

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

TRANSITIONAL ARRANGEMENTS

CONSULTATION PAPER

Additional Support Needs 08



SCOTTISH EXECUTIVE

Background

1. When commenced, the Education (Additional Support for Learning) Scotland) Act 2004, and the associated secondary legislation, will replace those sections of the Education (Scotland) Act 1980 that legislated for children and young people with special educational needs and Records of Needs. This will mean that Records of Needs will no longer be statutory documents and education authorities will not have any duties with regard to them.
2. However, particular provision has been made in section 30 of the Additional Support for Learning Act to address the transition from the current system to the new one for children and young people who had a Record of Needs immediately prior to the commencement of the Act.
3. This paper describes the effect the provision in section 30 will have. It also outlines some of our proposals for further provision that could be made by way of legislation for this transitional period.
4. The paper asks for your views on some specific issues. We are, however, happy to receive views and suggestions relating to any aspect of this paper.

Introduction

5. Under section 30 of the Act all children and young people who, immediately prior to the commencement of the Act, had a Record of Needs under section 60-65 of the Education (Scotland) Act 1980, are deemed to have additional support needs. Consequently, all the provisions of the Act, where they refer to children and young people with additional support needs, and their parents, apply. This means, for example, that parents of a child, or a young person with a Record of Needs immediately prior to the commencement of the Act, have access to free mediation services and dispute resolution arrangement. In determining whether these children and young people require a co-ordinated support plan, an education authority must have regard to the full requirements of the Act and the code of practice.
6. Section 30 does not apply where a child or young person has a Record of Needs, but for whose education an education authority are not responsible. These children or young people are not deemed to have additional support needs under section 30 of the Act but that does not necessarily mean that they do not have additional support needs. The Act does provide education authorities with powers under section 7 regarding children and young people belonging to their area, for whose education they are not responsible.

Preserving Existing Provision

7. When the Act commences, education authorities must, within 2 years, establish whether children and young people with a Record of Needs require a co-ordinated support plan. Until this time the Act states that the education authority must ensure that the provision being made for the recorded child or young person is no less than the provision which was made for the child or young person immediately prior to the commencement of the Act. In effect this means that, within this 2 year period, there will

be no change in the provision being made for the child or young person with a Record of Needs until such time as the education authority establish that:

- the child or young person requires a co-ordinated support plan, or
- the child or young person does not require a co-ordinated support plan, or
- there is a significant change in the child's or young person's additional support needs.

Co-ordinated support plan required

8. Where the education authority establish that a co-ordinated support plan is required they will prepare a plan that will contain the complex or multiple factors from which the additional support needs arise; the educational objectives; the additional support required by the child or young person and the persons who will provide the support. Further information about the co-ordinated support plan can be found in the draft code of practice and associated regulations which have been laid before the Scottish Parliament for comment; these documents are available on the Scottish Parliament's website : <http://www.scottish.parliament.uk/home.htm>

Co-ordinated support plan not required

9. In situations where the education authority decide, following assessment, that the child or young person does not require a co-ordinated support plan the Act ensures that the provision being made for him/her is preserved as a minimum for a further 2 years from the date that that the education authority make that decision. For some recorded children and young people this could result in provision being preserved for up to 4 years from the date the Act is commenced.

Role of the Additional Support Needs Tribunals

10. The decision of an education authority on whether or not a co-ordinated support plan is required can be referred to the Additional Support Needs Tribunal. The Tribunal has the power to either confirm the decision of the authority, or overturn the decision and require the authority to take such action as the Tribunal considers appropriate by such time as the Tribunal may require.

11. Where the Tribunal upholds the authority's decision to prepare a co-ordinated support plan, then from the date of that decision, the duty to preserve the provision ceases.

12. Parents (or the young person) may refer to a Tribunal the authority's decision not to prepare a co-ordinated support plan. Where the Tribunal upholds the authority's decision not to prepare a co-ordinated support plan then, as above, the authority must continue to ensure that the provision being made is no less than the provision being made immediately prior to the commencement of the Act for a further 2 years from the date that the authority's decision was reached (or unless the child's or young person's additional support needs change significantly).

13. Where the Tribunal does not uphold the authority's decision, and a co-ordinated support plan is prepared, then, from the date of that decision the duty to preserve the provision made under the Record of Needs ceases.

There is a significant change in the child's or young person's additional support needs

14. Where there is a significant change in the child's or young person's additional support needs the education authority are released from their obligation to ensure that the provision being made for the recorded child or young person is no less than the provision which was made for the child immediately prior to the commencement of the Act.

15. It should, however, be remembered in all of this that the Act provides for a child or young person in this position to be taken as having additional support needs and that the education authority are under an obligation to make adequate and efficient provision for such additional support as is required by each child or young person. The provisions in the Act and the guidance in the code of practice, as these relate to children and young people with additional support needs and their parents, apply. In particular, where parents are in disagreement with the authority then they may use the free mediation service and dispute resolution arrangements provided by the authority as explained in the draft code of practice and associated regulations.

Transitional provisions

16. We have explained above the provision made by the Act for children and young people with a Record of Needs. What we would seek your views on is whether it is necessary to make any provision additional to that already available. If this were thought necessary it could be achieved through legislating for the preservation of some of the provisions of the Record of Needs Regulations to ensure that Records can be maintained for the purposes of reference, preservation and destruction, after the commencement date of the Act.

17. Such arrangements could ensure that the Records of Needs would be available for reference purposes and they could be maintained for a period of 5 years from the date of commencement of the Act.

Q1 Do you think that we should legislate to the effect that would preserve the Record of Needs for reference purposes?

Q2. If you think that we should legislate on this issue, do you think that 5 years is the correct length of time, or is some other timescale more realistic?

18. The transitional arrangements for children and young people with a Record of Needs and the implications of the Act will be explained in a Circular to Directors of Education and others. A draft of the Circular is attached at Annex A for your comments. The draft will reflect any forthcoming developments and is scheduled to be issued prior to the start of the 2005-06 school year. There will also be a reference in the code of practice to this guidance.

**Scottish Executive Education Department
Additional Support Needs Division
May 2005**

DRAFT

Annex A



SCOTTISH EXECUTIVE

Education Department

Victoria Quay
Edinburgh EH6 6QQ

CIRCULAR XXXX/05

Chief Executives of Local Authorities
Directors of Education
Directors of Social Work
Head Teachers of Schools
Other interested organisations

«Date»

Dear Sir or Madam

**EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) ACT 2004
GUIDANCE ON TRANSITIONAL PROVISION: RECORDED CHILDREN AND
YOUNG PEOPLE**

1. This circular has been written to help and advise education authorities as they prepare for the commencement of the Education (Additional Support for Learning) (Scotland) Act 2004 referred to as the “Act”. The circular is with specific regard to section 30 of the Act which makes transitional provision for recorded children and young people¹.
2. The new provision will apply to any child or young person for whose school education an education authority are responsible, at the commencement date of the Act (Autumn 2005), and who, immediately before that date, was a recorded child or young person within the meaning of the Education (Scotland) Act 1980. Section 30 does not apply where a child or young person has a Record of Needs but for whose education the education authority are not responsible.

Legislation

3. When the Act commences, education authorities must, within 2 years, establish whether children and young people, who, immediately before the commencement date had a Record of Needs, require a co-ordinated support plan. Until the date of that decision the Act states that the education authority must ensure that the provision being made for the recorded child or young person is no less than the provision which was made for the child or young person immediately prior to the commencement of the Act. The provision referred to is the provision that was made under section 62(3) of the 1980 Act for a recorded child or young person, prior to the commencement of the Act, and includes provision for special educational needs. In effect this means that, within this 2 year period, there will be no change in the provision being made for the

¹ The Act refers to ‘young persons’ where a young person has the meaning as defined under the Education (Scotland) Act 1980 as ‘a person over school age who has not attained the age of eighteen years’. In this circular the term ‘young people’ will be used in place of ‘young persons’.

child or young person who had a Record of Needs until such time as the education authority establish that:

- the child or young person requires a co-ordinated support plan, or
- the child or young person does not require a co-ordinated support plan, or
- there is a significant change in the child's or young person's additional support needs.

Planning

4. Under section 30(2) of the Act all children and young people who, at commencement of the Act, have a Record of Needs are deemed to have additional support needs. Consequently, all the provisions of the Act where they refer to children and young people with additional support needs, and their parents, apply. This means, for example, that parents of children and young people with a Record of Needs (and the young person) on commencement of the Act, have access to free mediation services and dispute resolution arrangements; also in determining whether these children or young people require a co-ordinated support plan an education authority must have regard to the full requirements of the Act and the code of practice. In particular, education authorities must:

- comply with assessment requests from parents or young people, unless the request is unreasonable (section 8)
- inform parents and young people of their proposals to establish whether a co-ordinated support plan is required (section 11)
- seek and take account of relevant information and advice from appropriate agencies and other persons for such children and young people as the authority consider appropriate (section 12)
- provide the parents or young person with a copy of the plan and notify them of their right to make a reference to the Additional Support Needs Tribunal (section 11)
- observe the statutory timescale for preparation of a co-ordinated support plan (regulation 4 of the Education (Co-ordinated Support Plan) (Scotland) Regulations 2005)

5. Section 30 does not apply where a child or young person has a Record of Needs but for whose education an education authority are not responsible. These children or young people are not deemed to have additional support needs under section 30 of the Act, but that does not necessarily mean that they do not have additional support needs. The Act does provide education authorities with powers under section 7 regarding children and young people belonging to their area, for whose education they are not responsible. These powers enable an education authority to respond to a request to establish whether such a child or young person has additional support needs or would, if the education authority were responsible for the child's or young person's education, require a co-ordinated support plan.

Co-ordinated support plan required

6. Where an education authority establish that a child or young person who, immediately before the commencement date had a Record of Needs, requires a co-ordinated support plan they must prepare a plan that must contain the complex or multiple factors from which the additional support needs arise; the educational objectives; as well as the additional support required by the child or young person and the persons who will provide the support. Once an authority have established that a plan is required (subject to reference to a Tribunal as described below) then on the date on which that decision is established the transitional arrangements under section 30 will have been met. That is, if the co-ordinated support plan is, at some point in the future, no longer required (subject to reference to a Tribunal) then the provisions of section 30 no longer apply

and preservation of provision secured through the Record of Needs is no longer provided under section 30.

7. Further information about the co-ordinated support plan can be found in the draft code of practice and associated regulations which have been laid before the Scottish Parliament for comment; these documents are available on the Scottish Parliament's website: <http://www.scottish.parliament.uk/home.htm>

8. The decision of an education authority on whether a co-ordinated support plan is required can be referred to the Additional Support Needs Tribunal by the parents or the young person. The Tribunal has the power to either confirm the decision of the authority, or overturn the decision and require the authority to take such action as the Tribunal considers appropriate by such time as the Tribunal may require.

9. The parents (or the young person) may refer the decision of the authority to prepare a plan to the Tribunal, if they so wish under section 18. If the decision of the Tribunal is that a plan should not be prepared then the authority must continue to ensure that the provision being made is no less than the provision being made immediately prior to the commencement of the Act. This provision applies for a further 2 years from the date that the authority's decision was reached (or unless the child's or young person's additional support needs change significantly). The provision being made by the authority should also be preserved during the period the Tribunal is considering the referral.

Co-ordinated support plan not required

10. In situations where an education authority establish that the child or young person does not require a co-ordinated support plan the Act ensures that the provision being made for him/her is preserved as a minimum for a further 2 years from the date that that the education authority make that decision. For some recorded children and young people this could result in provision being preserved for up to 4 years from the date the Act is commenced.

11. Parents (or the young person) may refer to a Tribunal the authority's decision not to prepare a co-ordinated support plan. Where the Tribunal upholds the authority's decision not to prepare a co-ordinated support plan then the authority must continue to ensure that the provision being made is no less than the provision being made immediately prior to the commencement of the Act. This provision will apply for a further 2 years from the date that the authority's decision was reached (or unless the child's or young person's additional support needs change significantly). Where the Tribunal does not uphold the authority's decision, and a co-ordinated support plan is prepared, then from the date of that decision the duty to preserve the provision made under the Record of Needs ceases.

There is a significant change in the child's or young person's additional support needs

12. In meeting the requirements of section 30, education authorities must also have regard to their duty to make appropriate arrangements to keep under review the additional support needs and the adequacy of the support required to meet the additional support needs. If when doing so, it comes to the attention of the authority that there has been a significant change in the child's or young person's additional support needs, that requires a change in the provision to be provided, they are released from their obligation to ensure that the provision being made for the recorded child or young person is no less than the provision which was made for the child immediately

prior to the commencement of the Act. They will, however, still be under the duty in section 4(1)(a) to make adequate and efficient provision for such additional support as is required by each child or young person for whose education they are responsible.

13. Those who work with the child or young person, including their parents, will be best placed to know whether there has been a significant change in the child's or young person's additional support needs. In reaching a decision, education authorities should take account of the parents' (or young person's) views, the views of the child where appropriate, as well as assessment information and reports available. If an education authority conclude that the child's or young person's additional support needs have changed significantly, they should notify the parents or young person about the changes in needs, what the new additional support needs are, if any, and the provision to be made to support them. Parents and young people should also be advised of their right to access free mediation services and dispute resolution arrangements if they do not agree with the changes to be made.

Monitoring arrangements

14. In order to ensure that the duties under section 30 are being met, education authorities should have appropriate arrangements in place for:

- considering whether these formerly recorded children and young people require co-ordinated support plans
- monitoring significant changes in the formerly recorded child's or young person's additional support needs
- recording the decisions/outcomes for monitoring purposes

Future Needs Assessments

15. There will be young people who are recorded and are in the middle of Future Needs Assessments when the relevant provision in the 1980 Act will fall. Section 13 of the Act, which deals with planning arrangements for the transition from school to adult life, should apply for those children and young people who are likely to require support making this transition.

Previously recorded child or young person moving between education authorities during transition period

16. When a child or young person transfers from one authority to another and the first authority has not established whether the child or young person requires a co-ordinated support plan, then the first authority should provide the parents (or the young person) and the authority to which the child or young person is transferring (if this is known) with a written statement of the provision being made by them immediately before the commencement date (under section 62(3) of the 1980 Act; provision that has been preserved under Section 30 of the 2004 Act).

17. The authority to which the child or young person transfers are required to maintain this level of provision for 2 years from the date of commencement of the Act or until they establish (whichever is sooner) whether the child or young person requires a co-ordinated support plan (see paragraphs 6-9 above which apply), does not require a co-ordinated support plan (see paragraphs 10-11 which apply), or whether there is a significant change in the child's or young person's needs (see paragraphs 12-13 which apply).

18. Where the child or young person does have a co-ordinated support plan then that transfers with them to the new authority, who can, if they wish, review the plan.

Appeals

19. While the Scottish Executive will make every effort to ensure that appeals to the Scottish Ministers made under section 63 of the Education (Scotland) Act 1980 are resolved, there will be a few that will not, however, be resolved prior to the Act's commencement date.

20. These appeals relate to the terms of the Record of Needs and an education authority's decision to open a Record of Needs or to continue/to discontinue recording the child or young person. Given that the outcome of such appeals would be in respect of a Record of Needs, those appeals that have not been resolved by the date of commencement will fall since section 63 of the 1980 Act will have been repealed by the Act. In the case of appeals already lodged with Scottish Ministers, then Scottish Ministers will write to the parents making the appeal and to the appropriate local authority notifying all parties that the appeal can no longer be considered by Scottish Ministers. Where the appeal relates to a child or young person already recorded at the time of commencement of the Act, then the provisions of section 30 of the Act apply as above.

21. Where the appeal has been lodged with the local authority appeal committee, but not transferred to Scottish Ministers, then the local authority appeal committee should write to parents informing them that the appeal cannot be taken forward.

22. Where an appeal has been lodged with the sheriff in relation to the school to be attended, in respect of section 65 of the 1980 Act, then that appeal too will fall. The education authority should inform the parents. Since these children and young people would have had Records of Needs prior to the commencement of the Act, the provisions of section 30 of the Act apply as above.

Children and young people undergoing assessment for Record of Needs when the Act commences

23. Where a statutory assessment has been requested or is underway, at the time of commencement of the Act, then the outcome of the assessment cannot lead to the opening of a Record of Needs. Where parents have requested a statutory assessment, or one is already underway, then it can be assumed that the parents and/or the authority believe that the child or young person has additional support needs. Authorities will wish to consider any relevant information gathered prior to the date of commencement of the Act when considering any additional support needs of the child or young person.

Queries

24. Any queries concerning this Circular should be directed to, Robin McKendrick, Head of Legislation and Tribunals Team, Additional Support Needs Division, Scottish Executive Education Department, Area 3 B North, Victoria Quay, Edinburgh, EH6 6QQ.

Yours sincerely

MIKE GIBSON
Head of Additional Support Needs Division

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