

*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**

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## **EXPLANATORY NOTES**

### **BACKGROUND TO THE ACT**

3. The Act amends the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) which came into force on 14 November 2005. The 2004 Act introduced a new system for identifying and addressing the additional support needs of children and young persons who face a barrier to learning. References to young persons are to those aged 16 or 17 who are still receiving school education.
4. The 2004 Act sets out how children with additional support needs should be provided for by education authorities, supported, where necessary, by appropriate agencies, such as Health Boards, Careers Scotland and other local authorities.
5. The 2004 Act made provision for the establishment of new independent Additional Support Needs Tribunals for Scotland (“the Tribunal”). The Tribunal hears and decides appeals made by parents against the decisions by or failures of education authorities in relation to a co-ordinated support plan. Reference to the Tribunal may also be made regarding the refusal of a placing request in certain circumstances.
6. In determining all its decisions and directions, the Tribunal must take account of the code of practice published by the Scottish Ministers. The 2004 Act also provides for the Tribunal to be governed by rules of procedure and regulations separate from the code of practice.
7. Her Majesty’s Inspectorate of Education (“HMIE”) conducted a 2 year inspection programme into how local authorities were implementing the 2004 Act. An interim report of their findings was published in October 2006 and the final report was published on 14 November 2007. The report highlighted that authorities did not always provide sufficient information for parents, children and young people about their rights under the new legislation.
8. There have been two recent Court of Session judgements which concerned the interpretation of the 2004 Act:
  - *Gordon, Appellant* 2007 FamLR 76, in which Lady Dorrian accepted the appellant’s argument that none of the circumstances described in section 18(4)(a) to (c) existed on the day on which the placing request was refused, namely:
    - o Section 18(4)(a): a co-ordinated support plan has been prepared (and not discontinued) for the child or young person,
    - o Section 18(4)(b): no such plan has been prepared, but it has been established by the education authority that the child or young person requires such a plan, or

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o Section 18(4)(c): the education authority have decided that the child or young person does not require such a plan and that decision has been referred to a Tribunal under subsection (1).

Therefore, as a result, the Tribunal did not have the jurisdiction to hear the placing request appeal.

- *WD v Glasgow City Council* 2007 SLT 1057, held that the Tribunal does not have jurisdiction to hear appeals in relation to out of area placing request decisions and that parents of children with a co-ordinated support plan cannot make out of area placing requests. The ruling also infers that parents of children with additional support needs cannot make out of area placing requests.
9. This Act amends the 2004 Act in light of the HMIE reports, recent Court of Session rulings, the annual report from the President of the Additional Support Needs Tribunals for Scotland and informed observations in light of practice.
10. The Act makes the following adjustments to the 2004 Act:
- it permits parents of children with additional support needs and young people with additional support needs, including those with co-ordinated support plans, to make out of area placing requests.
  - following the refusal of an out of area placing request in respect of a child or young person who has a co-ordinated support plan, is being considered for a co-ordinated support plan, or in respect of whom the education authority have decided does not require a co-ordinated support plan and that decision has been referred to the Tribunal, a parent or young person is able to appeal the decision to refuse the request to the Tribunal. Where the placing request is to a special school the decision to refuse the request will be referable to the Tribunal whether or not a co-ordinated support plan is involved.
  - following the submission of an out of area placing request, a parent or young person is able to access mediation from the potential host authority regarding the placing request.
  - following a successful out of area placing request, parents or a young person are able to access mediation and/or dispute resolution from the host authority regarding that authority's functions under the 2004 Act.
  - following 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.
  - it enables 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 and 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 whether or not a co-ordinated support plan is involved.
  - 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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- it extends 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.
- it ensures 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.
- where a child is being educated outwith the area in which he or she lives as a result of a successful out of area placing request, it prevents the education authority (the host authority) from recovering the cost of providing any mediation and/or dispute resolution services from the authority for the area in which the child lives (the home authority).
- where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, responsibility for the child's or young person's education and carrying out all of the duties under the 2004 Act transfers to the host authority.
- where a child is being educated outwith his or her home authority as a result of arrangements made or entered into by the authority for the area to which the child or young person belongs with another authority, responsibility for the school education of the child or young person remains with the authority for the area to which the child belongs.
- it clarifies the definition of additional support by specifying that it is not limited to support provided in an educational environment.

it requires authorities to apply the wider definition of 'additional support' to children under school age other than prescribed pre-school children who have additional support needs arising from a disability within the meaning of the Disability Discrimination Act 1995.

- it requires 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.
- it provides that the education authority are required to make arrangements for the provision of independent mediation services which cannot include in-house mediation services.
- it provides that, where a parent or young person makes an application for dispute resolution the Scottish Ministers may by regulations provide that application must be made, to the Scottish Ministers.
- it enables 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 referred to in section 14 of the 2004 Act and places education authorities under a duty to publish information as to those persons.
- it extends 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.
- it automatically deems all looked after children and young people to have additional support needs unless they do not require additional support in order to benefit from education.
- it provides that if a child under school age (generally under 5 years old), who belongs to the authority's area, is brought to the attention of the authority as

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- it requires education authorities to provide parents of 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 of the 2004 Act.
- it provides that, when carrying out their duties under section 26 of the 2004 Act, the test to be used by authorities in establishing whether a young person lacks capacity should relate solely to the young person's ability to understand the information published under subsection 26(1)(d).
- it places authorities under a duty to ensure that a summary of the published information is available, on request, from each place in the authority's area where school education is provided and in any handbook or other publications provided by the school that is 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 the school or the authority for that purpose.
- it extends the list of matters on which authorities are required to publish information to include any procedures established for the resolution of disputes.
- it places authorities under a duty to seek and take account of the child's views in relation to any information to be provided to an appropriate agency or agencies in relation to a child leaving school.
- it permits the Tribunal to consider any placing request appeal, where a co-ordinated support plan has been prepared or is being considered, at any time before final determination by an education appeal committee or sheriff.
- it extends the types of references that may be made 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.
- it extends the power of the Tribunal to enable it to require the education authority to take action to rectify a 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.
- it extends the circumstances in which the decision of an education authority to refuse a placing request can be referred to a Tribunal, to include those decisions where an education authority have issued their proposal to establish whether a co-ordinated support plan is required.
- it extends the circumstances in which parents and young persons can make references to the Tribunal consequent on certain procedural failures of the education authority.
- it extends 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.
- it enables Scottish Ministers to make rules to allow a convener sitting alone to consider certain references and to allow the Tribunal to review its decisions in certain specified circumstances.
- it provides that following a decision of a Tribunal that requires an education authority to do anything, the President of the Tribunal will have the power to

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require the authority to provide him or her with information about the authority's implementation of the Tribunal decision.

- it provides the President of the Tribunal with the power to refer the matter to Scottish Ministers where he or she is satisfied that the authority are not complying with the Tribunal decision.
- it requires that for the first five years after commencement of the Act, the Scottish Ministers must report to the Scottish Parliament on what progress has been made in ensuring that sufficient information relating to children and young people with additional support needs is available to monitor the implementation of the 2004 Act.
- it 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.