

Consultation on the Education
(Additional Support for Learning)
(Scotland) Act 2004 -
Amendment Bill 2008

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THE EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) ACT 2004 – AMENDMENT BILL 2008

Consultation

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Section 1: Consultation questions

In sections 3 and 4 of this consultation paper you will find a full explanation of the background that has led the Scottish Government to propose these legislative changes to the Education (Additional Support for Learning) (Scotland) Act 2004 (the ASL Act). For more information on how to respond please see Annex A.

In this paper we use the term ‘young people’ to describe those young persons over school age (generally over 16 years) who are not yet 18 years of age and still receiving school education, as per the definition in the Education Scotland Act 1980

Placing requests – Timing

Q1. Should the ASL Act legislation relating to an Additional Support Needs Tribunal for Scotland’s (ASNTS’s) jurisdiction regarding placing requests be amended to allow an ASNTS to consider any placing request appeal where a co-ordinated support plan (CSP) is involved or is being considered, at any time before the final determination by the appeal committee or sheriff?

Q2. Can you foresee any problems with amending the legislation as suggested in Q1 above? If so, what are they?

Placing requests – Home & Host Authority

Q3. Do you agree that the parents of children with additional support needs (ASN), with or without CSPs, should have the same rights in respect of making out of area placing requests as parents of children without ASN?

Q4. If you do not agree with Q3 above, why not?

Q5. Are you content that in instances where a CSP is involved or is being considered, an appeal against a decision to refuse an out of area placing request should be referred to an ASNTS?

Mediation and Dispute Resolution

Q6. Do you agree that in instances where a child or young person is attending a school outwith his/her home authority area, as a result of a placing request, responsibility for providing mediation and dispute resolution should rest with the host authority?

Q7. In the situation described in Q6 above, do you agree that a contribution in respect of a host authority’s provision to parents or young people of mediation or dispute resolution services should not be recoverable from the home authority under section 23(2) of the Education Scotland Act 1980?

Home & Host authority: reviewing a CSP

Q8. Do you think that the CSP process would be streamlined by amending the legislation to provide that, following the acceptance of an out of area placing request for a child/young

person who has a CSP, the host authority assumes responsibility for reviewing the CSP, and that such a review should be conducted immediately?

Q9. In relation to the situation described in Q8 above, do you agree that the best time for the transfer of education authority responsibility to take place is at the time the child starts at the new school?

CSP timescales – references to an ASNTS

Q10. Should the ASL Act legislation be amended to allow references to an ASNTS regarding the following education authority failures?:

- Under section 6(2)(b) of the ASL Act, a parent or young person requests the education authority to establish whether a CSP is required and the education authority simply fails to acknowledge his/her request.
- Under section 11(2)(a) of the ASL Act, the education authority has issued its proposal to establish whether a child or young person requires, or would require, a CSP but fails to decide either way.

Q11. Should a new ASNTS document based process be introduced to expedite those references in which an education authority has failed to meet a relevant timescales?

ASNTS – reviewing decisions

Q12. Are you content for an ASNTS to be given the power to review its decisions?

Enforcement of a restricted reporting order or an award of expenses

Q13. Do you agree that the legislation should be amended to allow a breach of a restricted reporting order under paragraph 11(2)(n) of Schedule 1, or an award of expenses under paragraph 11(2)(s) of Schedule 1, to be enforced?

This paper asks for your view on some specific issues. However, we are happy to receive views and suggestions relating to any aspect of the Education (Additional Support for Learning) (Scotland) Act 2004.

Section 2: Current ASL Act legislative position

Background

1. The ASL Act came into force in November 2005 with the aim of creating a stronger, better system for supporting children's learning. The ASL Act places duties on education authorities to make adequate and efficient provision for the additional support needs of every child and young person for whose school education they are responsible and who requires additional support for learning. Education authorities must identify, support and review the needs of all children with additional support needs
2. The above duties apply to those children (or young persons) for whom education authorities provide, or are likely to provide, education either directly or indirectly. This means pupils at local authority schools and nurseries, independent special schools where the education authority is meeting the fees, and independent nurseries that are in partnership with the education authority, or places other than schools where the authority is providing school education. Parents are able to formally request the education authority to establish whether their child has additional support needs or requires a CSP.
3. Section 26 of the ASL Act also requires education authorities to publish certain information including their policies, in relation to provision for additional support needs, their arrangements for identifying children and young people with additional support needs and who may require a CSP, and parents' roles.
4. The ASNTS has been established to hear appeals relating to CSPs. Mediation services must be made available free of charge to parents by education authorities to assist in avoiding, or resolving, disagreements between parents and education authorities. Education authorities are required to put in place arrangements to enable parents to resolve certain disputes with their authority through independent adjudication
5. The ASL Act is accompanied by the code of practice- *supporting children's learning* - which provides guidance on the implementation of the ASL: Act. Those with duties under the Act are under a duty to have regard to the code of practice when carrying out functions under the ASL Act.
6. Section 1(3)(a) of the ASL Act defines 'additional support' as 'in relation to prescribed pre-school child, a child of school age or a young person receiving school education, provision which is additional to, or otherwise different from, the educational provision made generally for children or, as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority for the area to which the child or young person belongs.'

Placing Requests

7. Schedule 2 of the Act 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, unless certain circumstances apply, 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. There are, however, some circumstances where the duty to comply is not applicable.

8. 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 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.

Home/Host issues

9. A child or young person may attend a school under the management of an education authority other than the education authority for the area to which the child or young person belongs. The former education authority is referred to here as the host education authority, the latter the home education authority. The home education authority may enter into arrangements with host education authority, and arrange for that child or young person to be educated in that host education authority, in order that the home education authority can discharge its duties under the ASL Act. In such circumstances, the home education authority is responsible for the school education of the child or young person including being responsible for establishing whether that child or young person requires a CSP, for preparing the plan, as necessary, and for keeping under consideration the adequacy of any plan so prepared.
10. Where a child or young person is attending a school under the management of an education authority outside the child's (or young person's) home area by virtue of a placing request then it is that host education authority which is responsible for the child's school education and for preparing a CSP, should one be required. However, in terms of section 10 of the ASL Act the home authority has a duty to keep under consideration the adequacy of any CSP prepared and not discontinued for any child or young person belonging to its area. It will be for the home education authority to determine how best to carry out that duty having regard to the provision being made for the child or young person including that provided by the host education authority responsible for the school education of the child or young person.

Duty to prepare CSPs

11. A CSP must be prepared for those children or young people with enduring complex or multiple needs that require significant support from both within and outwith education services. The plan will focus on supporting the child (or young person) to achieve learning outcomes and assist the co-ordination of services from a range of providers.

12. Section 9 specifies the duties relating to CSPs. Where it is established that a child or young person does require a CSP, and the education authority is responsible for his/her school education, then the authority must prepare a plan.
13. 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
 - contact details of a named officer from whom information and advice may be sought.
14. Section 6(2) of the ASL Act states that education authorities must comply with a request from a parent or young person to establish whether the child or young person has additional support needs, or requires a CSP.
15. Chapter 4, paragraph 25 of the code of practice states that education authorities should notify the person making the request under section 6(2) of their decision as quickly as possible but certainly no later than 4 weeks from when the request is received.
16. Section 11(2)(a) of the ASL Act stipulates that before proceeding to establish whether a child or young person requires a co-ordinates support plan, the education authority must notify the child's parents or the young person of this proposal.
17. The ASL Act (CSP) (Scotland) Amendment Regulations 2005 stipulate that within 16 weeks of its decision to establish whether a CSP is required, the education authority must give a copy of the plan to the parents or young person, or where that authority decides that the child or young person does not require a plan, inform the parents or young person of that decision. In the case of the latter, the authority must also notify the parents or young person or their right of appeal to an ASNTS.
18. Chapter 4, paragraph 37 of the code of practice states that it is expected that an education authority will have reached a decision and notified the parent or young person no later than 4 weeks after informing the parent or young person of the proposal, unless it would be impracticable to do so.
19. Chapter 4, paragraph 38 of the code also states that where an education authority decides that the child or young person does require a CSP then it will have no more than 12 weeks remaining in which to prepare the plan and provide the parent or young person with a copy.
20. The ASL Act (CSP) (Scotland) Amendment Regulations 2005, regulations 5 and 6 state that the statutory 16 week period ends on the date on which the education

authority gives the child's parents or the young person a copy of the completed CSP. This date is the date a copy of the CSP is sent by the education authority.

21. Where an education authority is responsible for the school education of a child or young person then its decision not to comply with a request to establish whether a CSP is required is treated as a decision of the education authority that the child or young person does not require a CSP. In notifying the parents or young person of its decision, they must also notify them of their right to make a reference to an ASNTS.
22. Section 18(3)(c) states that a parent or young person can make a reference to an ASNTS where: it has been decided that the child or young person requires a CSP; it has been decided that the child or young person does not require a CSP; or where it has been established that the child or young person does require a CSP, the education authority fail to prepare a plan by the 16 weeks statutory time limit unless one of the exceptions contained in The ASL Act (CSP) (Scotland) Amendment Regulations 2005, section 7(1) applies. Section 7(2) stipulates that where one of these exceptions in section 7(1) apply the education authority must notify the parents or young person why the time limit of 16 weeks cannot be met and notify them of the revised date. Section 7(3) notifies that in these circumstances and in any event the time limit cannot exceed 24 weeks

Content of CSPs - The nominated school

23. Among other provision, the CSP must also state the name and address of the school it is intended that the child or young person will attend.

Transfer of the CSP

24. When a child or young person with a CSP moves, without any immediate intention of returning, from the area of one education authority to that of another, the education authority who prepared the CSP must transfer it to the new education authority within 4 weeks from either the date of departure notified on which the child or young person will be moving or, if the child or young person has already left the area, from the date the original education authority becomes aware the move has taken place.
25. From the date of transfer, the CSP is deemed to have been prepared by the receiving education authority. Subject to any review they may initiate, (which they may do immediately if they consider it necessary or expedient as a significant change in the circumstances of the child or young person) the new education authority is bound by the terms of the CSP and the plan must be treated in the same way as any other CSPs prepared for children and young people in their area. Any review will be subject to the provision in section 10 of the Act and in the Regulations.

Reviews of CSPs

26. Section 10 provides for reviews of CSPs. Education authorities have a duty to keep under consideration the adequacy of each CSP. 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 different from that 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. Currently, this is the responsibility of the home or residential education authority by reason of the words “belonging to their area” in section 10(1).

27. 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.
28. Where a host education authority prepares a CSP for a child or young person belonging to the area of another education authority then it should notify the home education authority that it has done so, and should provide that education authority with such information as the home education authority requests in order to enable it to carry out their duties under section 10 of the Act. It is currently for the home education authority to determine how best to carry out that duty having regard to the provision being made for the child or young person, including that provided by the host education authority responsible for the school education of the child or young person. (Chapter 4(8) Code)
29. Where an education authority is responsible for the school education of a child or young person then its decision not to comply with a request to establish whether a CSP is required is treated as a decision of the education authority that the child or young person does not require a CSP. In notifying the parents or young person of its decision, it must also notify them of their right to make a reference to an ASNTS.
30. Subsection 11(8) enables the Scottish Ministers to make further provision in regulations about CSPs, 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 CSPs.

Mediation services

31. Section 15 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 belonging to the area of the authority. 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.

Dispute resolution

32. Section 16 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 belonging to the area of the authority. These

arrangements must be free of charge to parents. Broadly a parent on behalf of his/her child, or the young person, can ask the education authority to refer a dispute about a matter outwith the jurisdiction of an ASNTS or an appeal committee under the Education (Scotland) Act 1980. Regulations have been made in terms of SSI 2005/501, The Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005.

Additional Support Needs Tribunals for Scotland (the ASNTS)

33. The ASL Act established a new independent and expert ASNTS to consider issues related to CSPs. An ASNTS is subject to the supervision of the Scottish Committee of the Council on Tribunals (to be replaced by the Administrative Justice & ASNT Council) and are headed by a President. ASNTS are constituted as required and hearings are held in locations across Scotland.
34. Section 18 specifies the references that may be made to ASNTS. If an education authority is 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 ASNTS.
35. Section 18, subsection (3) lists the matters that can be referred to ASNTS. These include:
 - decision of an education authority on whether or not a CSP is required or continues to be required,
 - failure by an education authority to prepare a CSP in the required time,
 - decisions of the education authority about information contained in a CSP 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 CSP by the required time,
 - decision of an education authority to refuse to carry out an early review of the CSP,
 - decision by the education authority to refuse a placing request.
36. References relating to refusal of a placing request can be made to an ASNTS if, at the time the request was refused, a CSP has been prepared for the child or young person concerned, or if it has been established that a CSP is required or if a reference has been made to an ASNTS over the decision that a CSP is not required.

37. 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 an ASNTS has ordered a plan to be amended or prepared.

Section 3: Reviewing the current legislation

38. Her Majesty's Inspectorate of Education (HMIE) conducted a 2 year inspection programme into how local authorities are implementing the ASL Act. An interim report of their findings was published on 31 October 2006 and their final report was published on 14 November 2007. Key issues raised from these reports include the need for better information to parents and young people, inter-authority arrangements and better engagement of health and social work services. They also raised some issues over arrangements for preparing CSPs.
39. Adam Ingram, Minister for Children and Early Years, wrote to all local authority Chief Executives on 21 December 2007 asking them to ensure that their authority's procedures are in line with the requirements of the ASL Act and associated code of practice.
40. Additionally, recent Court of Session rulings, namely a decision by Lady Dorrian in the case *Deborah Gordon against a decision of an Additional Support Needs Tribunal dated 25 August 2006* (2006 CSOH 45) on the jurisdiction of an ASNTS to hear placing request appeals and an Inner House decision given by Lord Macphail in the case of *WD v Glasgow City Council* (2007 CSIH 72) on an ASNTS's jurisdiction to in relation to out of authority placing request have highlighted the need to amend the current legislation to reflect the original policy intention that firstly, provision should be made to enable parents of children with CSPs to make out of area placing requests to any authority in Scotland and secondly, that a right of appeal against the refusal of such a request should lie with an ASNTS. Furthermore, a report produced by the Additional Support for Learning Advisory Group, and the annual report from the President of Additional Support Needs Tribunals for Scotland both identify areas for possible amendment which are covered in the paragraphs on the proposed legislative changes below.
41. There is no intention to change the thrust or ethos of the ASL Act.

Section 4: Proposed legislative changes

Placing requests – Timing

42. As detailed in paragraph 36 above, references relating to refusal of a placing request can be made to an ASNTS if, at the time the request was refused, a CSP has been prepared for the child or young person concerned, or a plan is about to be prepared or if a reference has been made to an ASNTS over the decision that a plan is not required.
43. Schedule 2 to the ASL Act makes provision for the transfer from the appeal committee (or sheriff on appeal) to an ASNTS only in respect of the intervention of one set of circumstances; namely, where the education authority has decided that no CSP is required and that decision has been referred to an ASNTS.
44. **Issue:** Lady Dorrian’s Court of Session ruling states that Schedule 2, as currently constructed, does not make provision for placing request appeals made prior to the authority establishing that a CSP should be prepared, to be transferred from either the appeal committee or the sheriff to an ASNTS. Moreover, Lady Dorrian’s ruling states clearly that ‘at the time’ means one single point in time, namely the actual date of the refusal of the placing request.
45. **Action:** Amend the legislation to allow an ASNTS to have jurisdiction to consider any placing request appeal where a CSP is involved or being considered, whether directed to the home or host authority, at any time before final determination by the appeal committee or sheriff, for example where the education authority is in the process of established whether a CSP is required.

Q1. Should the legislation relating to an ASNTS’s jurisdiction regarding placing requests be amended to allow an ASNTS to consider any placing request appeal where a CSP is involved or is being considered, at any time before the final determination by the appeal committee or sheriff?

Q2. Can you foresee any problems with amending the legislation as suggested in Q1 above? If so, what are they?

Placing Requests - Home & Host Authority

46. The policy intention of the ASL Act is that all pupils with ASN (regardless of whether or not they have a CSP) would be in the same position as others in relation to placing requests not only to their “home” authority but also out of area.
47. **Issue:** A request was made on behalf of a child with ASN and with a CSP in preparation who lived in Dunbartonshire to attend a school under Glasgow City Council’s management. Glasgow refused the placing request on the grounds of complying with the Standards in Scotland’s Schools etc. Act 2000 which provides for the presumption of mainstreaming.

48. The parent of the child then submitted a reference to an ASNTS appealing Glasgow's decision. The ASNTS's decision was that it had no jurisdiction to consider an appeal against Glasgow City Council's refusal to grant an out of area placing request. The case was subsequently referred to the Court of Session where Lord Macphail held that the ASL Act did not make, and should not be construed as making, any provision in respect of a child with additional support needs who required a CSP, for the making of a placing request to any education authority who were not responsible for the child's education, or for a reference to an ASNTS of a refusal by such an authority of such a request.
49. **Action:** Amend the legislation to allow young people with ASN and parents of children with ASN (including those with a CSP) to make out of area placing requests and for those with CSPs to make subsequent references to an ASNTS on refusal of such requests.

Q3. Do you agree that the parents of children, with ASN, with or without CSPs, should have the same rights in respect of making out of area placing requests as parents of children without ASN?

Q4. If you do not agree with Q3 above, why not?

Q5. Are you content that in instances where a CSP is involved or is being considered, an appeal against a decision to refuse an out of area placing request should be referred to an ASNTS?

Mediation and dispute resolution

50. Section 15 and 16 of the ASL Act place a duty on education authorities to arrange for independent mediation and enable regulations making provision for dispute resolution services to be provided, free of charge, to parents of children or young people belonging to the area of the authority. Mediation services will seek to avoid or resolve disagreements between the authority and parents or young people concerning functions under the ASL 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.
51. Section 23(2) of the Education Scotland Act 1980 provides that where a child is educated outwith their home authority, the educating authority (host) may recover from the home authority contributions in respect of provision of the child's school education and other services. Scottish Ministers may determine the level of contribution to be made by a home authority.
52. **Issue:** Where an out of authority placing request has been granted in relation to a child or young person, the home authority would be required to provide mediation or dispute resolution between the parent and the host authority at the home authority's expense. Therefore, the costs of these services would be provided by an authority which at that point is not responsible for the child's school education.

53. **Action:** Amend sections 15 and 16 of the Act to require the host authority to provide access to mediation and dispute resolution in circumstances where the host authority has accepted an out of area placing request and is, therefore, responsible for the education of the child.
54. Section 23(2) of the Education Scotland Act 1980 will also be amended to reflect the fact that the cost of providing any mediation or dispute resolution services will not be recoverable from the home authority. The reason for this is that the parents or young person would request mediation or dispute resolution in relation to the provision provided by, or a decision of, the host authority.

Q6. Do you agree that in instances where a child or young person is attending a school outwith his/her home authority area, as a result of a placing request, responsibility for providing mediation and dispute resolution should rest with the host authority?

Q7. In the situation described in Q6 above, do you agree that a contribution in respect of a host authority's provision to parents or young people of mediation or dispute resolution services should not be recoverable from the home authority under section 23(2) of the Education Scotland Act 1980?

Home & Host Authority: Reviewing a CSP

55. Section 10(1) of the ASL Act states that every education authority must keep under consideration the adequacy of any CSP prepared (and not discontinued) for any children or young persons belonging to their area. Therefore, under the current legislation, where a child or young person has been granted an out of authority placing request and has a CSP, the home authority would be responsible for reviewing the CSP, even though at that stage, the home authority would have no responsibility for that child's school education.
56. When reviewing the CSP, the home authority could decide to discontinue the CSP because the child no longer satisfied the criteria for a CSP.
57. **Issue:** A decision to discontinue a CSP is subject to appeal to an ASNTS. However, the ASL Act stipulates that it is the authority with responsibility for the child's education that would be the subject of any such appeal to an ASNTS. Therefore, it would appear that the parent would have no recourse to an ASNTS with regard to the home authority's decision on any matter relating to the review of the CSP as they would not be responsible for the child's school education.
58. **Action:** Amend the legislation to provide that, following the granting of an out of area placing request, the host authority assumes responsibility for the child's education, including duties in relation to reviewing the CSP, and that such a review should be conducted immediately by the host authority. The host authority will therefore assume all responsibility for the child's education and its CSP decisions, failures etc can be referred to an ASNTS. It is intended that this transfer of responsibility will take place at the time the child starts at the school in the host authority.

Q8. Do you think that the CSP process would be streamlined by amending the legislation to provide that, following the acceptance of an out of area placing request for a child/young person who has a CSP, the host authority assumes responsibility for reviewing the CSP, and that such a review should be conducted immediately?

Q9. Do you agree that the best time for the transfer of education authority responsibility to take place is at the time the child starts at the new school?

CSP Timescales - References to an ASNTS

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

60. Where an education authority has issued its proposal to establish whether a CSP is required, the code of practice states that it is expected that an education authority will have reached a decision and notified the parent or young person no later than 4 weeks after informing the parent or young person of the proposal, unless it would be impracticable to do so.

61. **Issue:** The ASL Act does not currently allow for:

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

62. **Action:** Amend the Act to allow the situations described in paragraph 61 above to be referred to an ASNTS: where the education authority, having received a request to establish whether a CSP is required, has failed to respond to the parent's or young person's request; and where the education authority, having indicated their intention to do so, have failed to establish whether a CSP is required.

Q10. Should the ASL Act legislation be amended to allow references to the ASNTS regarding the following education authority failures?

- A parent or young person requests the education authority to establish whether a CSP is required and the education authority simply fails to acknowledge his/her request.
- The education authority has issued its proposal to establish whether a child or young person requires, or would require, a CSP but fails to decide either way.

63. A reference can be made to an ASNTS where it has been determined that a child or young person requires a CSP but the education authority has failed to prepare one within the appropriate timescales.
64. **Issue:** Experience has shown that these references have not, so far, been opposed or subject to any dispute whatsoever on the facts. It may therefore be inappropriate that they follow the same procedure as other types of reference where careful fact finding may be necessary. It is in the interests of parties that a decision is made quickly to ensure that the local authority does not wait until just before the notified date of a hearing to indicate that its opposition has been withdrawn incurring wasteful expenses in the interim.
65. **Action:** To expedite references - introduce a documents only ASNTS procedure for references in which authorities fail to meet statutory timescales.

Q11. Should a new ASNTS document based process be introduced to expedite those references in which an education authority has failed to meet a relevant timescales?

ASNTS - reviewing decisions

66. It is intend that an ASNTS should be given the power to review its decisions, and revoke and vary its orders and awards, in such circumstances as may be determined in accordance with the regulations. It is considered appropriate for provision to be made for an ASNTS which made a particular decision to consider whether or not it should be reviewed. It is also considered that review may be appropriate (a) on account of an error, (b) in the event of either party being unable to be present or represented at the hearing, (c) new evidence becoming available or (d) if otherwise the interests of justice require.
67. **Issue:** The ASL Act does not currently allow for an ASNTS to review its decisions.
68. **Action:** Amend the legislation to allow an ASNTS to review its decisions

Q12. Are you content for an ASNTS to be given the power to review its decisions?

Enforcement of a restricted reporting order and an award of expenses

69. Paragraphs 11(2)(n) and 11(2)(s) of Schedule 1 respectively enable rules of procedure providing for an ASNTS to impose reporting restrictions in relation to all or part of ASNTS proceedings and to make an award of expenses. Rules 35 of the Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2006 ('the rules') makes provision for restricted reporting orders limiting or prohibiting the publishing of any specified matter including the identity of a child or other person. Rule 39 provides that, while an ASNTS shall not normally make an order as to

expenses, it may do so in certain circumstances including where either party has acted frivolously or vexatiously or wholly unreasonable. However, there are no provisions for enforcement in either of these situations.

70. **Issue:** There would appear to be a gap in the legislation in that there is no corresponding provision in relation to the enforcement of a restricted reporting order or an award of expenses.

71. **Action:** Amend the legislation to:

- introduce a criminal offence punishable by a fine not exceeding level 5 on the standard scale (currently £5,000) for anyone in breach of a restricted reporting order
- enable enforcement of an award of expenses as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff court i.e. treated as if it were a warrant issued by a sheriff.

Q13. Do you agree that the legislation should be amended to:

- introduce a criminal offence punishable by a fine for anyone in breach of a restricted reporting order under Rule 35 of the Rules?
- enable enforcement of an award of expenses under Rule 39 of the Rules as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff court?

How to respond

Responding to this consultation paper

We are inviting written responses to this consultation paper by Thursday 19 June 2008. Please use the response form enclosed with this paper.

Please send your response to:

CREASLBill
Central Scanning Unit
U5b Saughton House
Broomhouse Drive
Edinburgh
EH11 3XD

or

Asl.amendmentbill2008@scotland.gsi.gov.uk

If you have any queries contact Seth Chanas on 0131 244 1481. **We would be grateful if you could use the response forms enclosed with this paper as this will aid our analysis of the responses received.** If you require more space for your answers, please use additional sheets of paper and clearly mark each response with the appropriate question number. When returning your response to the above address, please arrange the sheets with the completed Respondent Information Form on the front.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Government now has an email alert system for consultations (SEconsult: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SG consult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the enclosed **Respondent Information Form** with your response as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public (see Respondent Information Form enclosed with this paper), these will be made available to the public in the Scottish Government Library by 18 July 2008 and on the Scottish Government consultation web pages by 25 July 2008. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the SE Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the close of the consultation we will examine all the views submitted carefully. We will then produce a report on the views expressed in the consultation, our responses to them, and any changes to our proposals following the consultation. Subject to the above, the Scottish Government intends to introduce a Bill at the earliest suitable legislative opportunity.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

Seth Chanas
Support for Learning Division
Scottish Government
2B (South)
Victoria Quay
Edinburgh
EH6 6QQ

Or e-mail them, marked for Seth Chanas' attention, to:

Asl.amendmentbill2008@scotland.gsi.gov.uk

The Scottish Government consultation process

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises¹. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (e.g. analysis of response reports) can be accessed at: Scottish Government consultations (<http://www.scotland.gov.uk/consultations>).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

¹ <http://www.scotland.gov.uk/consultations>

List of consultees

Aberlour Child Care Trust
 Action for Sick Children (Scotland)
 Advocacy for Education Service
 Afasic Scotland
 Allied Health Professionals
 Anti-bullying Network
 Army Welfare Service
 ASNTS President
 ASPEP
 Association for Children with Heart Disorders
 Association of Directors of Education in Scotland
 Association of Directors of Social Work
 Association of Scottish Colleges
 Barnardo's Scotland
 Barnardos- West Lothian Family Support Team
 British Deaf association Scotland
 British Red Cross Society
 British Stammering Association
 Butterfly Trust
 C.H.I.P
 Caledonian Award
 Capability Scotland - EBD Project
 Careers Scotland
 Carers National Association (Scotland)
 Central Scotland Racial Equality Council
 Centre of Racial Equality in Scotland
 Chief Executives of Health Boards
 Child Health Commissioners
 Childline Scotland
 Children First
 Children in Scotland
 Collusion Theatre Company
 Commission for Racial Equality
 Community Councils
 Contact a Family Scotland
 COSLA
 Council for Disabled Children
 Deaf Blind Scotland
 Directors of Education
 Directors of Social Work
 Disability Rights Commission
 Down's Syndrome Scotland
 Drake Music Project
 Dyslexia Scotland
 Dyslexia Scotwest
 Dyspraxia Foundation
 Edinburgh and Lothians Racial Equality Council

Education Equity Group
Educational Institute of Scotland (EIS)
ENABLE - Self Advocacy Groups
Engender
Enquire
Epilepsy Scotland
Equal Opportunities Commission
Equality Network
Extra Special Parents
Family Fund
Fife Racial Equality Council
Fife Rights Service
Further Education Colleges
Govan Law Centre
Grampian Racial Equality Council
Health Colleagues
Hearing Impaired Service
Higher Education Institutions
Highland Society for the Blind
HMIE Staff
Implementation Officers: ASL implementation officers. Health, Education and Social Work
Inclusion Scotland
Inclusive Learning Network
Inclusive Play
Independent Special Education Advice (ISEA) (Scotland)
Learning and Teaching Scotland
Learning Disability Alliance of Scotland
Linking Education and Disability
LT Scotland
ME Association Scotland
MELDI (Minority Ethnic Learning Disabilities Initiative)
National Autistic Society
National Autistic Society in Scotland
National Deaf Children's Society
NCH Action for children Scotland
NHS Helpline Scotland
One Parent Families Scotland
Parent Network Scotland
Parent to Parent Tayside
Parenting Across Scotland
Parentline Scotland
Parents
Partners in Advocacy
Project Ability, Centre for Developmental Arts
RAMTRAQ
Relationships Scotland
RNID Scotland
Royal National Institute for Deaf People
Rudolf Steiner Schools
San Jai Chinese Project

Save the Children
Schoolhouse
Schools (All)
Scotland's Commissioner for Children & Young People
Scottish Association for Mental Health
Scottish Child Law Centre
Scottish Civic Forum
Scottish Consumer Council
Scottish Council for Independent Schools
Scottish Council for Voluntary Organisations
Scottish Council on Deafness
Scottish Disability Equality Forum
Scottish Independent Special Schools Group
Scottish Marriage Care/Stepfamily Scotland
Scottish Mediation Network
Scottish Network for able pupils
Scottish Parent and Teacher Council
Scottish Pre-School Play Association
Scottish Refugee Council
Scottish School Boards Association
Scottish Sensory Centre
Scottish Society for Autism
Scottish Spina Bifida Association
Scottish Travellers Education Programme (STEP)
SCVO
Sense Scotland
Shaw Trust (Dunfermline)
SHS Scotland
Sign Bridge to Literacy
SKILL Scotland
Sleep Scotland
Special Needs Information Point
Tayside Racial Equality Council
Visual Impairment Scotland
VOCAL
Voluntary Health Scotland
West of Scotland Racial Equality Council
YCSA
Young People Speak Out

Education (Additional Support for Learning) (Scotland) Bill

[CONSULTATION DRAFT]

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Education (Additional Support for Learning) (Scotland) Bill

[CONSULTATION DRAFT]

An Act of the Scottish Parliament to amend the law in relation to the school education of children and young persons having additional support needs; and for connected purposes.

Placing requests and references to Tribunal

1 Placing requests and references to Tribunal

- (1) The Education (Additional Support for Learning) (Scotland) Act 2004 (asp 4) (“the 2004 Act”) is amended in accordance with this section.
- (2) In section 1(3)(a) (additional support needs), for “for the area to which the child or young person belongs” substitute “responsible for the school education of the child or young person”.
- (3) In section 10 (reviews of co-ordinated support plans)—
 - (a) in subsection (1), for “belonging to their area” substitute “for whose school education they are responsible”,
 - (b) after subsection (5) insert—

“(5A) Where any such co-ordinated support plan as is mentioned in subsection (1) is transferred to the education authority by virtue of regulations made in pursuance of section 11(8), the authority must carry out a review of the plan as soon as practicable after the date of transfer.”.
- (4) In section 11(8) (co-ordinated support plans: further provision), in paragraph (e) the words from “when” to the end of the paragraph are repealed.
- (5) In section 18 (references to Tribunal in relation to co-ordinated support plan)—
 - (a) in subsection (3)(e)—
 - (i) for “the”, where it occurs for the first time, substitute “an”,
 - (ii) for “the”, where it occurs for the second time, substitute “a”,
 - (iii) at the end add “(including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible)”,
 - (b) in subsection (4)—
 - (i) the words “, at the time the placing request is refused” are repealed,
 - (ii) after paragraph (b) insert—

- “(ba) no such plan has been prepared, but the education authority have received a request referred to in section 6(2)(b) to establish whether the child or young person requires such a plan,
- (bb) no such plan has been prepared, but under subsection (2)(a) of section 11 the education authority have informed the persons mentioned in subsection (3) of that section of their proposal to establish whether the child or young person requires, or would require, such a plan.”.
- (6) In schedule 2 (placing requests)—
- (a) after paragraph 2(4) add—
- “(5) In sub-paragraph (1), the reference to an education authority includes an education authority which are not responsible for the school education of the child.”,
- (b) after paragraph 4(2) insert—
- “(2A) Sub-paragraph (2) does not apply where the placing request was made to an education authority which, at the time of the request, were not responsible for the school education of the child.”,
- (c) in sub-paragraph (4) of paragraph 6, for the words from “there” to the end of the sub-paragraph substitute—
- “the things mentioned in any of paragraphs (a), (b), (ba), (bb) and (c) of section 18(4) occur.”,
- (d) in sub-paragraph (8) of paragraph 7, for the words from “there” to the end of the sub-paragraph substitute—
- “the things mentioned in any of paragraphs (a), (b), (ba), (bb) and (c) of section 18(4) occur.”.

2 References to Tribunal in relation to co-ordinated support plan

In section 18 of the 2004 Act (references to Tribunal in relation to co-ordinated support plan), after subsection (5) insert—

- “(5A) Where an education authority fail, in response to a request referred to in section 6(2)(b)—
- (a) to inform under subsection (2)(a) of section 11 the persons mentioned in subsection (3) of that section of their proposal to establish whether a child or young person requires, or would require, a co-ordinated support plan by the time required by regulations made in pursuance of subsection (8) of that section, or
- (b) to inform those persons of any decision not to comply with the request by the time required by regulations made in pursuance of subsection (8) of that section,

that failure is to be treated for the purposes of this section as a decision of the authority that the child or young person does not require a co-ordinated support plan.

- (5B) Where under subsection (2)(a) of section 11 the education authority have informed the persons mentioned in subsection (3) of that section of their proposal to establish whether the child or young person requires, or would require, a co-ordinated support plan, failure by the authority so to establish by the time required by regulations made in pursuance of subsection (8) of that section is to be treated for the purposes of this section as a decision of the authority that the child or young person does not require a co-ordinated support plan.”.

Mediation and dispute resolution

3 Mediation services

In subsection (1) of section 15 of the 2004 Act (mediation services)—

- (a) for paragraph (a) substitute—
 - “(a) the parents of any children,”
- (b) for paragraph (b) substitute—
 - “(b) any young persons,”
- (c) in paragraph (c), the word “such” is repealed,
- (d) for the word “such”, where it occurs for the third time, substitute “the”,
- (e) after the word “of”, where it occurs for the fifth time, insert “any of”.

4 Dispute resolution

In subsection (1) of section 16 of the 2004 Act (dispute resolution), the following are repealed—

- (a) in paragraph (a), the words “belonging to the area of the authority”,
- (b) in paragraph (b), the words “belonging to that area”,
- (c) in paragraph (c), the word “such” where it occurs for the first time.

5 Contributions not recoverable in respect of certain services

In section 23 of the Education (Scotland) Act 1980 (c.44) (provision by education authority for education of pupils belonging to areas of other authorities), after subsection (2) insert—

- “(2A) Subsection (2) does not permit an education authority to recover contributions in respect of—
- (a) mediation services provided under arrangements made in pursuance of section 15(1) of the 2004 Act (mediation services), or
 - (b) services provided by the authority forming part of any procedure provided for in regulations under section 16(1) of that Act (dispute resolution).”.

*Tribunal: miscellaneous***6 Tribunal: review, reporting restrictions and expenses**

- (1) Schedule 1 to the 2004 Act (Additional Support Needs Tribunals for Scotland) is amended in accordance with this section.
- (2) After paragraph (t) of sub-paragraph (2) of paragraph 11 add—
 - “(u) enabling a Tribunal, in specified circumstances, to—
 - (i) review,
 - (ii) vary or revoke,
 any of its decisions, orders or awards,
 - (v) enabling a Tribunal, in specified circumstances, to review the decisions, orders or awards of another Tribunal and take such action (including variation and revocation) in respect of those decisions, orders or awards as it thinks fit.”.
- (3) After paragraph 11 insert—

“Breach of reporting restrictions an offence

- 11A(1) Where any reporting restrictions imposed by a Tribunal after the coming into force of this paragraph, by virtue of rules under paragraph 11, are breached by a person, the person is guilty of an offence.
- (2) It is a defence for a person charged with an offence under sub-paragraph (1) to show that the person had a reasonable excuse for breaching the restrictions.
- (3) A person who commits an offence under sub-paragraph (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Enforcement of orders as to expenses

- 11B(1) Any order as to expenses made by a Tribunal by virtue of rules under paragraph 11 may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.
- (2) In sub-paragraph (1), the reference to an order as to expenses—
 - (a) does not include an order which has been revoked, and
 - (b) in relation to an order which has been varied, is to be construed as a reference to the order as so varied.”.

*General***7 Short title and commencement**

- (1) This Act may be cited as the Education (Additional Support for Learning) (Scotland) Act 2008.
- (2) This section comes into force on Royal Assent.
- (3) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.
- (4) Different days may be so appointed for different purposes.

Q1. Should the ASL Act legislation relating to an Additional Support Needs Tribunal for Scotland's (ASNTS's) jurisdiction regarding placing requests be amended to allow an ASNTS to consider any placing request appeal where a co-ordinated support plan (CSP) is involved or is being considered, at any time before the final determination by the appeal committee or sheriff?

Yes No

Additional comments:

Q2. Can you foresee any problems with amending the legislation as suggested in Q1 above? If so, what are they?

Q3. Do you agree that the parents of children with additional support needs (ASN), with or without CSPs, should have the same rights in respect of making out of area placing requests as parents of children without ASN?

Yes No

Additional comments:

Q4. If you do not agree with Q3 above, why not?

Q5. Are you content that in instances where a CSP is involved or is being considered, a decision to refuse an out of area placing request should be referred to an ASNTS?

Yes No

Additional comments:

Q6. Do you agree that in instances where a child or young person is attending a school outwith his/her home authority area, as a result of a placing request, responsibility for providing mediation and dispute resolution should rest with the host authority?

Yes No

Additional comments:

Q7. In the situation described in Q6 above, do you agree that a contribution in respect of a host authority's provision to parents or young people of mediation or dispute resolution services should not be recoverable from the home authority under section 23(2) of the Education Scotland Act 1980?

Yes No

Additional comments:

Q8. Do you think that the CSP process would be streamlined by amending the legislation to provide that, following the acceptance of an out of area placing request for a child/young person who has a CSP, the host authority assumes responsibility for reviewing the CSP, and that such a review should be conducted immediately?

Yes No

Additional comments:

Q9. In relation to the situation described in Q8 above, do you agree that the best time for the transfer of education authority responsibility to take place is at the time the child starts at the new school?

Yes No

Additional comments:

Q10. Should the ASL Act legislation be amended to allow references to an ASNTS regarding the following education authority failures?:

- Under section 6(2)(b) of the ASL Act, a parent or young person requests the education authority to establish whether a CSP is required and the education authority simply fails to acknowledge his/her request.

Yes No

Additional comments:

- Under section 11(2)(a) of the ASL Act, the education authority has issued its proposal to establish whether a child or young person requires, or would require, a CSP but fails to decide either way.

Yes No

Additional comments:

Q11. Should a new ASNTS document based process be introduced to expedite those references in which an education authority has failed to meet a relevant timescales?

Yes No

Additional comments:

Q12. Are you content for an ASNTS to be given the power to review its decisions?

Yes No

Additional comments:

Q13. Do you agree that the legislation should be amended to allow a breach of a restricted reporting order under paragraph 11(2)(n) of Schedule 1, or an award of expenses under paragraph 11(2)(s) of Schedule 1, to be enforced?

Yes No

Additional comments:

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