

These notes relate to the Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4) which received Royal Assent on 7 May 2004

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

EXPLANATORY NOTES

THE ACT

3. The Act replaces the system for assessment and recording of children and young people with special educational needs, including the Records of Needs process, established by the Education (Scotland) Act 1980 (“the 1980 Act”) as amended by the Education (Scotland) Act 1981 and subsequent legislation. A new system for identifying and addressing the additional support needs of children and young people who face a barrier to learning is provided for in the Act. (References to young people are to those aged 16 or 17, still receiving school education.)
4. The Act encompasses any need that requires additional support in order for the child or young person to learn. It places duties on education authorities (in Scotland these are the local authorities) and requires other bodies and organisations to help. In providing school education, education authorities are required to identify and then make adequate and efficient provision for the additional support needs of children and young people. Parents can request an education authority to establish whether their child has additional support needs and whether they require a co-ordinated support plan.
5. A co-ordinated support plan must be prepared for those with enduring complex or multiple needs that require support from outwith education services. The plan will focus on supporting the child to achieve learning outcomes and assist the co-ordination of services from a range of providers. Additional Support Needs Tribunals are established to hear appeals relating to co-ordinated support plans. Mediation services must be made available to assist in avoiding disagreements between parents and education authorities or schools and authorities may be required to put in place arrangements for dispute resolution.

Section 1 – Additional support needs

6. This section defines what is meant by the term “additional support needs” and describes its context. The need for additional support is related to the ability to benefit from school education. Support is considered as additional if it is provision that is different in some way from that generally provided for children of the same age in pre-school centres and schools.

Section 2 – Co-ordinated support plans

7. This section specifies who is eligible for a co-ordinated support plan. A child or young person requires a co-ordinated support plan if they have enduring additional support needs that have a significant adverse effect on their education and that require support from services outside education.
8. The duty to provide and maintain a co-ordinated support plan only applies for those children and young people for whose school education the education authority are responsible. This means pupils at local authority schools and pre-school centres,

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independent special schools where the education authority are meeting the fees, independent pre-school centres that are in partnership with the authority, or places other than schools where the authority are providing education.

Section 3 – Children and young persons who lack capacity

9. This section defines the circumstances in which children or young people lack capacity and is self-explanatory. In the Act, young people are given the same rights as parents of children, unless they are considered to lack capacity in the context of each relevant part of the Act, when their parents will act on their behalf.

Section 4 – Duties of education authority in relation to children and young persons for whom they are responsible

10. This section specifies the duties education authorities have towards individual children and young people with additional support needs, for whose education those authorities are responsible. Each education authority must make adequate and efficient provision for the needs of each such child or young person, and must have in place arrangements for ensuring that the additional support being provided remains adequate to meet those needs. In fulfilling their duties, an education authority are not required to act beyond their legal competence, nor to incur unreasonable expenditure.

Section 5 – General functions of education authority in relation to additional support needs

11. This section specifies the general duties on education authorities to take account of the additional support needs of children and young people when providing school education. Subsections (2) and (3) oblige an education authority to provide additional support to disabled children in their area, who are under 5 years old and not in pre-school education, where such children have been referred to the authority by a health board and it is established that they do have additional support needs.
12. In addition, subsection (4) enables education authorities to assist other children and young people with additional support needs for whose school education they are not responsible. This means children and young people being educated at home or at an independent school or pre-school centre, under arrangements made by their parents, can be helped by an education authority, but the authority are not under a duty to do so. It also includes children under the age of 3 who are not disabled, but who have additional support needs.

Section 6 – Children and young persons for whom education authority are responsible

13. This section places duties on each education authority relating to the children and young people for whom school education is being provided by the authority, either directly or indirectly. An education authority must have in place arrangements for identifying those with additional support needs and what their additional support needs are, and for determining who may require a co-ordinated support plan.
14. Subsection (2) enables parents, or young people, to request that an education authority establish whether their child, or they as a young person, have additional support needs. They can also request the authority to establish if the child or young person needs a co-ordinated support plan. Education authorities have to comply with the request unless it is unreasonable. Where the authority does comply with a request and it is established that the child or young person does have additional support needs, the authority must advise whoever made the request of that fact.
15. Subsections (5) and (6) provide for other circumstances where it is brought to the attention of the education authority that a child or young person may have additional support needs or may require a co-ordinated support plan. Where this happens,

the education authority must establish if this is so or not, unless they consider it unreasonable to do so. For example, any member of school or out-of-school club staff or someone in the child's community, such as a youth worker or sports coach, or even the child themselves, may alert the education authority.

Section 7 – Other children and young persons

16. This section enables a request to be made in relation to children and young people for whose school education the education authority are not responsible. Children and young people not being educated in the public system are not eligible for a co-ordinated support plan, but the education authority are given powers to be able to help them where they may have additional support needs. Parents of these children, or young people themselves, may request the education authority to establish whether their child, or they as a young person, have additional support needs. They may also request the authority to establish whether they would, if they were receiving school education from the education authority, require a co-ordinated support plan. The managers of independent schools and grant-aided schools may also make such a request about one of their pupils requiring a plan. Where someone, other than parents or school managers, draws to the attention of an education authority that a child or young person may have additional support needs, the authority may take action to establish that fact.
17. Education authorities are not under a duty to comply with any request, but have discretion to do so. If they do comply, and the child or young person does have additional support needs or would, had they been the responsibility of the authority, have required a co-ordinated support plan, then the education authority must provide appropriate advice and information to the parent or young person or the managers of the independent or grant-aided school. Education authorities are not under any obligation to make provision for supporting the learning of the child or young person who is not in the public schooling system, but they are not prevented from doing so.

Section 8 – Assessments and examinations

18. This section provides a right to request a specific type or types of assessment or examination for additional support needs. This means that when an education authority intend to establish whether a child or a young person has additional support needs, including when this is a result of a request to do so by parents of the child or by the young person, the parents or the young person themselves can request a certain type of assessment. This applies too when the authority intends to establish if a co-ordinated support plan is required or intends to review a co-ordinated support plan, including when this is a result of a request from parents or a young person. This is not a right to request an assessment by a specific individual.

Section 9 – Duty to prepare co-ordinated support plans

19. This section specifies the duties relating to co-ordinated support plans. Where it is established that a child or young person does require a co-ordinated support plan, and the education authority are responsible for their school education, then the authority must prepare a plan. The plan must record:
 - the reasons for the individual's need for additional support,
 - the planned outcomes to be achieved that will ensure that the individual benefits from school education,
 - the additional support required to achieve these outcomes and who will provide that support,
 - the school the individual is to attend,
 - the details of the nominated person who will co-ordinate the plan, and

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- contact details of a named officer from whom information and advice may be sought.
20. The nominated co-ordinator and the contact person can be either one person or two separate people. The co-ordinator does not need to be employed by the education authority but the contact person does.

Section 10 – Reviews of co-ordinated support plans

21. This section provides for reviews of co-ordinated support plans. Education authorities have a duty to keep under consideration the adequacy of each co-ordinated support plan. The education authority must therefore review each plan every 12 months. It may be reviewed earlier if there has been a significant change in the circumstances of the child or young person, for example if their needs change or if progress is greater than expected. This will ensure that the information contained in the plan remains up-to-date and relevant, especially the educational outcomes and the support needed to achieve these.
22. Parents, or a young person, may also request the education authority to review the plan at an earlier interval than 12 months. The education authority must comply with such a request unless the request is unreasonable.

Section 11 – Co-ordinated support plans: further provision

23. This section describes the procedures to be followed by education authorities in preparing or amending co-ordinated support plans. If consideration is being given as to whether a child or young person may require a co-ordinated support plan, or the plan needs to be reviewed, then, before proceeding, the education authority must inform the parent or young person (or managers of an independent or grant-aided school, if applicable) of their intentions. On establishing whether the child or young person requires a co-ordinated support plan, or on completion of the review of the plan, they must also inform the parent or young person of the outcome and of any rights they may have to appeal to an Additional Support Needs Tribunal.
24. When a plan has been prepared, or amended, the education authority must provide a copy of the plan to the parent or young person and then take steps to ensure that the plan is implemented and the support co-ordinated. To facilitate this, the education authority must also provide information about the contents of the plan to those involved in providing the support that is set out in the plan. This is likely to be those in other agencies, such as health professionals, or others in the local authority such as social workers.
25. Subsection (8) enables the Scottish Ministers to make further provision in regulations about co-ordinated support plans, including provision about their form, content and the timescales and procedures attaching to managing those plans. It is intended that these regulations will, among other things, provide a template to be used by education authorities for co-ordinated support plans.

Section 12 – Duties to seek and take account of views, advice and information

26. This section places duties on education authorities to seek and take account of advice and information or views from others, including other agencies and the child or young person and their parents. This should be done when the education authority are establishing an individual's additional support needs or when determining the provision of support to be made. It should also be done when the authority are establishing whether a co-ordinated support plan is needed, when the need for continuing such a plan is being reviewed or when a plan is being prepared. Those who should be approached by the education authority will depend on the individual child or young person and their needs and whom the education authority consider appropriate. It may be necessary to seek

advice and information from elsewhere in the public sector, from health professionals for example, or from a voluntary organisation that may have been supporting the child.

27. Subsections (5) and (6) provide specifically for the period prior to a child or young person with additional support needs leaving school. Education authorities must approach, for information, any other agency that they consider is likely to be involved with the child or young person once they have left school. Authorities must, when considering the adequacy of support to be provided to the individual, take account of that information and also any provision other than education that the local authority are likely to provide themselves on the child or young person ceasing school education. Authorities must also seek and take account of the views of the child or young person and their parents. This all should be done at least 12 months before the child or young person is expected to leave school, so it could be done when the child is 15 years old or even earlier.

Section 13 – Provision of information etc. on occurrence of certain events

28. This section places a duty on education authorities to provide information about any child or young person with additional support needs to other agencies where the authority consider that those other agencies will have a role in supporting the child or young person once they have left school education. The education authority must also consider what provision, if any, other than education the local authority are likely to provide themselves to the child or young person on their ceasing school education. The section requires these things to be done at least 6 months before the child or young person leaves school, but they could be done earlier. Information to other agencies may only be passed on with the consent of the child's parent or the young person. Where information has been passed on, education authorities must then inform such other agencies of the actual date when the young person does leave school.
29. Subsections (6) and (7) enable the Scottish Ministers to make provision, by regulations, for action when other changes in school education may occur and when information about a child's or young person's additional support needs should be shared with others. It is intended that these regulations will cover moves from one school to another, from one stage of schooling to another, and when arrangements in schooling change, for example a return to school after a long stay in hospital.

Section 14 – Supporters and advocacy

30. This section provides a right for a young person or a child's parents to be accompanied by another person at any meetings they may have with an education authority, including meetings at school. This other person may act as a supporter or may speak or make representations on behalf of the young person or child's parents. There is no requirement for education authorities to provide or pay for any supporters or advocacy services, but nor are they prevented from doing so.

Section 15 – Mediation services

31. This section places a duty on education authorities to arrange for independent mediation services to be provided, free of charge, to parents of children or young people in the education authority area. Mediation services will seek to avoid or resolve disagreements between the authority and parents or young people concerning functions under the Act. Subsection (2) defines mediation services as being independent if those providing the service have no involvement in the authority's exercise of any other of its functions under this Act. This will allow education authorities to employ mediators directly, for example where there is a wider local authority or public sector mediation service, but any such mediators cannot be involved in any way in providing education services or decisions relating to education provision.

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32. Subsection (3) provides that parents or young people are not compelled to refer disagreements to a mediation service and that their entitlement to make a reference to a Tribunal is not affected by their use or otherwise of mediation.

Section 16 – Dispute resolution

33. This section enables the Scottish Ministers, by regulations, to require education authorities to put in place arrangements to resolve disputes between the authority and any parents or young people in the local authority area. These arrangements must be free of charge. Regulations may prescribe which disputes relating to particular functions of the authority under the Act will be subject to dispute resolution. Parents, and young people, will not be compelled to use any dispute resolution procedure put in place, nor will their entitlement to make a referral to a Tribunal be affected.

Section 17 – Additional Support Needs Tribunals for Scotland

34. This section provides for the establishment of the new Additional Support Needs Tribunals for Scotland. Schedule 1 makes provision about the constitution and procedures of the Tribunals and other matters. The Scottish Ministers will appoint a President to head up the Tribunals and may, by regulations, make further provision in connection with the Tribunals and the President.

Section 18 – References to Tribunal in relation to co-ordinated support plan

35. This section specifies the references that may be made to a Tribunal. If an education authority are responsible for providing school education for the child or young person, then the parent of the child or young person (if the young person lacks capacity to do this), or the young person themselves, may make a reference to a Tribunal.
36. Subsection (3) lists the matters that can be referred to a Tribunal. These are:
- decision of an education authority on whether or not a co-ordinated support plan is required or continues to be required,
 - failure by an education authority to prepare a co-ordinated support plan in the required time,
 - decisions of the education authority about information contained in a co-ordinated support plan relating to:
 - the reasons for the individual’s need for additional support,
 - the planned outcomes to be achieved,
 - the additional support required to achieve the planned outcomes,
 - who will provide the additional support,
 - failure by an education authority to carry out or to complete a review of the plan by the required time,
 - decision of an education authority to refuse to carry out an early review of the plan,
 - decision by an education authority to refuse a placing request to a specified school, in particular circumstances.
37. Where information in the co-ordinated support plan is referred to a Tribunal, there cannot be a further reference on the same information until an updated plan is issued following its next review. The information being referred does not need to have been changed from the previous version of the plan so long as the plan has been reviewed.
38. References relating to refusal of a placing request can be made to a Tribunal if, at the time the request was refused, a co-ordinated support plan has been prepared for the child

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or young person concerned, or a plan is about to be prepared or if a reference has been made to the Tribunal over the decision that a plan is not required. Referrals on refusal of placing requests can only be made once in each 12 months unless the plan has been reviewed in that period, or a Tribunal has ordered a plan to be amended or prepared.

Section 19 – Powers of Tribunal in relation to reference

39. This section specifies the powers that a Tribunal has in relation to references. The Tribunal may either confirm the authority's decision that a co-ordinated support plan is needed, or not needed, or overturn the decision and direct the authority to take specific action within a specified time. This also applies where the education authority have decided not to comply with a request to review a co-ordinated support plan earlier than the required 12 month period.
40. Where a reference relates to the education authority's failure to prepare a plan or their failure to conduct or complete a review of the plan within the time required, then the Tribunal can require the authority to rectify this. Where a reference relates to information in a plan, the Tribunal may confirm the information or direct the education authority to amend the information.
41. Where a reference relates to an education authority's refusal of a placing request, as described in section 18, then the Tribunal must consider the statutory grounds of refusal and the appropriateness of the refusal for the individual child or young person. The statutory grounds of refusal are listed in schedule 2. The Tribunal may confirm the decision to refuse the placing request, or they may direct the education authority to amend the co-ordinated support plan and place the child in the school specified in the placing request.
42. In considering a reference relating to obtaining a co-ordinated support plan, if the Tribunal confirms the education authority's decision that the child or young person does not require a plan, then the Tribunal may refer any related appeal on a refused placing request to the education authority's appeal committee (set up under section 28D of the 1980 Act). If the Tribunal does this, then the education authority's appeal committee will consider the appeal on the refused placing request and either confirm or overturn the education authority's decision, as they will do for all other appeals on refused placing requests not connected with a co-ordinated support plan.
43. In determining all its decisions and directions, Tribunals must take account of the code of practice published by the Scottish Ministers (under section 27). The code of practice provides guidance to education authorities and others about how they should exercise their functions under this Act.

Section 20 – References to Tribunal and powers of Tribunal: further provision

44. This section enables the Scottish Ministers, by order, to extend what can be referred to a Tribunal under section 18(1). Such an order may also extend the Tribunals' corresponding powers and enable the President of the Tribunals to reject certain references without a hearing.

Section 21 – Appeal to Court of Session against Tribunal decision

45. This section enables any person who has made a reference to a Tribunal, and the relevant education authority, to subsequently appeal the decision of the Tribunal to the Court of Session. Such an appeal to the Court of Session may only be made on a point of law.

Section 22 – Placing requests

46. This section refers to schedule 2 and provision on making requests and appealing decisions relating to placements in specified schools for children and young people with additional support needs.

Section 23 – Other agencies etc. to help in exercise of functions under this Act

47. This section places duties on other agencies to help an education authority in its functions under this Act if requested to do so. Appropriate agencies are defined as any other local authority, any Health Board and any other person (this includes any organisation or body) that the Scottish Ministers may specify.
48. Agencies requested to help must comply with the request unless to do so would be incompatible with their own statutory or other duties or would unduly prejudice their ability to carry out their functions. The Scottish Ministers are enabled to specify, by regulations, the time periods within which other agencies should comply with requests.
49. Subsection (5) places a duty on education authorities to exercise their non-education functions (for example, social work services or housing) if they consider that would help in the exercise of their functions under the Act. However, they need not exercise those functions if it would be incompatible with their statutory or other duties or would unduly prejudice the discharge of any of their functions.

Section 24 – Power to prescribe standards etc. for special schools

50. This section enables the Scottish Ministers to make regulations which set standards and make requirements of special schools. It re-enacts, with changes to reflect the new concept of additional support needs, section 65F of the 1980 Act.

Section 25 – Attendance at establishments outwith the United Kingdom

51. This section provides education authorities with a discretionary power to support a child or young person with additional support needs to attend a school or other appropriate establishment outside the United Kingdom. It re-enacts, with changes to reflect the new concept of additional support needs, section 65G of the 1980 Act.

Section 26 – Publication of information by education authority

52. This section places duties on education authorities to publish and keep up-to-date certain information. Subsection (2) lists the information that should be published. Subsection (3) enables the Scottish Ministers, by regulations, to add further matters to the requirements relating to publishing information.

Section 27 – Code of practice and directions

53. This section requires the Scottish Ministers to publish a code of practice giving guidance on the exercise by education authorities and appropriate agencies of their functions under this Act. Subsection (2) lists topics which a code of practice may include. Before a code, or revised code, is published, the Scottish Ministers must consult all education authorities and agencies and anyone else they think appropriate, and they must take account of any comments by Parliament on the draft code.
54. There is a duty placed on education authorities and appropriate agencies to have regard to the code of practice.
55. Subsections (9) to (11) enable the Scottish Ministers to give directions to all, or any, education authorities about the exercise of authorities' functions under this Act and education authorities are under a duty to comply with such directions.

Section 28 – Requests under this Act: further provision

56. This section specifies the form of any requests made under this Act and also the information education authorities must provide if they decide not to comply with a request. Any request being made under this Act must be in writing or any other permanent form and the reasons for the request must be given.

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57. If an education authority decide not to comply with any request, they must inform whoever made the request and give their reasons. They must also provide information, as appropriate, on mediation services, dispute resolution procedure and on any right to refer the matter to a Tribunal or an appeal committee.

Section 29 – Interpretation

58. This section defines terms used throughout the Act and is self-explanatory. In the Act, children or young people for whose school education an education authority are responsible, are those who are, or are about to be, provided with school education either in a school managed by the authority or under arrangements made by the authority. This also includes pre-school centres. The section also provides a new definition of special school, referring to provision suited to the additional support needs of children and young persons, rather than recorded children as in the previous definition.
59. Subsection (5) allows for the use of electronic means in providing anything in writing.

Section 30 - Transitional provision: recorded children and young people

60. This section makes provision for the transition to the system established by this Act for those children and young people who have a Record of Needs immediately prior to the Act coming into force, and for whose school education an education authority are responsible.
61. When the Act commences, education authorities must, within 2 years, establish whether or not such children and young people require a co-ordinated support plan. The provision being made for the recorded child or young person is preserved as a minimum level of support unless there is a significant change in the individual's additional support needs or until the date that it is established that they require a plan, or if they do not require a plan, 2 years from the date that is established. For some recorded children and young people this could result in provision being preserved for up to 4 years. The duties on education authorities in other sections of the Act regarding individual children and young people with additional support needs, for example to ensure that provision for such needs is adequate and efficient, will apply also to such recorded children and young people.

Section 31 – Duty to inform in writing or alternative permanent form

62. This section provides that education authorities must, when informing parents or young people of anything, do so in writing or any other permanent form that is considerate of the needs of the parents or young person, for example, where they may have communication difficulties.

Section 32 – Ancillary provision

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

Section 33 – Modification of enactments

64. This section refers to schedule 3 where the modifications of enactments in consequence of the Act are listed.

Section 34 – Orders, regulations and rules

65. This section makes general provision about orders, regulations and rules made under the Act by the Scottish Ministers. They will be made by statutory instrument.

Section 35 – Commencement and short title

66. This section allows the Scottish Ministers to set, by order, the date on which the provisions of the Act will commence, other than sections 29, 32 and 34 which come into force on Royal Assent.

Schedule 1 – Additional Support Needs Tribunals for Scotland

67. This schedule contains provisions for and arrangements under which the Additional Support Needs Tribunals for Scotland will operate. The Tribunals will be supervised by the Scottish Committee of the Council on Tribunals (schedule 3, paragraph 8 modifies the Tribunals and Inquiries Act 1992).
68. The Scottish Ministers will appoint a President of the Tribunals and two panels of members. One panel will be of individuals who may act as convener of a Tribunal and one panel will be of individuals who may act only as members. The President may be a convener of any Tribunal. Each Tribunal must consist of a convener and two members. The qualifications, training and experience of Tribunal members will be prescribed. It is intended that conveners will be legally qualified and members will have expertise or experience in additional support for learning. Tribunal members may serve for 5 years and may be re-appointed.
69. The President must ensure that Tribunal functions are exercised efficiently and effectively and can issue directions on the practice and procedure of Tribunals. It is intended that Tribunals will be held in locations across Scotland. The Scottish Ministers must make rules as to the practice and procedure for Tribunals. These will set out operational matters for the Tribunals and paragraph 11 lists the particular areas that may be included in the rules.
70. It is intended that each party to the appeal will have an opportunity to present any relevant evidence in support of their case to the Tribunal, including documents and evidence from witnesses at the hearing. Tribunals will have the power to commission expert reports, though this is not expected to be normal practice. Tribunals will also be able to hold hearings in private and impose reporting restrictions. Witnesses may be cited by Tribunals and may be required to provide documents. A decision by a Tribunal will be by a majority and must be recorded, with a full statement of the facts and the reasons for the decision. This must be copied to each of the parties.
71. The President is required to submit an annual report to the Scottish Ministers, which will be laid before the Scottish Parliament, and may also be required to provide Ministers with information about the discharge of Tribunal functions.

Schedule 2 – Children and young persons with additional support needs: placing requests

72. This schedule is distinct from the provision relating to placing requests and appeals in the 1980 Act (sections 28A, 28C, 28E to 28G) and relates to placing requests for children or young people with additional support needs. The schedule starts with a duty on the education authority to comply with a parent's (or young person's) request to place the child or young person with additional support needs in a specified school. The request can be for a special school (public or independent) or a mainstream school. If the specified school is an independent special school, in Scotland or elsewhere in the United Kingdom, the education authority must meet the fees and other costs. Paragraph 3 sets out the circumstances where the duty to comply is not applicable.
73. These circumstances include the requirement in section 15 of the Standards in Scotland's Schools etc. Act 2000. That section provides an assumption that education will be provided in a mainstream school unless this would not be suited to the ability or aptitude of the child or young person; or it would be incompatible with providing efficient education to the other children at the mainstream school; or it would result

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in unreasonable public expenditure. A further circumstance is where the request is for an independent special school, but the education authority can make provision for the child in another school and this school is more suitable, including with regard to cost, than the specified school.

74. Where an education authority do not comply with a request, parents or a young person may appeal the decision to the education authority's appeal committee (established under section 28D of the 1980 Act). They may then appeal the decision of the appeal committee to the sheriff.
75. Where a child or young person has a co-ordinated support plan, appeals regarding placing requests will be referred to the Additional Support Needs Tribunals rather than to an education authority appeal committee. Where an appeal on a refused placing request has been made to the appeal committee or the sheriff and before it has been disposed of, a reference is made to a Tribunal over the decision that a co-ordinated support plan is not required, the placing request appeal must be transferred to the Tribunal for disposal.

Schedule 3 – Modification of enactments

76. This schedule lists all the modifications to existing legislation as a consequence of this Act.