

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL 2008

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This briefing looks at the changes to additional support needs legislation proposed in the Education (Additional Support for Learning) (Scotland) Bill 2008 (the Bill) introduced to the Parliament on 6 October.

The Bill makes technical changes to the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act). For background on the additional support for learning system see [SPICe Briefing 08/46](#) (Georghiou and Kidner 2008).

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CONTENTS

KEY POINTS	3
INTRODUCTION	4
EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) ACT 2004	4
OUT OF AREA PLACING REQUESTS	5
PLACING REQUESTS AND THE 2004 ACT.....	5
ENABLING OUT OF AREA PLACING REQUESTS.....	6
<i>Views from the Consultation</i>	6
APPEALING OUT OF AREA PLACING REQUESTS	8
<i>Views from the Consultation</i>	8
MEDIATION AND DISPUTE RESOLUTION.....	8
<i>Views from the Consultation</i>	9
RESPONSIBILITY FOR THE CSP	9
<i>Views from the Consultation</i>	10
FUNDING ISSUES REGARDING OUT OF AREA PLACING REQUESTS.....	11
LOCAL AUTHORITY PLACEMENTS.....	12
ADDITIONAL SUPPORT NEEDS TRIBUNAL	12
GROUNDS FOR REFERRAL TO THE TRIBUNAL	13
<i>Current grounds for referral</i>	13
<i>Proposed additions to the grounds for referral</i>	13
TRANSFER OF CASES FROM THE TRIBUNAL TO THE EAC OR SHERIFF	16
<i>Current Provisions</i>	16
<i>Proposed Additions</i>	16
<i>Choice of placing request appeal route</i>	17
COMMENTS IN CONSULTATION ON THE ABOVE PROPOSALS	17
<i>Simplification</i>	17
<i>Jurisdiction</i>	17
<i>Why the Tribunal?</i>	18
<i>'Contriving' a CSP</i>	19
<i>Removing 'request' ground</i>	19
<i>Delay</i>	19
<i>New Grounds for Referral to ASNT: missed deadlines</i>	20
RULES OF PROCEDURE	20
<i>Timescales</i>	20
<i>Review</i>	21
<i>Enforcement</i>	21
OTHER ISSUES	21
SUPPORT OUTWITH A TEACHING ENVIRONMENT	21
DEFINITION OF 'SIGNIFICANT'	21
FIT WITH OTHER POLICY AREAS	22
AGE	22
FINANCIAL MEMORANDUM	23
ANNEX 1: EFFECT OF AMENDMENTS	24
ANNEX 2: GLOSSARY	25

KEY POINTS

- The main proposal of the Bill is to allow parents of children with additional support needs, including those with co-ordinated support plans (CSPs) to make out of area placing requests. This brings the legislation into line with the original policy intention of the 2004 Act.
- The Bill does not propose any major changes to the way the Additional Support Needs system is intended to work.
- An out of area placing request is a request made by a parent to a local authority other than the one in which they live. The request is for their child to attend a school in this other authority (the 'host authority') rather than one in the authority where they live (the 'home authority').
- Where a CSP has been prepared or is being considered by the home authority, a decision to refuse an out of area placing request will be appealable to the Additional Support Needs Tribunal (the Tribunal).
- Host authorities will be required to provide mediation and dispute resolution services to parents who have made a successful out of area placing request (currently they are required to use mediation and dispute resolution from the home authority).
- The host authority will assume responsibility for a child's education, including the CSP, by accepting an out of area placing request. The Bill requires the CSP to be reviewed as soon as is practicable by the host authority.
- The Bill adds new grounds for taking appeals to the Additional Support Needs Tribunal. These are if the education authority misses statutory deadlines either for answering a request to assess whether a child needs a CSP or for establishing whether a CSP is required. Cases that only concern missed deadlines will be heard by the Convener sitting alone.
- The Tribunal is given power to review its own decisions.
- The Bill makes changes to how placing requests are appealed. The intention is that if there is a CSP issue involved, then any placing request appeal will be heard by the Tribunal.
- The consultation exercise sought comments on any other issues not addressed by the Bill. Respondents raised concerns on a number of issues including, resource allocation between local authorities, the definition of 'significant' in the criteria for a CSP, and the age at which various parts of the legislation applies to children and young people. Many of these issues will be addressed in a revised 'Support for Children's Learning Code of Practice' that will be consulted upon at some point next year.
- One of the key themes in the consultation responses was that the system is very complex.
- The wide definition of ASN means that placing requests for children with ASN can sometimes involve very complex issues about the type of provision required, or can be relatively straightforward if the child's ASN can easily be accommodated in most schools.

INTRODUCTION

The Education (Additional Support for Learning) (Scotland) Bill (the Bill) makes a number of technical changes to the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act), mainly in order to give better effect to the original policy intention. The Bill does not seek to make any general policy changes to the way the Additional Support for Learning system was intended to operate. Reviews of the Act's implementation and a number of Court of Session opinions found certain areas where the 2004 Act was not working as intended. In particular, the Court of Session found that out of area placing requests could not be made for children with Co-ordinated Support Plans (CSPs) and there was a strong inference that this extended to all those with additional support needs (ASN). The Bill proposes to allow such requests. It also proposes changes to the way the Education Appeals Committee (EAC) and the Additional Support Needs Tribunal (the Tribunal) interact. The detail of the way in which the Bill changes the 2004 Act is set out in Annex 1.

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) ACT 2004

The 2004 Act provides for the assessment and provision of support to children with additional support needs (ASN). A child with ASN includes any child who, for whatever reason, requires additional support for their education. The 2004 Act sets out the duties which local authorities and other agencies have as well as the rights of parents and young people. It provides for a statutory plan (CSP), an appeals system and placing requests. Parents and young people can appeal to the Tribunal and make placing requests¹. A transition period for implementation ran from 2005 to November 2007 during which time all children with a Record of Needs had to be assessed for a CSP.

Her Majesty's Inspectorate of Education (HMIe) published a review of implementation in November 2007 which raised a number of issues. Key findings included inconsistent approaches by different local authorities, the need to provide better information to children and parents and the low number of CSPs. More positively, HMIe found many examples of good practice in which authorities used multi-agency approaches to identify and meet the needs of children and families. They made recommendations for improved practice which cover: the need for guidance, training, better transition pathways, the local authority duty as corporate parent, better communication with children and parents, and the need to plan services around the individual.

In addition, there have been a number of Court of Session cases which have focused on statutory interpretation:

- Gordon v Argyll and Bute Council ([2007 CSOH 45](#)) considered the transfer of references between an EAC and a Tribunal. Lady Dorrian.
- JT v Stirling Council ([2007 CSIH 52](#)) considered the definition of 'significant' in the criteria for a CSP. Lord Nimmo Smith.

¹ In this briefing references to parents includes young people, who have the same rights on their own behalf. A young person has the same meaning as under the Education (Scotland) Act 1980 which is a person over school age (generally over 15) who is not yet 18 years of age and receiving school education.

- *WD v Glasgow City Council* ([2007 CSIH 72](#)) found that out of area placing requests could not be made for children with a CSP. There was a strong inference that out of area placing requests could not be made for any children with ASN. Lord Macphail.
- *SC v. Edinburgh City Council* ([2008 CSOH 60](#)) considered the definition of 'additional support'. Lord Wheatley.
- *B v Highland Council* ([2007 CSOH 126](#)) found that a local authority's responsibility for a child's education relates to the degree of control which the authority has over that education. Lord Brailsford.

Some of the above issues are addressed in the Bill while others will be taken forward through general policy work and changes to the Code of Practice. Further background on the 2004 legislation and ASN generally can be found in Georghiou (2003) and Georghiou and Kidner (2008).

OUT OF AREA PLACING REQUESTS

A parent may wish to send their child to a school in a different local authority area to the one in which they live. This is referred to as an 'out of area' placing request. In this situation, the local authority where the child lives is referred to as the 'home' authority, and the other local authority providing education is referred to as the 'host' authority.

It was the original policy intention of the 2004 Act that all parents of a child with ASN would be able to make placing requests to their home authority or to a host authority. However, this policy intention was called into question by Lord Macphail's Court of Session ruling (*WD v Glasgow City Council* ([2007 CSIH 72](#))) which held that the 2004 Act does not allow out of area placing requests for children with additional support needs who require a CSP, or for a reference to be made to the Tribunal in such situations. There was a strong inference that this ruling extended to all children with additional support needs.

Consequential to allowing out of area placing requests, the Bill also makes provision for:

- the host authority to provide mediation and dispute resolution
- the host authority to review the CSP.

Respondents to the Scottish Government's consultation on proposed amendments (Scottish Government 2008a) raised concerns about which authority is responsible for funding ASN provision following out of area placing requests. Funding was not addressed in the 2004 Act and is not addressed in the Bill, but this issue is discussed below at p.11.

PLACING REQUESTS AND THE 2004 ACT

Parents can submit a 'placing request' to their local authority if they wish to send their child to a different school to the one which is being offered by the authority. General provisions for placing requests are set out in the Education (Scotland) Act 1980 (the 1980 Act), however, if a child has ASN, Schedule 2 of the 2004 Act applies instead. The provisions of both require education authorities to comply with such requests, except in certain circumstances.

Parents of a child with ASN can make a request for their child to attend a special school (public or independent), as well as a mainstream school (Schedule 2 Para 2 (1) and (2)). Where a placing request is made to an independent special school, or to a school elsewhere in the UK,

the application is to the home authority and the home education authority must meet the fees and costs.

An education authority can refuse a placing request on the grounds listed in Schedule 2 Para 3 (1). Grounds for refusal include:

- if granting the placing request would be in breach of the presumption for mainstream education (required by Section 15 of the Standards in Scotland's Schools etc. Act 2000)
- if granting the placing request would result in unreasonable public expenditure
- if the placing request is for an independent special school, but the education authority can make provision for the child in another school in terms of suitability and with regard to cost.

Education authorities have the power to accept placing requests, even where there are grounds for refusal, this at their discretion (Schedule 2 Para 3 (2)).

ENABLING OUT OF AREA PLACING REQUESTS

The Court of Session case (*WD v Glasgow City Council* ([2007 CSIH 72](#))) concerned a parent making a placing request to Glasgow City Council for their child who had a CSP, living in West Dunbartonshire, to attend a local authority run special school in Glasgow. Glasgow City Council refused the request on the grounds that it went against the presumption of mainstreaming.

The parent appealed the refusal to the Tribunal, but the Tribunal said it did not have the jurisdiction to consider the reference. At the Court of Session Lord Macphail made the following judgement:

“In our opinion, accordingly, the 2004 Act does not make and should not be construed as making any provision, in respect of a child with additional support needs who requires a CSP, for the making of a placing request to any education authority who are not responsible for the child’s school education, or for a reference to the Tribunal of a refusal by such an authority of such a request.”

So, not only did the 2004 Act not provide for out of area placing requests, it is not possible for a parent to appeal a decision by a potential host authority when it refuses the placing request.

The Bill aims to amend this by allowing parents of children with ASN, including those with a CSP, to make out of area placing requests. At s.1(8) the Bill gives host authorities a duty to comply with placing requests by adding a new Schedule 2 paragraph 2(5) to the 2004 Act. This specifies that the duty to comply with a placing request includes education authorities which are not responsible for the child’s education.

Views from the Consultation

The Scottish Government consultation asked whether parents of children with ASN, with or without a CSP, should have the same rights in respect of making out of area placing requests as parents of children without ASN (Scottish Government 2008a). Respondents indicated a high level of support for this, 87% were in favour (Scottish Government 2008b). There was a general sense that the original intention was to ensure the rights of parents of children with ASN to make out of area placing requests, and that amending this would resolve the anomaly identified by Lord Macphail.

The National Autistic Society Scotland (NASS) indicated why there is a need to ensure entitlement to make out of area placing requests:

“..many children with autism cannot access suitable placements to meet their needs in their local area and so are forced to look outwith their education authority. NAS research revealed that 46% of children were not in the kind of school their parents think would best support them. Over half the parents we surveyed felt that they had no choice over the type of setting in which their child is educated, and that their choice was limited by a lack of appropriate placements in their local area.” (Scottish Government 2008c)

Three local authorities suggested a different approach (Edinburgh City Council, Stirling Council, and Argyll and Bute Council in Scottish Government 2008c). They argued that the process for out of area placing requests could be the same as the process for placing requests to independent special schools. In this instance, parents would submit a placing request to the home authority, ‘which would be responsible for establishing whether it could agree the request or considered that there were statutory grounds for refusal’ (Edinburgh). A ground for refusing a placing request to independent special schools is that the education authority can make provision for the child in another school. The home authority would remain responsible for costs and arrangements of dispute resolution. Any appeals would be based on the home authority’s decision to refuse a placing request.

A number of local authorities expressed strong reservations regarding the proposed lack of involvement for home authorities in the decision making process of out of area placing requests. This is of particular concern because there is a legislative presumption that a request will be granted and there is an ability to recover costs from the home authority. For example, Argyll and Bute Council argued:

“The host authority can only deal with the placing request on the basis that it should be granted unless one of the statutory exemptions is met. The effect is that the home education authority has no say in how its money is spent.” (Scottish Government 2008c)

While agreeing that the rights of children and parents need to be safeguarded, Falkirk Council argued that there needs to be recognition of the financial burden on home authorities as a result of out of area placing requests:

“This is particularly the case when the placing request is based solely on a parental preference, and not on the ability of the home authority to meet the needs of the pupil within the home authority.” (Scottish Government 2008c)

Some respondents expressed the view that well resourced authorities may receive more placing requests from parents in authorities which are less well resourced (Dundee Council, One Parent Families Scotland and Association of Directors of Social Work – ADSW in Scottish Government 2008c), or that it will make it more difficult for host authorities to plan future resources based on the demographic make up of the authority, and potentially might require further management and regulation (ADSW).

APPEALING OUT OF AREA PLACING REQUESTS

As indicated above, Lord Macphail ruled that according to the 2004 Act it is not possible to appeal a decision by a potential host authority when it refuses the placing request. To amend this, the Bill allows that where there is both a placing request and a CSP issue any education authority can be taken to the Tribunal not just the home authority. It does this by specifying in that the decision of refusing a placing request includes a decision of a local authority which is not responsible for the child's education (Section 1(6)(a)(iii) of the Bill amending s.18(3)(e) of the 2004 Act.).

Views from the Consultation

Most respondents (81%) supported the proposal to allow appeals against a host authority's refusal of a placing request to go to the Tribunal, where a CSP is involved (Scottish Government 2008b).

However, some concerns were raised. Dundee Council, Glasgow City Council, East Renfrewshire Council and ADSW indicated that host authorities may not have access to full information on the nature and extent of the child's existing needs on which to base their decision. It was argued that grounds for refusal may be made on incomplete information and that 'an authority has no right of appeal if a placement [placing request] is granted based on misinformation or miscalculation' (ADSW). East Renfrewshire Council suggested that a duty should be placed on local authorities to supply such information.

A few respondents questioned whether the host or home authority will be the respondent where an appeal is made to the Tribunal (for example, Dundee Council and ADSW in Scottish Government 2008c). The Tribunal President argued that there should be an enabling provision to convene two authorities to one reference in this instance. However, as it is the host authority's decision to refuse the placing request that is subject to an appeal, the host authority will be the respondent.

MEDIATION AND DISPUTE RESOLUTION

Section 15 of the 2004 Act provides for independent mediation services to be provided by education authorities in order to avoid or resolve disagreements. Section 16 of the 2004 Act enables Scottish Ministers, by regulations, to require education authorities to put in place procedures to resolve disputes². Dispute resolution is carried out by an independent adjudicator who considers the case and makes recommendations to both parties. However, both these provisions only apply to those belonging to the area of the authority. Therefore, where an out of area placing request has been granted, the home authority is required to provide mediation/dispute resolution between the parent and the host authority. Sections 2 and 3 of the Bill, respectively, amend this by removing the requirement for the child to belong to the authority's area. Therefore, if there is a dispute between the parent and the host authority, it is the host authority which will provide mediation and dispute resolution.

Section 23 of the 1980 Act provides that where a child is being educated in a host authority, the host authority may claim costs for the provision from the home authority, including for ASN. Costs are therefore met by the home authority, so an education authority which is not

² Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005/501

responsible for the child's education and not party to the issues will be paying the costs. Section 4 of the Bill amends the 1980 Act to prevent the host authority from recovering costs of mediation or dispute resolution from the home authority.

Views from the Consultation

77% of respondents to the consultation agreed that the host authority should be responsible for the provision of mediation and dispute resolution (18% did not answer), while 62% agreed that the host should cover the costs of the provision (22% did not answer) (Scottish Government 2008b). The majority of local authorities responding to the consultation agreed with these changes, as did the Association of Directors of Education in Scotland (ADES) and ADSW. Of respondents who made comments, there was a general view that these changes make logical sense.

Despite being in favour of the changes, some respondents expressed concerns that the additional cost to host authorities may result in fewer out of area placing requests being accepted (Govan Law Centre, NASS, Children's Commissioner, Autism Rights, Enable), Independent Specialist Education Advice (ISEA) stated:

“...a host authority would take this additional cost into consideration in their determination of out of authority placing requests, thus placing these children and young people at a disadvantage compared with children and young people who have made a placing request and belong to that authority area. This could raise an equality issue.” (Scottish Government 2008c)

RESPONSIBILITY FOR THE CSP

One major element of responsibility for education is responsibility for the CSP. This was previously reviewed by the home authority but the Bill provides that it will be the authority responsible for the child's education that will review the CSP³. Where there is an out of area placing request, responsibility for education transfers to the host authority and therefore so will the CSP. The CSP will have to be reviewed 'as soon as practicable after the date of transfer'⁴ and regulations will specify how the transfer of the CSP will take place⁵. The policy memorandum states that:

“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” (paragraph 26)

Currently, the host authority alters the nominated school on the CSP when the placing request is accepted (Schedule 2, para 4(2)). In *WD v. Glasgow*, Lord Macphail, in discussing why out of area placing requests were not possible, said that:

³ section 1(4) amending s.10(1).

⁴ section 1(4)(b) of the Bill inserting new s.10(5A) to the 2004 Act.

⁵ section 1(4) inserting new section 10(5A) and s.1(5) amending s.11(8)(e)).

“The matter appears to us to be placed beyond doubt by the terms of paragraph 4(2). It provides that on complying with a placing request relating to a child for whom a CSP has been prepared, “an education authority must modify accordingly the nomination in the plan of a school to be attended by the child.” That can only mean that the authority who complies with the request is the authority who modifies the CSP. An out of area authority cannot modify the CSP because it remains the responsibility of the home authority who prepared it.” (paragraph 65)

In addition to making the host authority responsible for reviewing the CSP, the Bill therefore proposes adding paragraph 4(2A) to Schedule 2 to the effect that on complying with a placing request the host authority is not required to alter the named school. This might have the consequence that the CSP is not updated to reflect the placing request until the review that occurs following the child starting school.

Views from the Consultation

The consultation asked whether, following an accepted out of area placing request, the host authority should assume responsibility for the CSP, and conduct a review ‘immediately’. It also asked whether the best time for the transfer of education authority responsibility is when the child starts at the new school (Scottish Government 2008a).

Most respondents agreed with the questions (77% in both cases), but a number of issues were raised. Firstly there was a view that as a consequence of the host authority assuming responsibility for the CSP fewer out of area placing requests may be accepted (ISEA and Children’s Commissioner in Scottish Government 2008c).

Some respondents expressed concerns regarding which authority has responsibility for education and potential consequences of the host assuming responsibility. For example, Falkirk Council disagreed that the host authority should gain all responsibility for the CSP because they feel that home authorities could be subject to ‘repercussions of a decision made by another authority.’ A concern was that local authorities currently use different criteria to open a CSP and this may lead to different opinions about the support required. This may in turn lead to disputes between local authorities about paying for support. Scottish Borders Council took this view further by stating:

“We feel that there needs to be a formal mechanism for disputes between home/host authorities to alleviate the potential for difficulties arising from differences of opinion about the criteria for CSPs. Input of professional time has not been taken into account in this proposal.” (Scottish Government 2008c)

A number of respondents commented on the proposal for host authorities to conduct a review of the CSP ‘immediately’, suggesting that it should take place once the child is settled in the new school and should consider whether a review has been recently conducted (for example, Stirling Council, Highland Council and NHS Highland, West Dunbartonshire Council, Children in Scotland, Falkirk Council and ADES). However, the draft Bill proposed that the review be conducted ‘as soon as is practicable after the date of transfer’ (s 1(3)(b)). This reflects the general opinion of respondents in terms of when a review should be conducted, and the Bill as introduced keeps the provision. The timescales for reviewing the CSP will be clarified in secondary legislation.

A number of respondents commented on the need for effective transition planning before a child starts at a new school (Govan Law Centre, Dundee Council, Children's Commissioner, NASS, Aberdeen Council). The Tribunal President argued that:

"The responsibility for the review of any plan or additional support in place before the change of school would facilitate a smoother transition. The review may not be able to be completed until the child has actually moved school but the process of the review should be commenced earlier." (Scottish Government 2008c)

NASS felt that the transfer of responsibility for reviewing the CSP will be confusing for parents in terms of understanding who is responsible for their child's education, 'there must be clear accountability between home and host authorities and there must be clear routes of appeal for parents'. Enable were concerned about maintaining co-ordination between different agencies, especially those from the home authority who provide support through health or social work services:

"Firstly, a CSP requires multi agency cooperation. This means that the home authority may remain responsible for certain services. For example, social work and community care. In addition, other agencies such as health boards might be involved. Careful consideration needs to be given to how such a review would operate." (Scottish Government 2008c)

FUNDING ISSUES REGARDING OUT OF AREA PLACING REQUESTS

Under Section 23 of the 1980 Act a host authority can request financial support from the home authority. This is a matter for local authorities to agree between themselves. If an agreement cannot be reached then Scottish Ministers can determine the recovery of costs from one authority to another, but this is not legally binding. If, for example, a home authority does not adhere to the determination of Scottish Ministers, then it would be possible for the host authority to consider taking legal action to recover costs. As discussed above, the Bill amends this in relation to mediation and dispute resolution, to ensure that the host authority covers the costs of these services.

A number of local authorities (Stirling Council, Aberdeen City Council, West Dunbartonshire Council, and Perth and Kinross Council in Scottish Government 2008c) expressed concern that the proposals do not stipulate who should be responsible for funding ASN provision where an out of area placing request has been accepted, particularly given that under the Bill's proposals home authorities will no longer be responsible for reviewing the CSP.

"...authorities have no responsibility but are effectively asked to write a blank cheque to the host authority." (Aberdeen City Council in Scottish Government 2008c)

There were also concerns that requirements on home authorities to fund provision in such instances could impact on funding provision within their own area:

"The issue arises when there is no reason for the host authority to refuse a place but the home authority considers it has adequate or better provision and refuses rightly to consider payment as paying these costs to another authority could reduce the capacity

within the home authority to provide resources for its own provisions or take their out of authority payments even further into the red.” (Stirling Council in Scottish Government 2008c)

Perth and Kinross Council argued for a national agreement on costs for inter-authority payments to resolve this problem.

Autism Rights shared similar concerns regarding costs, with an implication of the potential negative impact on the child and their education:

“What, for instance, will the situation be if the host authority decides that provision will need to include additional specialist supports that the home authority is not willing to pay for?” (Scottish Government 2008c)

Additionally, a few local authorities questioned whether the home or host authority will be responsible for other costs such as clothing grants, transport and free school meals (Glasgow City Council, Dundee Council, and West Dunbartonshire Council in Scottish Government 2008c).

LOCAL AUTHORITY PLACEMENTS

Currently, arrangements may be made between two authorities for a child living in one area to attend a school in another local authority area. This is not the same as submitting an out of area placing request. It was the intention of the 2004 Act that in such instances, the home authority would remain responsible for the child’s education.

However, Lord Brailsford’s Court of Session ruling (2007 CSOH 126) stated that if a particular authority controlled the education of the child, then that authority was responsible within the terms of Section 29(3) of the 2004 Act. The Bill aims to ensure that where a home authority has arranged for a child to attend a school in a host authority, that the home authority remains responsible for the child’s education. Section 5 of the Bill does this by amending Section 29 (3) of the 2004 Act to provide that where such arrangements are made between authorities, it will always be the authority for the area to which the child belongs that is the responsible authority.

This amendment will clarify that where a decision to place a child in a school in a different authority to where they live has been made by the home authority, it is the home authority which remains responsible for their education.

ADDITIONAL SUPPORT NEEDS TRIBUNAL

This section considers the proposed changes to the Tribunal.

Any case involving a CSP

There are two new grounds for appeal to the Tribunal relating to missed deadlines by a local authority. These are: firstly, when a local authority doesn’t respond to a request for a CSP within the required timescales; and secondly, when a local authority fails to prepare a CSP within the required timescale.

The Bill also proposes allowing for new rules of procedure so that the Tribunal can review its own decisions, and, where the issue is only about missed timescales, the Convener can take a case on his or her own.

Appealing a placing request decision to the Tribunal

The Bill proposes a new ground for appeal to the Tribunal when a placing request is involved. That is, if the local authority has agreed to establish whether a CSP is required, then any placing request issue will be heard by the Tribunal, not the EAC. The Bill also seeks to ensure that the host authority can be taken to the Tribunal.

Transferring placing request appeals to and from the Tribunal

The Bill proposes new grounds for transferring placing requests from the EAC or Sheriff to a Tribunal when a CSP issue arises. It also proposes new grounds for transferring placing requests to the EAC or Sheriff when a CSP issue disappears.

GROUNDINGS FOR REFERRAL TO THE TRIBUNAL

Current grounds for referral

Section 18 of the 2004 Act sets out grounds on which parents and young people can make references to the Tribunal. These are:

- the local authority decides whether or not a child or young person requires a CSP. s.18(3)(a) and (b) (including refusing a request to establish whether a CSP is required s.18(5))
- the local authority fails to prepare a CSP within the required timescales s.18(3)(c)
- the parents disagree with information in the plan s.18(3)(d)(i)
- the local authority fails to review the plan s.18(3)(d)(ii)
- the local authority fails to complete the review within the required timescales s.18(3)(d)(iii)
- the local authority refuses a request to carry out a review of a CSP s.18(3)(d)(iv)
- certain cases involving placing requests: s.18(3)(e)
 - where at the time the placing request is refused s.18(4)
 - there is a current CSP s.18(4)(a)
 - it is agreed that a CSP is required s.18(4)(b)
 - the refusal of a CSP is being appealed s.18(4)(c)
 - if the placing request is already at an EAC then it must be transferred to the Tribunal if there is an appeal against a refusal of a CSP (Schedule 2)
 - if the placing request is already at the Sheriff then it must be transferred to the Tribunal if there is an appeal against a refusal of a CSP (Schedule 2)

Proposed additions to the grounds for referral

Additions are proposed relating to: timescales, a local authority proposal to establish whether a CSP is required and to the circumstances in which a case must transfer from the EAC or Sheriff to the Tribunal.

Timescales

At section 6, the Bill adds the following new grounds for taking a case to the Tribunal:

- the local authority fails, within the required timescale, to say whether they will comply with a request to establish whether a CSP is required. New s.18(5A).
- the local authority fails to prepare a CSP within the required timescale. New s.18(5B).

The timescales are to be set by regulations under s.11(8)(f)(i) of the 2004 Act. The current regulations ([The Additional support for Learning \(Co-ordinated Support Plan\) \(Scotland\) Amendment Regulations 2005. SSI 2005/518](#)) allow 16 weeks from a *request to establish* whether CSP is required to handing over a copy of the plan (regulation 4) with a possible extension to a maximum of 24 weeks in certain circumstances (regulation 7). In addition, the Code of Practice requires that a CSP assessment should be completed within four weeks (paragraphs 4.32 to 4.42 in Scottish Executive 2005).

If the local authority misses the deadlines it would be considered as a refusal to provide a CSP i.e a deemed refusal. A refusal to provide a CSP can be appealed to the Tribunal. Therefore, if, as well as appealing to the Tribunal about missed deadlines on the CSP a parent or young person has also put in a placing request, any appeal about the placing request will be heard by the Tribunal, not the EAC. This is because there is a 'deemed refusal' to provide a CSP.

Placing Requests

Currently, an appeal about a placing request will generally be heard by an EAC unless, 'at the time' the request was refused, certain CSP issues existed, in which case it will be heard by the Tribunal. In *Gordon v. Argyll and Bute Council* [2007] CSOH 45, two days before an EAC about a placing request refusal, the Council proposed to establish a CSP and moved the appeal to the Tribunal. However, it was found that the parent should have been allowed to continue at the EAC because on the date of the refusal of the placing request there had not been a decision about the CSP from the local authority. The fact that a local authority subsequently proposed to prepare a CSP did not allow the appeal to go to the Tribunal.

The Bill seeks to remedy this by allowing appeals to be transferred from the EAC/Sheriff to the Tribunal where certain CSP issues arise at any time during the course of an appeal. This is intended to ensure that where a CSP issue is involved, the placing request is dealt with by the Tribunal. In summary:

- If certain CSP issues arise while the case is at the **EAC** – then it must be transferred to the Tribunal. If these CSP issues then disappear, then it can be transferred back to the EAC.
- If certain CSP issues arise in the 28 days following an EAC decision, then any subsequent appeal can be heard by the Tribunal. If the CSP issues disappear, the placing request issue is still decided by the Tribunal.
- If certain CSP issues arise while the case is at the **Sheriff** - then it must be transferred to the Tribunal. If the CSP issues disappear, then it can be transferred back.

The current and proposed new grounds relating to placing requests are summarised in the table overleaf:

Table 1: Grounds on which a placing request appeal will go to the Tribunal

This table shows the grounds on which a placing request appeal will go to the Tribunal. The first column shows grounds for referral. The new ground proposed in the Bill is in bold. The second column shows where these grounds are provided for in the Act. If one of these grounds is met a placing request issue will go straight to the Tribunal.

The remaining columns show where, if the placing request appeal is already in progress at the EAC or Sheriff, it will have to transfer to the Tribunal because a ground for referral to the Tribunal arises. For example, if it is agreed that a CSP is required, (1st column, 2nd row) the Bill proposes that any placing request appeal which is at the EAC must transfer to the Tribunal (3rd column, 2nd row). The references are to the relevant sections of the 2004 Act. References in bold show amendments made to that Act by the Bill.

<i>Ground for referral: The placing request appeal will be heard by the Tribunal because:</i>	<i>Initial referral is to Tribunal</i>	<i>Appeal is at the EAC, but must transfer to Tribunal because a ground for referral arises</i>	<i>In 28 days after EAC decision a ground for referral arises</i>	<i>Appeal is at sheriff, but must transfer to Tribunal because a ground for referral arises</i>
A CSP exists/is created	18(4)(a)	Sch 2 para 6(4) and 6(5) with 18(4)(a)	18(3)(f) with 18(4)(a)	Sch 2 para 7(8) and 7(9) with 18(4)(a)
Local authority agreed that CSP is required	18(4)(b)	Sch 2 para 6(4) and 6(5) with 18(4)(b)	18(3)(f) with 18(4)(b)	Sch 2 para 7(8) and 7(9) with 18(4)(b)
Local authority agree to establish if CSP required	18(4)(ba)	Sch 2 para 6 (4) and 6(5) with 18(4)(ba)	18(3)(f) with 18(4)(ba)	Sch 2 para 7(8) and 7(9) with 18(4)(ba)
Parents/young person has appealed the refusal of CSP to the Tribunal	18(4)(c)	Sch 2 para 6(4) and 6(5) with 18(4)(c)	18(3)(f) with 18(4)(c)	Sch 2 para 7(8) and 7(9) with 18(4)(c)

n.b A refusal of a CSP includes: refusal to comply with a request for a CSP assessment s.18(5) and local authority failure to meet certain timescales. Proposed s.18(5A) and 5(B). These create 'deemed refusals' which can therefore be appealed to the Tribunal under s.18(4)(c).

In the Bill, the changes highlighted in bold are made by s.1(6)(b) and (c) and s.1(8)(c) and (d).

TRANSFER OF CASES FROM THE TRIBUNAL TO THE EAC OR SHERIFF

Table 1 above details the circumstances when a case must transfer from the EAC or Sheriff to the Tribunal. There is also provision for cases to transfer back the other way – from the Tribunal to the EAC or Sheriff.

Current Provisions

In relation to a placing request the Tribunal can:

- agree with the local authority, if a ground for refusing the placing request exists,
- overturn the local authority's decision, place the child in the school requested and make the required changes to the CSP, or
- transfer the case to the EAC. It can only do this if the placing request appeal came to the Tribunal because while it was being appealed to the EAC the parents also started an appeal at the Tribunal against a refusal of a CSP. If the Tribunal confirm that no CSP is required, the placing request issue transfers back to the EAC.

Proposed Additions

The table below sets out when a Tribunal can send a case to the EAC or the Sheriff. The first column gives the amended section in the 2004 Act, the second and third columns set out the reasons why the case is at the Tribunal. The fourth and fifth columns set out the reasons why it would get transferred to the EAC or Sheriff. All except s.19(5)(c) are proposed additions. (LA = Local Authority).

Table 2: Transfer of placing request appeals from Tribunal to EAC or Sheriff

Amended section	The case is at the Tribunal because:		The case moves to the EAC or Sheriff because:	
	section	meaning	condition	Moves
s.19(5)	section	meaning	condition	Moves
19(5)ba	18 (4)(ba)	LA informed parents that they intended to establish whether child requires a CSP.	LA decide no CSP required, not appealed	Refer to EAC
19(5)c	18 (4)(c)	<i>LA decided the child did not require a CSP, and the parents have appealed.</i>	<i>Tribunal confirm no CSP required</i>	<i>Refer to EAC</i>
19(5)d	Sch 2 paras 6(4) and 6(5) because 18 (4)(ba) occurred	After the case went to EAC but before a decision was reached, the LA informed the parents that they intended to establish whether child requires a CSP	LA decide no CSP required, parents do not appeal	Refer back to EAC
19(5)e	Sch 2 paras 6(4) and 6(5) because 18 (4)(c) occurred	After the case went to EAC but before a decision was reached, LA decided the child did not require a CSP, and the parents appealed	Tribunal confirm no CSP required	Refer back to EAC
19(5)f	Sch 2 paras 7(8) and 7(9) because 18 (4)(ba) occurred	After the case went to the Sheriff but before a decision was reached, the LA informed the parents that they intended to establish whether child requires a CSP	LA decide no CSP required, parents do not appeal	Refer back to Sheriff
19(5)g	Sch 2 paras 7(8) and 7(9) because 18 (4)(c) occurred	After the case went to Sheriff but before a decision was reached, LA decided the child did not require a CSP, and the parents appealed	Tribunal confirm no CSP required	Refer back to Sheriff

These changes are made by s.1(7) of the Bill which amends section 19(5) of the 2004 Act. While moves from the EAC or Sheriff to the Tribunal are compulsory, moves back are at the discretion of the Tribunal.

Choice of placing request appeal route

Provisions which constrain the choice of placing request appeal route are:

- an appeal cannot be made to the EAC, if the case can be considered by the Tribunal (Schedule 2, para 5(2)).
- an appeal cannot be made to the Sheriff, if the case can be considered by the Tribunal. (Schedule 2 para 7(1A)). This is a new proposal made by s.1(8)(d)(ii) of the Bill.

Therefore if any of the conditions in Table 1 apply, the parent must go to the Tribunal.

COMMENTS IN CONSULTATION ON THE ABOVE PROPOSALS

The interaction between the EAC and the Tribunal has been described as complex and confusing (Govan Law Centre in Scottish Government 2008c). However, in general, respondents to the consultation were positive about the Government's proposed amendments. Most favoured allowing placing request appeals to be transferred to the Tribunal 'at any time' during an appeal. Most favoured introducing the new appeal grounds on failure to meet timescales, and allowing the Tribunal to review its own decisions (Scottish Government 2008b). The consultation had originally proposed that the Tribunal should be allowed to enforce reporting mechanisms and awards for expenses (Scottish Government 2008a). While 67% agreed with the proposal, there were some concerns raised and these proposals have been dropped from the Bill (Scottish Government 2008b).

Simplification

A key theme in the consultation responses was the need for simplification (for example: Tribunal President, Govan Law Centre, Children's Commissioner and NASS in Scottish Government 2008c). The Children's Commissioner stated that:

"the existence of two parallel appeal routes is likely to make the process difficult to understand. If it cannot be explained in a simple enough way for people who are meant to use them, then the conclusion must be reached that it is too complex for its purpose and it should be reconsidered." (Scottish Government 2008c)

Jurisdiction

There were varying views on the jurisdiction of the Tribunal. ISEA felt that it should be extended to cover all children with ASN, whether or not a CSP was an issue. However, the Tribunal President pointed out that ASN vary from minor, transitory need to very complex, enduring needs. However, the Tribunal President did have some concerns about criteria for referral. She stressed that because the key criterion for a CSP was the need for co-ordination between agencies rather than the complexity of the child's difficulties, then referral to the Tribunal becomes based on the administrative organisation of local authorities rather than the nature of additional support required. She suggested therefore that a condition relating to the type of school requested would provide more consistency.

Falkirk Council suggested that everything should be dealt with by one body: "otherwise we have the potential for the appellant simply to move on to the next body if they are unhappy with the answer which has been given." Stirling Council thought that it would be worth considering

whether either all ASN placing requests should go to the Tribunal or none should. On the other hand, East Renfrewshire Council considered that extending the jurisdiction of the Tribunal might undermine local authority procedures. West Lothian Council thought that it would be preferable that one appeal route should be exhausted before another can start.

The Govan Law Centre and the Tribunal President made their own proposals for Tribunal jurisdiction. The Tribunal President suggested that the Tribunal should have jurisdiction for placing request appeals if the request is for a child with additional support needs to go to:

- any special school
- any independent school
- any host authority where the issue is its ability to meet the child's ASN
- any school where there is a CSP existing, in preparation or where this can be determined by the Tribunal.

The Tribunal President also suggested that a placing request appeal ought to be transferred from the Sheriff to the Tribunal where there is an issue about the content of a CSP or where timescales are not met. She also suggested that once an appeal has moved to a Tribunal it should stay there and not move back.

The Govan Law Centre suggested that placing requests should be dealt with by the Tribunal where a CSP exists or definitely will exist and where EAC feel issues are too complex. Like the Tribunal President, they also suggest that once transferred the reference should stay with Tribunal. However, they disagree that appeals should be able to be transferred from the Sheriff to the Tribunal – only from an EAC.

Why the Tribunal?

The different views on jurisdiction raise the issue of why the Tribunal is seen by many to be preferable to EACs. Children in Scotland mentioned independence and others referred to expertise. There was concern about the level of knowledge which EACs had of ASN issues. Submissions recognised the need for CSP issues to be dealt with by a body with the appropriate knowledge, (for example, Dundee Council, Argyll and Bute Council, Aberdeen Council and East Renfrewshire Council in Scottish Government 2008c). Some suggested that EACs lacked the level of knowledge required, (for example Govan Law Centre and the Tribunal President in Scottish Government 2008c). The Tribunal President stated that:

“there is anecdotal evidence that EACs find placing requests in respect of children with additional support needs a highly specialised process for which they seldom have the appropriate knowledge.” (Scottish Government 2008c)

A key issue is that the wide definition of ASN means that placing requests for children with ASN can sometimes involve very complex issues about the type of provision required, or can be relatively straightforward if the child's ASN can easily be accommodated in most schools.

West Dunbartonshire Council considered that by introducing the Tribunal as “some kind of gold standard” parents may see the EAC as second best. Stirling Council's response noted that the Tribunal is already seen as a preferred route, but that this:

“leads to unnecessary conflict and argument about a CSP when the only agenda item is the placing request. [This] Already gives the CSP a status/currency which is not helpful and [is] a source of unnecessary angst for both parents and authority as the CSP hurdle has to be overcome first.”

'Contriving' a CSP

As a result of perceptions about the Tribunal's status, some local authorities were concerned that parents may raise a CSP issue simply in order to come within the jurisdiction of the Tribunal and not because they really thought their child needed a CSP (for example, Edinburgh City Council, Stirling Council and Aberdeen City Council in Scottish Government 2008c). Edinburgh Council stated that:

"The sense of fair play and the integrity of the wider admission and appeals process would be further under-mined in the event or even suspicion that some parents may seek to gain advantage over others by 'contriving' to meet the grounds that 'a CSP is involved or being considered' whilst the matter is still in process."

In the consultation analysis the Government stated that:

"in light of the concerns raised about frivolous claims being made to avoid the normal routes of appeal through the Education Appeals Committee or Sheriff, the legislation will also provide that cases can be transferred from an ASNTS [Tribunal] back to the Education Appeal Committee or sheriff if it is decided that no CSP is required". (Scottish Government 2008b)

In response to this, and concerns about parallel appeal routes, the Bill as introduced added the following provisions which were not in the draft Bill:

- a number of circumstances were added to those in which the Tribunal can refer cases to the EAC or sheriff (see Table 2 above on s.19(5)).
- cases which can go to the Tribunal cannot be appealed to the Sheriff. (New Sch 1, para 7 (1A)).

Removing 'request' ground

The consultation on the Bill had suggested that one ground for referral would be that the parent had asked the local authority to establish whether a CSP was needed (Scottish Government 2008a). This request would be to the home authority. However, if the parents also put in a placing request to another authority, the appeal route for that placing request would be changed because of the CSP request. The parents would have to know that they needed to inform the potential host authority that a CSP had been requested and the appeal route for the placing request would be to the Tribunal not the EAC.

The Bill as introduced does not contain this provision. The Bill does however propose that placing request appeals relating to the host authority will go to the Tribunal if the home local authority has agreed to establish whether a CSP is required (i.e there is a definite proposal to assess rather than just a request to assess). The Government stated in the consultation analysis that the proposal letter to the parents will explain that the parent or young person should notify any potential host authority that an assessment for a CSP is currently being considered (Scottish Government 2008b).

Delay

A number of submissions referred to delays which can be caused because cases move between the EAC and the Tribunal, (for example Govan Law Centre, the Tribunal President, Falkirk Council and Stirling Council in Scottish Government 2008c). A case could start at an EAC, move to the Tribunal when a CSP issue arises, then move back again if the Tribunal decides that there is no CSP issue. Falkirk Council referred to the possibility of cases taking more than two years by the time they have gone through all the appeals. Stirling Council

referred to a case which took a year. Dundee Council made the point that the EAC process is more straightforward than the Tribunal and that placing requests usually peak in April and May (in time for the next school term). The Council wondered whether the Tribunal would be able to manage the increased demand. Aberdeen City Council pointed out that the CSP process is longer (16 weeks) than the placing request process (8 weeks). West Dunbartonshire Council pointed out that local authorities have 28 days to respond to a placing request, but where there is ASN or CSP the decision might be quite complex and require in depth information about the child's support needs.

There were a number of suggestions made to reduce potential delays. These included:

1. setting time limits (Children's Commissioner)
2. giving the sheriff discretion whether to transfer to the Tribunal (PAMIS⁶)
3. setting a cut off point for the transfer of cases (Govan Law Centre/ISEA)

New Grounds for Referral to ASNT: missed deadlines

As mentioned, the Bill proposes two new grounds for referral to the Tribunal to do with missed deadlines. These are that, within the required timescales, the local authority fails to acknowledge a request for a CSP or fails to establish whether CSP is required.

Some organisations queried whether issues about missed deadlines should be heard by the Tribunal at all. Dundee Council worried that it might encourage an adversarial approach. On the other hand, Barnardo's was of the view that it would allow for redress for parents in a more accessible way. Glasgow City Council, Stirling Council, Falkirk Council and ADSW all referred to local resolution such as internal local authority procedures.

RULES OF PROCEDURE

The Bill proposes some additions to the rules which can be made for the Tribunal. In the 2004 Act, Schedule 1 paragraph 11 provides a long list of matters which can be specified in Tribunal rules. From (a) to (t) these cover such issues as the ability to take proceedings in private and the ability to impose reporting restrictions. Section 7 of the Bill makes some additions to this list. These are:

- cases about failure to meet timescales to be dealt with by the Convener alone
- enabling a Tribunal to review, vary or revoke its decisions
- enabling a Tribunal to review the decisions, orders or awards of another Tribunal.

Timescales

The Tribunal President proposed that the 2004 Act be amended to allow the Convener to decide cases about missed deadlines on their own. This has been included in the Bill. She also made a number of other suggestions for changes to the Tribunal rules. A couple of organisations were concerned that the Tribunal might not be the best place to deal with missed deadlines particularly if the remedy was to issue a further deadline, which could lead to further delays. The Govan Law Centre and National Deaf Children's Society suggested a power to refer the matter to Scottish Ministers analogous to s.137 of the Antisocial Behaviour etc. (Scotland) Act 2004.

⁶ Promoting a More Inclusive Society

Review

75% agreed with the proposal that the Tribunal be able to review its decisions, for example, the Children's Commissioner referred to the similar power of SENDIST Tribunals in England and Wales.⁷ However, there were some concerns raised. The Govan Law Centre: "would have grave concerns with a power to review in relation to new evidence" which would "lead to uncertainty, and potentially unfairness (as authorities would be more able to access fresh reports, assessments etc)."

Enforcement

In the consultation the Government had proposed that breaching a reporting restriction should be a criminal offence and that orders for expenses should be able to be enforced (Scottish Government 2008a). These proposals received a significant number of negative comments and have been dropped from the Bill as introduced. The Tribunal President noted that only one reporting restriction order has been made to date and there is no similar power in similar Tribunals in England and Wales. Generally, the Tribunal President felt that little would be gained by forcing someone to pay a fine. To date there have been no awards of expenses made and none sought. The Tribunal President was concerned that even the remote possibility of being required to pay expenses might deter parents from coming forward.

OTHER ISSUES

Consultation responses raised a number of issues about the ASN system as a whole. These are not dealt with by the Bill but some of the main issues raised are outlined briefly below. One major theme was the complexity of the current system. For example, Govan Law Centre stated that:

"the ASNTS, [Tribunals] associated procedure and applicable education law seems to be getting more and more complex. As an over-arching principle, we should strive to make the law as simple and accessible as possible at all times. [...] The level of detail and complexity in this field of law is in danger of becoming beyond the reach of most people. In the longer term, this may require a more radical approach, aimed at the simplification of the whole additional support for learning framework."

SUPPORT OUTWITH A TEACHING ENVIRONMENT

There was concern about the implications of *SC v. City of Edinburgh Council* [2008] CSOH 60. The Children's Commissioner summarised this case as: "making a clear distinction between the educational support a child needed in a 'teaching environment' and the social and environmental needs of a child and of the parents who cared for the child." The Commissioner and others raised the point that this needed to be examined in the light of broadly framed policy which envisages a more holistic approach.

DEFINITION OF 'SIGNIFICANT'

The criteria for a CSP includes that a child's needs arise from complex or multiple factors which require 'significant additional support' beyond educational support. Many organisations have said that they find it difficult to interpret what is meant by 'significant'. This issue was also highlighted in the HMle report (HMle 2007). In their consultation response on the Bill, ISEA described it as "the most contentious issue within the legislation." The organisation referred to variation in interpretation between local authorities and suggested that difficulties often arise in

⁷ Special Educational Needs and Disability Tribunal

relation to the way in which resource requirements from other agencies are assessed. They and the Children's Commissioner suggested that the threshold used by health boards for 'significant' is often too high. ISEA "believe that the word significant is the main reason why so few children and young people in Scotland have a CSP" and recommend that the word is removed.

FIT WITH OTHER POLICY AREAS

A number of consultation responses raised concerns about the extent to which the ASN system integrates with other areas of policy and legislation. The particular areas mentioned were Getting it right for every child (GIRFEC) and looked after children. For example, Highland Council, which has been a pathfinder area for GIRFEC said that:

"The aspiration of the single, multi-agency plan document being developed with the GIRFEC pathfinder is that for children who receive a significant level of multi-agency service there will be a single, multi agency plan. This is clearly not consistent with the ASL legislation which requires a discreet CSP, following a legally specified format. This inconsistency threatens the progress of a key aspect of the GIRFEC pathfinder, is confusing to parents and carers within the GIRFEC pathfinder area, and requires legislative change. It is disappointing that the appropriateness of this change does not appear to have been accepted within the Scottish Government."

The Tribunal President raised the need for the system to fit better with the Children's Hearings system. Potentially, a child could have additional support needs because they are 'looked after'. This was an area also raised in the HMle report (HMle 2007). Where a looked after child has a CSP the local authority will have duties to prepare plans under both the Children (Scotland) Act 1995 and the 2004 Act.

Generally, if a looked after child attends a school in a different local authority this will have been arranged by the home authority. The home authority will therefore retain responsibility for the child's education. However, potentially there could be a parental out of area placing request for a looked after child. This would result in different local authorities having responsibility for the social work support and education support. As with issues about resources and decisions about placing requests, there is a need for collaboration to ensure that all the child's needs are met under both education and social work legislation.

There is provision in the 2004 Act at s.23 that, when asked, other 'appropriate agencies' are required to help a local authority discharge its functions under the 2004 Act. 'Appropriate agencies' include local authorities, health boards and anyone named in regulations. Therefore, under s.23 a host authority could ask a home authority to help discharge its duties under the 2004 Act and vice versa. Section 23 also provides that a local authority must exercise any of its functions if these help them meet their duties under the 2004 Act. Therefore the 2004 Act requires a local authority to exercise its social work functions (for example) if by doing so, this helps meet its duties towards children with additional support needs.

AGE

There were some suggestions relating to the age at which the legislation applied to young people. The 2004 Act applies to young people up to the age of 18. However, the Children's Commissioner pointed out that many young people with ASN remain at school after the age of 18 years, and so ought to be covered by the Act. The Children's Commissioner also proposed

allowing children under 16 to take appeals to the Tribunal in order to be more consistent with UNCRC⁸ and the Age of Legal Capacity (Scotland) Act 1991.

FINANCIAL MEMORANDUM

The Bill provides for out of area placing requests. However, as it was not generally realised until Lord Macphail’s ruling that these were not possible, such requests have been happening in practice. This suggests that the financial impact of this amendment will be minimal. The main issues about resourcing ASN provision are not dealt with by this Bill. There are concerns about the cost of making provision for ASN and difficulties around the ability of the host authority to recover costs from the home authority (see p.11 above). However, this Bill does not change the current arrangements. More likely to have financial implications is the widening jurisdiction of the Tribunal.

The costs of appeals vary with an appeal to an EAC being the cheapest.

Table 3: Costs of appeals

	Minimum	Maximum	Average
EAC	£350	£4,800	£2,000
ASNT	£500	£18,000	£5,000
Sheriff Court	£2,700	£25,000	£9,000
Court of Session (Local authority cost)	£9,000	£28,000	£14,000

Financial Memorandum paragraphs 46-7, 61.

The Bill will result in appeals that would have been heard by the EAC being dealt with by the Tribunal. It increases the potential for transferring appeals between different bodies. It also creates some new grounds for appeal. The financial memorandum estimates that the number of cases involved will be very small, primarily because the number of CSPs is very low and so is the proportion of the total pupil population which makes appeals about placing requests.

Overall it is estimated that there will be 12 to 18 extra cases to the Tribunal. Costs are estimated at £112,770 to local authorities and £70,875 to the Tribunal. Savings are estimated at £58,000 to the local authorities and £7,400 to the Tribunal. The net cost would be c. £55,000 to local authorities and c. £63,000 to the Tribunal creating a total net cost of c. £118,000. Factors that might increase costs include:

- if the number of CSPs were to increase from the current 1,881 to the 11,200 to 13,700 originally expected
- if parents of children with ASN make placing requests and appeals at a higher rate than the general population
- if the number of cases on missed timescales is more than 4 to 8 cases per year
- if allowing the Tribunal to review its own decisions does not reduce appeals to the Court of Session.
- if transfer between different appeal bodies becomes more common and this increases the time spent on cases.

⁸ United Nations Convention on the Rights of the Child

ANNEX 1: EFFECT OF AMENDMENTS

2008 Bill section	Changes 2004 Act section	Effect
s.1 (2)	1(3)(a)	Definition of ASN. Alters the definition of additional support needs so that it refers to the education authority responsible for the education of the child, rather than just the home authority. Relates to the ability to make out of area placing requests.
s.1(3)	7(1)(b)	Power to respond to request for CSP. Originally, local authorities not responsible for child's education could respond to a request for a CSP. eg a child educated at home, an independent school or in another local authority. Now can only do so if there is no education authority responsible for the child's education. eg educated at home or at an independent school.
s.1(4)	10(1) new 10(5A)	Reviews of CSPs. The local authority with responsibility for reviewing the CSP is the one responsible for the child's education rather than the one where the child lives. New s.5A Regulations to provide for review of CSP when it is transferred to another authority.
s1(5)	11(8)(e)	Reviews of CSPs. Alters the regulation making powers so they refer to any transfer of CSP, rather than only when the child moves authority. Links to new s.10(5A) above.
s.1(6)	<u>Section 18</u> 18(3)(e), new 18(3)(f), new 18(4)(ba) 18(4),	Appeals on placing requests. Allows the Tribunal to deal with any authority other than home authority. s.18(3)(e). Adds two new grounds for referral to the Tribunal (new (3)(f) and new (4)(ba)). Deletes the requirement that references to the Tribunal can be only be made if certain CSP issues arise by the date the placing request is refused. i.e allows the Tribunal to take an appeal if a CSP issue arises at any time. s.18(4).
s.1(7)	<u>Section 19</u> new s.19(5)(ba), (d), (e), (f), (g) new s.19(5A)	Appeals on placing requests. New grounds for the Tribunal to transfer a case to/back to EAC or Sheriff.
s.1(8)	<u>Schedule 2:</u> new 2(5) new 4(2A) 6(1) 6(4) 7(1) 7(8) new 7(1A)	Placing requests and appeals. Places a duty to comply with a placing request onto local authorities who are not responsible for the child's education. i.e allows out of area requests. para 2(5) On complying with a placing request a host authority is not required to alter the nominated school on the CSP. para 4(2A) Adds new grounds for transferring a case from EAC or sheriff to the Tribunal. Paras 6 and 7) Cannot appeal to Sheriff if the case can go to the Tribunal. Para 7
s.2	s.15(1)	Mediation Mediation arrangements regarding local authority functions under 2004 Act to be made in relation to any children – not just those belonging to the authority.
s.3	s.16(1)	Dispute Resolution. Through regulations, local authorities can be given duties to establish dispute resolution for any parent or child – not just those belonging to the local authority area.
s.5	new s.29(3A)	Placements made by local authority. Adds to the interpretation section that where the out of area placement is made by the home authority (rather than the parents), the home authority remains responsible for the child's education.
s.6	new s.18(5A) new s.18(5B)	Appeals. Adds new grounds for referral to Tribunal relating to missed deadlines.
s. 7	<u>Schedule</u> <u>1(11)(2):</u> new sub-para (ka), (u) and (v)	Appeals. Adds new areas on which Tribunal Rules can be made. Tribunal can review its decisions and Convener can sit alone on cases relating only to missed deadlines.

In addition, section 4 of the Bill proposes amending s.23 of the 1980 Act to the effect that host authorities cannot reclaim the cost of mediation and dispute resolution costs from the home authority.

ANNEX 2: GLOSSARY

ASN	Additional Support Needs. The definition of additional support needs is very wide, including any child who, for whatever reason needs additional support in order that they benefit from education.
ASNT	Additional Support Needs Tribunal. Established by the 2004 Act to deal with complaints relating to CSPs.
CSP	Co-ordinated Support Plan. A statutory plan introduced by the 2004 Act. There are certain criteria which must be met for a child to get a CSP.
EAC	Education Appeals Committee. Established under s.28D of the 1980 Act, these deal with placing requests and school exclusions. Decisions can be appealed to the Sheriff Court. Members are nominated by the local authority. It is not a Committee of the authority but operates under the Scottish Committee of the Council of Tribunals.
GIRFEC	Getting it right for every child is a policy programme that seeks to ensure that every child gets the help they need when they need it. A key theme is better integrated assessment, planning and delivery of support.
Home Authority	In a placing request, the authority where the child lives is the home authority and the authority where they attend school is the host authority.
Host Authority	Where, as a result of a placing request, a child attends school in a local authority where they do not live, the local authority where that school is, is known as the host authority.
IEP	Individualised Education Programme. These are not statutory, but are recommended in the 2005 Code of Practice.
Independent Adjudication	Independent adjudication was introduced by the 2004 Act and is a formal review by someone independent of the education authority.
Looked After	Children who are 'Looked after' under the Children (Scotland) Act 1995 are either accommodated by the local authority (e.g. through foster care or in a children's home) or are living with their parents, but are subject to a court order or supervision order from a Children's Hearing.
Mediation	Mediation is a non-judicial way to resolve disagreements. An independent, trained mediator will be present and parents can have a supporter with them.
Out of area placing request	Where a parent makes a placing request for their child to attend a school in a local authority where they do not live.
Placement	A placement is the end result of either a successful placing request or an arrangement made between two local authorities for a child to attend a school in an area they do not live.
Placing Request	Parents who wish their child to attend a school other than the one offered by the local authority can request this by using a 'placing request'. Placing requests for children with ASN are made under Schedule 2 of the 2004 Act.
Presumption of Mainstreaming	Since 2003 there has been a statutory presumption that children will be educated in mainstream schools. This is provided for in Section 15 of the Standards in Scotland's Schools etc Act 2000.
RoN	Record of Needs. A statement of the support required by children with special educational needs. The system has been replaced by the 2004 Act.
SEN	Special Educational Needs. The term was introduced by the Warnock Report of 1978, which identified the children likely to need special education provision.

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Consultation responses referred to in the text are:

- [Aberdeen City Council](#)
- [Argyll and Bute Council](#)
- [Association of the Directors of Education \(ADES\)](#)
- [Association of the Directors of Social Work \(ADSW\)](#)
- [Autism Rights](#)
- [Barnardo's](#)
- [Children in Scotland](#)
- [Dundee City Council Education Department and Partners](#)
- [East Renfrewshire Council](#)
- [Edinburgh City Council](#)
- [Enable](#)
- [Falkirk Council](#)
- [Govan Law Centre](#)
- [Glasgow City Council Director of Education](#)
- [Highland Council and NHS](#)
- [ISEA](#)
- [National Autistic Society Scotland](#)
- [National Deaf Children's Society](#)
- [One Parent Families Scotland](#)
- [PAMIS](#)
- [Perth and Kinross Council](#)
- [President of the Additional Support Needs Tribunals for Scotland \(Tribunal President\)](#)
- [Scottish Borders Council](#)
- [Scotland's Commissioner for Children and Young People](#)
- [Stirling Council](#)
- [West Dunbartonshire Council](#)
- [West Lothian Council](#)