "*supporting children's learning code of practice*". The 2004 Act was designed to be responsive to local structures and systems and the Bill will not dilute this objective.

Local government

44. It is difficult to estimate the full implications of the Bill for local authorities. All authorities are already implementing the 2004 Act and the Bill will therefore not impose

substantial additional costs as the existing system is not being changed to any significant degree. The costs involved are detailed in the Financial Memorandum.

Sustainable development

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

Equal opportunities

46. The provisions of the Bill are not discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation. The Bill makes a positive statement about extending parental rights and the rights of young people with a view to increasing equality of opportunity.

Race equality impact assessment

47. Children and young people from ethnic communities can have additional support needs as a result of having English as an additional language. As such the 2004 Act already recognises this as a factor that can give rise to additional support needs and as such, it is not an issue that will be affected by the provisions of the Bill. This policy should not impact differently on different ethnic and racial groups and it is not considered that the Bill will have an adverse impact on any particular group.

Age

48. This is an education Bill and will be relevant to those under 18 years of age who are receiving an education for which an education authority is responsible.

Disability

49. The definition of disability set out in the Disability Discrimination Act 1995 (DDA) states that a person has a disability...if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day-to-day activities.

50. The definition of additional support needs by the 2004 Act provides for a broad framework of factors to be taken into account in assessing additional support needs. The vast majority of children and young people who are disabled will be covered by the 2004 Act. In effect, the proposed provisions in the 2008 Bill will strengthen their rights under this legislation.

Gender

51. It is not considered that the Bill will have an adverse impact on issues related to gender.

Lesbian, gay, bisexual & transgender

52. Children and young people who suffer from homophobic incidents can have additional support needs. As such the 2004 Act already recognises this as a factor that can give rise to additional support needs and as such, it is not an issue that will be affected by the provisions of the Bill.

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Monitoring

53. HMIE will report on the impact of the amended 2004 Act on children and young people with additional support needs as part of the inspection process to ensure that, in practice, the policy meets, and continues to meet, the needs of all pupils.

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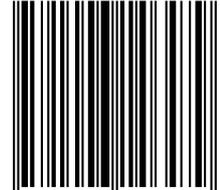
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