

These notes relate to the Education (Additional Support for Learning) (Scotland) Act (asp 7) which received Royal Assent on 25 June 2009 (asp 7) which received Royal Assent on 25 June 2009

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) ACT (ASP 7) WHICH RECEIVED ROYAL ASSENT ON 25 JUNE 2009

EXPLANATORY NOTES

THE ACT – SECTION BY SECTION

Section 1: Placing requests

11. **Section 1** of the Act enables parents of children with additional support needs and young persons with additional support needs including those with co-ordinated support plans to make requests for their children or themselves (as appropriate) to attend a school outwith the local authority area in which the child or young person lives. It does this by amending paragraph 2 of schedule 2 to the 2004 Act to ensure that the description of the education authority which is to consider a placing request is not restricted to the authority which is currently responsible for the child or young person's education (see subsection (8)(a)). It also extends the jurisdiction of the Tribunal to enable it to hear appeals on refusals of such out of area placing requests by amending section 18(3) (e) of the 2004 Act to allow referral to the Tribunal of a placing request decision by an education authority which is not the authority responsible for the child (or young person) (see subsection (7)(b)(iv)).
12. The other provisions in section 1 make amendments that relate to placing requests to ensure the existing system continues to operate in a logical manner. They also ensure the system properly accommodates the possibility of an "out of area" placing request being made.
13. For children or young persons with additional support needs who are attending a school outwith the area in which they live following a successful out of area placing request, section 1 also transfers the duty to keep under review any co-ordinated support plan from the original home authority to the new host authority (see subsection (4)(a)). New subsection (5A) is inserted to section 10 of the 2004 Act which places a duty on the new host authority to carry out a review of the co-ordinated support plan as soon as possible after the date of any transfer of the co-ordinated support plan from the home authority to the host authority (time limits for conducting this review will be specified in secondary legislation).
14. Section 1 of the 2004 Act defines what is meant by the term "additional support needs". Subsection (2) amends the basis on which additional support needs are assessed to accommodate out of area placing requests. It provides that a child's or young person's additional support needs will be assessed against the provision made for children or young people of the same age in schools run by the education authority that are responsible for his/her education. Where no education authority are responsible for the child's or young person's education e.g. the child or young person is home or privately educated, his/her additional support needs will be assessed against the provision made

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15. Section 7 of the 2004 Act enables a request to be made to an education authority to establish whether a child or young person belonging to that authority's area, but for whose education the authority are not responsible, has additional support needs or requires a co-ordinated support plan. This allows the education authority for the area to which the child belongs (the home authority) to comply with such a request where the child or young person is home educated, privately schooled or attending school under the management of another authority (a host authority). Section 1(3) amends section 7 of the 2004 Act to restrict a home authority from complying with such a request in relation to children and young people for whose school education *any* education authority are responsible. The effect of this is that where a successful out of area placing request is made, the child or young person will be covered by the provisions in section 6 of the 2004 Act and will be unable to utilise the provision in section 7.
16. Subsection 6 inserts new subsection (3A) into section 12 of the 2004 Act and provides that, where a child or young person with a co-ordinated support plan moves from a school in one authority area to a school in another authority (e.g. following a change of residential address or a successful out of area placing request for a child or young person with a co-ordinated support plan), the new host authority are under a duty to seek and take account of information and advice from the education authority from which the co-ordinated support plan was transferred as well as any agencies or persons involved in providing support under the co-ordinated support plan prior to its transfer.
17. Section 18(3) of the 2004 Act lists the matters that can be referred to the Tribunal. Subsection 7(a) inserts a new paragraph (da) into section 18(3) to enable the decision of an education authority refusing a placing request in respect of a place in a Scottish special school to be referred to the Tribunal. It also allows the decision of an education authority refusing a placing request in respect of a place in a school in England, Wales and Northern Ireland which is a school making provision mainly or wholly for children or young people with additional support needs to be referred to the Tribunal.
18. Section 18(3)(e) of the 2004 Act enables a decision of an education authority refusing a placing request to be referred to the Tribunal in cases where a co-ordinated support plan has been prepared or is being considered. Subsection (7)(b)(ii) provides that where a placing request to a special school (including those in England, Wales and Northern Ireland) is submitted on behalf of a child or young person with additional support needs who has a co-ordinated support plan on the horizon, there is only one appropriate appeal route in place under section 18(3)(da). Without this subsection there would be two different appeal routes: one for children with additional support needs wanting to go to a special school and the other for those that have a co-ordinated support plan on the horizon.
19. Section 18(7) of the 2004 Act provides that references to the Tribunal on the refusal of a placing request can only be made once in each 12 month period unless the co-ordinated support plan has been reviewed in that period, or a Tribunal has ordered a co-ordinated support plan to be amended or prepared. Subsection (7)(e) extends the provisions in section 18(7) to prevent repeated references to the Tribunal under section 18(3)(da). A period of 12 months will have to lapse before another reference can be submitted to the Tribunal under section 18(3)(da).
20. Section 19 of the 2004 Act specifies the powers that a Tribunal has in relation to references. Subsection (8)(a) inserts new subsection (4A) into section 19 of the 2004 Act to give the Tribunal powers in relation to the new decisions referable under section 18(3) (da). It provides that when hearing a placing request appeal in respect of a place in a special school, the Tribunal has the power to confirm the decision of the authority or overturn the decision of the authority and specify when the placing request should commence and make any amendments to a co-ordinated support plan.

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21. Subsection (8)(b) amends section 19(5)(b)(i) of the 2004 Act to extend the power of the Tribunal, when considering a placing request appeal, to enable it to specify a time scale for placing the child in the school specified in the placing request.
22. Subsection (7)(c) inserts new paragraph (f) into section 18(3) of the 2004 Act to provide that a decision made by an education appeal committee to refuse a placing request may be referred to the Tribunal if, before the expiry of the time limit for appeal to the sheriff court (28 days), a co-ordinated support plan is involved or being considered.
23. Section 18(4) of the 2004 Act sets out circumstances which indicate (for the purposes of the 2004 Act) when a co-ordinated support plan is involved or is being considered. Subsection (7)(d)(ii) adds a new circumstance to that list. The new circumstance is that the education authority have advised the parent or young person that they will establish whether a co-ordinated support plan is required. The effect of this subsection is that a decision by an education authority referred to in section 18(3)(e) of the 2004 Act or by an education appeal committee referred to in section 18(3)(f) of the 2004 Act refusing a placing request can now be referred to the Tribunal if the authority have advised the parent that they will establish whether a co-ordinated support plan is required.
24. Subsection (9)(d)(ii) inserts a new sub-paragraph (1A) to paragraph 7 of schedule 2 to ensure that where a child or young person has a co-ordinated support plan or is being considered for a co-ordinated support plan, appeals regarding placing requests should be referred to the Tribunal rather than to the sheriff.
25. Subsection (9)(c)(ii) and (d)(iii) extends the circumstances in which a placing request appeal must be transferred from the education appeal committee or sheriff to the Tribunal from being limited to the event described in section 18(4)(c) of the 2004 Act to include the things described in the other paragraphs of section 18(4) (as amended by the Act). The effect of this extension, and subsection (7)(d)(i) (which removes the words “at the time the placing request is refused” from section 18(4) of the 2004 Act), is that if, at any time before the education appeal committee or sheriff has made their final decision on a placing request appeal, a co-ordinated support plan is being prepared or is being considered, the appeal is to be transferred to the Tribunal. Subsection (9)(d)(iv) inserts a new sub-paragraph (12) into paragraph 7 of schedule 2 to ensure that any reference transferred back to the sheriff from the Tribunal will be treated as if it were an appeal made directly to the sheriff in the first instance thus ensuring the sheriff has the power to deal with such a reference.
26. Subsection (8)(b) extends the circumstances in which a placing request appeal can be transferred from the Tribunal to the education appeal committee (see subsection (8)(b)(ii)). This section also provides the Tribunal with the discretion to transfer placing request decisions back to the education appeal committee or sheriff where it has been decided that no co-ordinated support plan is required (see subsection (8)(b)(iii)).

Section 2: Mediation services

27. **Section 2** amends section 15 of the 2004 Act. Section 15 places a duty on education authorities to arrange for independent mediation services in relation to the exercise of the authority’s functions under the 2004 Act to be provided, free of charge, to parents of children or young people belonging to their area. Mediation aims to bring parties together to discuss the issues and to help broker a way forward. Section 2 removes the requirement for the child or young person to belong to the authority’s area. This will allow parents of children or young persons who have submitted an out of area placing request or are being educated in an authority outwith the authority in which they live as a result of a successful out of area placing request, to access the mediation services provided by the host authority.

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Section 3: Dispute resolution

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

Section 4: Contributions not recoverable in respect of certain services

29. Section 23 of the **Education (Scotland) Act 1980 (c.44)** ("the 1980 Act") provides that where a child or young person is being educated outwith the authority in which he or she lives, the education authority for the area in which the child or young person is being educated (the host authority) may recover from the home authority contributions in respect of provision of the child's or young person's school education and/or other services, including additional support under the 2004 Act.
30. **Section 4** of the Act amends section 23 of the 1980 Act to prevent the "host" authority from recovering the cost of providing any mediation or dispute resolution services under the 2004 Act for pupils being educated in their area as a result of a successful out of area placing request.

Section 5: Arrangements between education authorities

31. Section 29(3) of the 2004 Act provides the definition of "a child or young person for whose school education an education authority are responsible". However Lord Brailsford's Court of Session ruling in the case of *RB v. a decision of an Additional Support Needs Tribunal* [2007] CSOH 126, which concerned a child who was being educated at home, stated that if, as a matter of fact, a particular authority controlled the education of the child, then that authority was responsible within the terms of section 29(3). Section 5 amends section 29(3) of the 2004 Act to provide that where arrangements are entered into between two authorities in respect of the school education of a child or young person, it will always be the authority for the area to which the child or the young person belongs (known as the "home authority") that are the responsible authority.
32. A successful out of area placing request does not involve any arrangements being made between authorities. Therefore, where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, the host authority will be the education authority with responsibility for the child's or young person's education and carrying out all of the duties under the 2004 Act (see section 29(3)(a) of the 2004 Act).

Section 6: Additional support

33. **Section 6** amends section 1(3) of the 2004 Act. It amends section 1(3)(a) to provide clarification on the definition of "additional support" by making explicit that it is not confined to educational support but also includes, for example, multi-agency support such as health, social work, voluntary agencies etc.
34. It also amends section 1(3)(b) to ensure that this wider definition of additional support also applies to children under school age other than prescribed pre-school children.

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Section 7: Assessments and examination

35. **Section 7** inserts section 8A into the 2004 Act to extend the rights of parents of children with additional support needs and young people with additional support needs to enable them to request a specific assessment, such as an educational, psychological or medical assessment, at any time.
36. Education authorities are required to comply with the assessment request unless the request is unreasonable.
37. The process of assessment or examination will be carried out by such person as the education authority consider appropriate. Education authorities are not required to arrange for examinations or assessments to be carried out by named individuals or organisations requested by the parent or young person.
38. Authorities must take into account the results of the assessment or examination when considering the additional support needs of the child or young person and the adequacy of the additional support provided.

Section 8: Additional support needs etc.: specified children and young people

39. Section 8(1) inserts new subsections (1A) and (1B) into section 1 of the 2004 Act. Subsection (1A) deems looked after children and young persons to have additional support needs. Therefore, all the provisions of the 2004 Act relating to children and young persons with additional support needs apply to looked after children and young people.
40. Subsection (1B) provides that where, in the course of identifying the additional support needs of a particular looked after child or young person an education authority decide that that child or young person is likely to be able to benefit from school education without the provision of additional support, then subsection (1A) will cease to apply and the child or young person will no longer be deemed to have additional support needs.
41. Subsection (2) requires that every education authority should consider whether those looked after children and young people who are deemed to have additional support needs under Subsection (1) and where the education authority are responsible for their education, require co-ordinated support plans.

Section 9: Functions of education authority in relation to certain pre-school children with additional support needs

42. Section 5 of the 2004 Act requires an education authority to provide additional support to certain disabled pre-school children in their area, normally those who are under 3 years old. This duty applies where such children have been brought to the attention of the education authority by an NHS Board as having, or appearing to have, additional support needs arising from a disability within the meaning of the Disability Discrimination Act 1995. Section 9 broadens the persons who have the ability to bring such a child to the attention of the authority to enable any organisation or person (including a parent) to undertake this role. Section 9 also provides that the duty to provide such children with additional support will not apply in cases where the child's parent does not give his or her consent.

Section 10: Provision of advocacy service: Tribunal

43. **Section 10** inserts a new section 14A into the 2004 Act. Subsections (1) and (2) require the Scottish Ministers to secure the provision of an advocacy service to be available on request and free of charge to support parents and young people in Tribunal proceedings. Subsection (3) specifies, for the purposes of subsection (1), the meaning of advocacy services.

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Section 11: Mediation services

44. **Section 11** amends section 15(2) of the 2004 Act to prevent an education authority from being able to offer in-house mediation services where a local authority employee mediates between the authority and parents or young people. The effect is that in future an education authority are required to buy in mediation services as required or may contract with an external mediation service in order to provide mediation services on their behalf.

Section 12: Dispute resolution

45. **Section 12** amends section 16(2) of the 2004 Act to provide that the Scottish Ministers may make regulations to provide that where a parent or young person makes an application for dispute resolution, that application must be made to the Scottish Ministers.

Section 13: Provision of published information to certain persons

46. Under section 26 of the 2004 Act, education authorities are under a duty to publish and keep up-to-date certain information. Section 13 requires education authorities to provide all parents of all children with additional support needs (and young persons with additional support needs), for whose school education the authority are responsible, with all the information authorities are required to publish under section 26.
47. **Section 13** inserts a new subsection (2A) in section 26 of the 2004 Act. Subsection (2A) (b)(ii) specifies that where the authority are satisfied that the young person lacks the capacity to understand the information which is published under section 26(1) of the 2004 Act, that information should be sent instead to the young person's parent. The test to be used by authorities in establishing whether a young person lacks capacity relates to the young person's ability to understand the information published under subsection (1) (d).

Section 14: Availability of published information

48. **Section 14** inserts new subsection (e) before subsection (b) in section 26(1) of the 2004 Act. This new subsection (e) places authorities under a duty to ensure that a summary of the information published under section 26 of the 2004 Act is available, on request, from each place in the authority's area where school education is provided, regardless of whether the school is under the management of the education authority.
49. New subsection (e) also requires education authorities to provide this summary in any handbook or other publications provided by any school in the authority's area, that is provided by the authority for the purposes of providing general information about the school or, as the case may be, the services provided by the authority, and on any website maintained by any such school or the authority for that purpose.

Section 15: Publication of information on dispute resolution

50. **Section 15** inserts new subsection (ea) into section 26(2) of the 2004 Act to extend the list of matters on which authorities are required to publish information to include any procedures established in accordance with section 16 of the 2004 Act for the resolution of disputes.

Section 16: Power to specify additional sources of information

51. **Section 16** inserts a new paragraph (i) in section 26(2) of the 2004 Act to enable the Scottish Ministers to make an order specifying certain persons from which parents and young people can obtain further advice, information and support in relation to the provision for additional support needs, including support and advocacy services as

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Section 17: Provision of information by education authority on occurrence of certain events

52. **Section 17** inserts new subsection (4A) in section 13 of the 2004 Act. The new subsection (4A) places education authorities under a duty to seek and take account of the child's views (unless the authority are satisfied that the child lacks capacity to express a view) in relation to any information to be provided to an appropriate agency or agencies under section 13(2)(a) or (4) of the 2004 Act regarding the child leaving school.

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

53. Subsection (1)(a) of section 18 extends the circumstances in which parents and young persons can make references to the Tribunal to include failure by the education authority to provide, or make arrangements for the provision of, the additional support contained in a co-ordinated support plan which is necessary for the child or young person to achieve their educational objectives.
54. Subsection (1)(b) extends those circumstances to include certain procedural failures of the education authority. It provides that where a parent or young person has requested that the authority establish whether the child or young person requires a co-ordinated support plan and the authority have not responded to that request within a specified period of time (set out in regulations), the failure so to respond is treated as if it were a decision by the education authority that no co-ordinated support plan is required. It also provides that where an authority have notified a parent or young person that they will establish whether the child or young person requires a co-ordinated support plan but, after a specified period of time (set out in regulations), the authority have not made a decision on the matter either way, that failure is to be treated as if it were a decision of the education authority that no co-ordinated support plan is required. Decisions of an authority that no co-ordinated support plan is required can be referred to the Tribunal.
55. Subsection (2) amends section 19(3) of the 2004 Act to extend the power of the Tribunal to require the education authority to take action to rectify the failure by the authority to provide, or make arrangements for the provision of, the additional support contained in a co-ordinated support plan which is necessary for the child or young person to achieve their educational objectives. It also enables the Tribunal to specify a timescale within which such action must be taken.

Section 19: References to Tribunal in relation to duties under section 12(6) and 13

56. **Section 19** inserts new subsection (g) into section 18(3) of the 2004 Act to extend the jurisdiction of the Tribunal to allow it to consider references in relation to an authority's failure to comply with its duties in terms of post-school transitions under sections 12(5) and (6) and 13 of the 2004 Act.

Section 20: Power to make rules in respect of Tribunal practice and procedure

57. As detailed in paragraph 54 above, the Act will extend the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the education authority. These new circumstances relate to an authority's failure to take action within a specified period of time. Section 20 enables the Scottish Ministers to make rules regarding the ability of Convener of a Tribunal to sit alone to consider references where they relate to failures by education authorities to comply with specified time scales.
58. **Section 20** will also allow the Scottish Ministers to make rules to allow the Tribunal to review its decisions in certain circumstances.

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Section 21: Power to monitor implementation of Tribunal decisions

59. Section 21 inserts new paragraph 11A into schedule 1 of the 2004 Act to provide that following a decision of a Tribunal that requires an education authority to do anything, the President of the Tribunal may require the authority to provide him or her with information about the authority’s implementation of the Tribunal decision. It will also provide the President with the power to refer the matter to the Scottish Ministers where he or she is satisfied that the authority are not complying with the Tribunal decision.

Section 22: Availability of information on additional support needs

60. Section 22 inserts new subsection 26A into the 2004 Act to provide that for the first five years after commencement of the Act, the Scottish Ministers report to the Scottish Parliament, detailing the progress that has been made in ensuring that sufficient information relating to children and young people with additional support needs has been made available to monitor the implementation of the 2004 Act.

Section 23: Collection of data on additional support needs

61. Section 23 inserts new section 27A into the 2004 Act which specifies the information that must be collected from education authorities and published on an annual basis by the Scottish Ministers. This information must include the number of children and young people with additional support needs for whose school education the authority are responsible, the principal factors giving rise to those additional support needs, the types of support provided and the cost of providing that support.

Section 24: Ancillary provision

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

Section 25: Orders

63. This section makes general provision about orders made under the Act by the Scottish Ministers. They will be made by statutory instrument. The section also specifies the Parliamentary procedure for an order under section 24.

Section 26: Short title and commencement

64. This section allows the Scottish Ministers to set different dates to commence different provisions of the Act by order, other than sections 24, 25 and 26 which will come into force on Royal Assent.

Parliamentary Stages

Bill Stage	Date	Official report
Finance Committee – approach to Financial Memorandum	28 October 2008	http://www.scottish.parliament.uk/s3/committees/finance/or-08/fi08-2402.htm#Col750
Subordinate Legislation Committee - consideration of the Bill at stage 1	4 November 2008	http://www.scottish.parliament.uk/s3/committees/subleg/or-08/su08-3002.htm#Col406
ELLC Committee – informal roundtable discussion with stakeholders	26 November 2008	http://www.scottish.parliament.uk/s3/committees/ellc/inquiries/asl%20bill/Informalsession.pdf

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Bill Stage	Date	Official report
Stage 1: ELLC Committee evidence session - Scottish Government officials	3 December 2008	http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-2902.htm#Col1719
Stage 1: ELLC Committee evidence session - Additional Support Needs Tribunals for Scotland	10 December 2008	http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-3002.htm#Col1755
Stage 1: ELLC Committee evidence session - ISEA(Scotland) and Govan Law Centre	17 December 2008	http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-3102.htm#Col1832
Stage 1: ELLC Committee evidence session - 3 local authorities and ADES	14 January 2009	http://www.scottish.parliament.uk/s3/committees/ellc/or-09/ed09-0102.htm#Col1860
Stage 1: ELLC Committee evidence session - Minister for Children and Early Years	21 January 2009	http://www.scottish.parliament.uk/s3/committees/ellc/or-09/ed09-0202.htm#Col1904
Stage 1: ELLC Committee Report	10 February 2009	http://www.scottish.parliament.uk/s3/committees/ellc/reports-09/edr09-02.htm#2
Stage 1: debate	4 March 2009	http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0304-02.htm#Col15365
Stage 2: ELLC Committee session 1	25 March 2009	http://www.scottish.parliament.uk/s3/committees/ellc/or-09/ed09-1002.htm#Col2151
Stage 2: ELLC Committee session 2 ('informal' session)	22 April 2009	http://www.scottish.parliament.uk/s3/committees/ellc/or-09/ed09-1102.htm#Col2171
Stage 2: ELLC Committee session 3	29 April 2009	http://www.scottish.parliament.uk/s3/committees/ellc/or-09/ed09-1202.htm#Col2226
Stage 3: debate	20 May 2009	http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0520-02.htm#Col17576
Royal Assent	25 June 2009	