EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

AGENDA

1st Meeting, 2009 (Session 3)

Wednesday 14 January 2009

The Committee will meet at 10.00 am in Committee Room 2.

1. Decision on taking business in private: The Committee will decide whether to take item 4 in private.

2. Education (Additional Support for Learning) (Scotland) Bill: The Committee will take evidence on the Bill at Stage 1 from—

   Dr Ted Jefferies, Principal Psychologist, Argyll and Bute Council;

   Martin Vallely, Service Manager Professional Services, City of Edinburgh Council;

   Cameron Munro, Senior Solicitor (Education), Glasgow City Council;

   Bryan Kirkaldy, Representative, ADES.

3. Subordinate legislation: The Committee will consider the following negative instrument—


4. Review of Scottish Parliamentary Corporate Body supported bodies: The Committee will consider its response to the consultation published by the Review of the SPCB Supported Bodies Committee.

Eugene Windsor
Clerk to the Education, Lifelong Learning and Culture Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 0131 348 5204
Email: eugene.windsor@scottish.parliament.uk
The papers for this meeting are as follows—

**Agenda item 2**

Paper by the Clerk  
ELLC/S3/09/1/1

**Agenda item 3**

SSI cover note  
ELLC/S3/09/1/2

**The Edinburgh Napier University Order of Council 2008**  
(SSI 2008/388)

**Agenda item 4**

Paper by the Clerk  
ELLC/S3/09/1/3  
(P)
Background

1. The Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16)\(^1\) was introduced in the Scottish Parliament on 6 October 2008 by Fiona Hyslop MSP.

2. The Parliamentary Bureau subsequently referred the Bill to the Education, Lifelong Learning and Culture Committee as lead committee at Stage 1.

3. At its meeting on 1 October 2008, the Committee agreed its approach to its Stage 1 scrutiny of the Bill.

4. The Committee issued a call for evidence with a closing date set as 20 November 2008. The responses received have been circulated previously to members and are available on line at this link—

   http://www.scottish.parliament.uk/s3/committees/ellc/inquiries/asl%20bill/ASL\_writtenevidence.htm

5. At its meeting on 3 December 2008, the Committee expressed disappointment at the number of written submissions it had received from local authorities, given the extent to which the Bill could affect every local authority in Scotland. The Committee therefore agreed to write to all local authorities who had not yet submitted written evidence to invite them to do so. Submissions received are attached at Annexe B.

6. In addition to the submissions received, South Lanarkshire Council and Dundee City Council indicated that they had nothing to add to the submissions made to the Scottish Government’s consultation. Responses to the Scottish Government’s consultation can be found at this link:

   http://www.scotland.gov.uk/Publications/2008/07/16110426/0

Scrutiny to date

7. The Committee agreed that, as part of its scrutiny, it would hold an informal roundtable discussion session with a group of voluntary sector representatives before it began to take evidence on the Bill formally.

8. This session was held on 26 November 2008. A note of this session is available at this link:

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9. On 3 December 2008, the Committee began its formal scrutiny of the Bill and took evidence from Scottish Government officials. The Official Report of that session can be viewed on-line at this link—

[http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-2902.htm#Col1719](http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-2902.htm#Col1719)

10. On 10 December 2008, the Committee took evidence from the Additional Support Needs Tribunals for Scotland (ASNT). The Official Report of that session can be viewed on-line at this link—

[http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-3002.htm#Col1755](http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-3002.htm#Col1755)

11. On 17 December 2008, the Committee took evidence from Govan Law Centre and the Independent Specialist Advocacy Service (ISEA). The Official Report of that session can be viewed on-line at this link—

[http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-3102.htm#Col1832](http://www.scottish.parliament.uk/s3/committees/ellc/or-08/ed08-3102.htm#Col1832)

**Evidence session on 14 January 2008**

12. On 14 January 2009, the Committee will take evidence from Argyll and Bute Council, the City of Edinburgh Council; Glasgow City Council; and ADES. Copies of the written submissions made by these witnesses can be found at [Annexe A](#).

**Future scrutiny**

13. The Committee will continue to take oral evidence on the Bill as follows—

- 21 January 2009 – Minister for Children and Early Years.

**Draft Stage 1 report**

14. The Committee will then have a maximum of three meetings (28 January 2009; 4 and 11 February 2009) to consider and agree its Stage 1 report. The deadline for Stage 1 set by the Parliament is 6 March 2009.

Nick Hawthorne  
Senior Assistant Clerk  
Education, Lifelong Learning and Culture Committee
1. We welcome this opportunity to comment on the general principles informing the above Bill. We previously made detailed comment on specific aspects through the earlier Scottish Government consultation.

2. At the most general level we note with interest that the modifications to the original Act focus exclusively on matters relating to Coordinated Support Plans (CSPs) and dispute resolution. The effect is to confirm the contradiction between the broad vision of additional support needs set out in the first paragraph of the Act and its actual impact. In practice the Act has sponsored a focus on the very small proportion of children with CSPs and those whose parents are in dispute with education authorities. It has made very little impact on the experience of the wide range of children and young people who need additional support.

Placing requests

3. The opportunity for any parent to make a placing request for any school run by any education authority is in accord with general principles of parental choice and the exclusion of any group cannot be justified. However it is a mistake to assume that there are no disadvantages to increasing parental choice. Most widely there is a fallacy that the aggregate of individual choices will automatically lead to better general provision. This is particularly unlikely to be true for the small numbers of pupils with high support needs. As an example, an education authority’s efforts to support mainstream education for children with sensory impairments may be undermined if parents choose a special school elsewhere leaving the authority without the critical mass to allow it to provide a specialist support service. The advantages of mainstream education may then be lost for subsequent pupils.

4. Although it is not a matter for the Act, it is also important to be aware that the current financial arrangements mean that the home authority will be charged for a child placed by a parent. It is less than fair that the home authority should be compelled to meet costs without having any say in the matter. The cost neutrality indicated in paragraph 51 of the financial memorandum does not apply to the budgetary position of home authorities where out of authority provision is more expensive than within authority provision.

5. We welcome the clarification over responsibilities where a child will be placed in a school by the parent rather than their home authority. The effect of the Bill is to make it clear that those who provide school education are best placed to take responsibility for the coordination of services as part of their management of the child’s school experience. In fact, this applies equally to children who have been placed by their home authority. However, we accept
that as the home authority retains legal responsibility for the child’s education it has an obligation to ensure that support is planned and monitored. This can only be done in cooperation with the host authority.

**Placing request appeal routes**

6. We support the amendment which reflects a commonsense view that the exact sequence of events in relation to a CSP should not be the determinant of the route that an appeal takes. The ASN Tribunal is an expert body and is better placed to arbitrate such matters than either a local authority appeal committee or a Sheriff. Obstructions should not be placed in the way of using its powers.

7. Our view, which was expressed in the earlier consultation, continues to be that any appeal against a refusal of a placing request for a special school ought to be directed to the ASN Tribunal as the most competent body to hear such matters. Apart from the advantages to children of the expert body there is a compelling argument against using CSP status as the determinant of the appeal route. CSPs only partly reflect the complexity of a child’s needs they are also predicated on the nature and extent of other agencies’ involvement. It is indefensible that a child with a high level of need but low agency involvement should have access to less expert decision making than one with less need but more agency involvement.

**Financial memorandum**

8. We would offer a general comment that some of the costs associated with dispute resolution are hidden or opportunity costs. Estimates are offered in the Memorandum of financial costs which presumably include officer time. The reality is that the work is undertaken by senior professional staff with other responsibilities. Their time is therefore diverted from positive developments and support for children and young people into this work.

9. We accept that it was sensible to take a sample and estimate an average cost for dispute resolution and that cost estimates vary widely. However we would comment strongly that the cost of a Sheriff Court action may vastly exceed those quoted in the Memorandum. The central issue for education authorities is that such costs may act as a disincentive to resisting appeals against refusals of placing requests where complex issues are at stake. It should be borne in mind that authorities will only refuse placing requests on substantial and serious grounds. They will always have a view that the requested school is either unnecessary for a child or that it is not in his or her best interests. The guiding principle should, of course, be the promotion of the child’s best interests. This reinforces the desirability of having such matters resolved by the ASN Tribunal, if possible.

**Policy memorandum**

10. It was important to have the issues rehearsed again to provide ready access for consultees to the context for the changes introduced in the Bill.
Consultation

11. This appears to have been carried out seriously and equitably.

Dr Ted Jefferies
Principal Educational Psychologist
25 November 2008
SUBMISSION FROM THE CITY OF EDINBURGH COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

Introduction

1. The Education (Additional Support for Learning) (Scotland) Act 2004 provides a far-reaching and farsighted approach to the provision for learners with additional support needs. Although the scope of the 2004 Act is such that its full impact will be seen over the medium and long term, already within a relatively short period substantial progress has been made, not least in early years provision and new approaches to supporting learners needs in partnership with the NHS.

2. Wider developments promoted via the Curriculum for Excellence and Getting it Right for Every Child complement the Act. This creates a positive environment in which to realise the aims of the 2004 Act over the coming years. Within this context the City of Edinburgh Council supports the view that it would be premature to consider extensive revisions of the legislation and that any change should be restricted to address specific issues at this stage.

3. The City of Edinburgh Council supports the case for change to clarify rights and avenues of redress but it considers that some of the remedies may be better achieved through different means than those proposed in the Bill. The Council has particular concerns about the proposals for out of area placing requests especially the breaking of the links to the home authority.

Out of area placing requests – key issues

4. The policy memorandum states that the Bill will “permit parents of children with additional support needs and young people with additional support needs, including those with co-ordinated support plans (CSPs), to make out of area placing requests.”

5. This is a potentially misleading premise given that the Court of Session has determined that the existing legislation already makes provision for out of area placing requests. The decision established that parents have the right to make an out of area placing request to their home authority. This has not been explained or widely publicised to parents or education authorities as it has only recently been clarified by opinion of the Court of Session. In the view of the Council, this is an important feature of the landscape against which to assess changes to the legislation and especially so in relation to children and young people requiring significant additional support.

6. City of Edinburgh Council believes it is important to distinguish the implications of the Court of Session opinion, referred to in paragraph 9 of the Explanatory Notes, in terms that differ according to the level of additional support that a child or young person requires.

7. The question of whether a child has additional support needs is
determined by reference to the nature of the educational provision made generally for children of the same age in schools under the management of the education authority for the area to which the child belongs (section 1(3)(a)). On this basis, different authorities may have differing views as to the needs of a particular child in relation to additional support.

8. As the Act defines additional support needs very broadly, most children and young people will have some kind of additional support need at some point in their school career. In only a minority of cases will these be of a long-standing nature or require significant additional support. The implications of the Court of Session opinion are quite different for children and young people who may have transitory or ‘marginal’ additional support needs that can be met within the resources of mainstream schools in comparison with those whose needs are longstanding and require significant additional support. In operational terms these can be distinguished as:

- **Additional support needs supported within mainstream school resources**
  Many learners have additional support needs that can be met within the resources of a mainstream school. For these transitory or ‘marginal’ additional support needs, therefore, a placing request made directly to another authority may result in a child or young person who is seen as having additional support needs within their home authority as no longer having additional support needs because of differences in the nature of provision in the two authorities. Likewise, a child or young person who is not judged to have additional support needs in the home authority may be viewed as having additional support needs with reference to the provision generally made in the host authority.

- **Additional support needs requiring significant additional support**
  A minority of children and young people who have additional support needs require significant additional support from the education authority over and above the resources under the management of a mainstream school placement. This would apply in mainstream school, for example, where a pupil's additional support needs require the direct support of an additional adult for all or substantial parts of the of the school day and/or the provision of specialised equipment and/or expert support from outside the school. It would also include children and young people for whom the presumption of mainstream does not apply, who require a special school placement, and those requiring significant level of support from another agency.

**Out of area placing requests – a wider view**

9. The existing legislation already makes provision for out of authority placing requests to the home authority. The question therefore is what may be required in addition to this. The City of Edinburgh Council submits that it is

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1As accommodated, for example, within arrangements for the support for learning and support for pupils normally available within a mainstream school.
important to adopt a balanced approach taking into account a wider view with reference to five key considerations:

- The preferences and views of the parent(s) including the right to request a school placement.
- The views of the child.
- The need to ensure clarity of responsibility, transparency, accountability and effective use of resources on the part of education authorities.
- The overriding need to ensure that effective provision is made for each child’s additional support needs for the purposes of school education itself, which may include provision from another agency or agencies.
- The effective integration of planning for school education with any supports required to meet needs outwith school, for example, with regard to health or support to the parents.

10. The City of Edinburgh Council considers that the proposals in the Bill have focused almost entirely on the rights of parents to make requests directly to host authorities.

11. The proposals do not include measures establishing the child’s own contribution as a requirement in the formal decision making process around school placement.

12. Critically, the proposals also fall short in giving sufficient weight to the potential impact on the effectiveness of provision for children and young people who require significant levels of support and co-ordination. In particular, the Bill pays insufficient attention to the importance of maintaining the link with the home area for children and young people with significant additional support needs. In this regard City of Edinburgh Council considers that further consideration should be given to:

- The important inter-relationships between the provisions for placing requests and a residential authority’s duties under the existing legislation:
  - to make adequate efficient provision for its area
  - to make appropriate provision for each child’s additional support needs for which it is responsible
  - to uphold the presumption of mainstream other than in exceptional circumstances
  - to co-ordinate support for children and young people requiring a CSP
• to forward plan transitions into post-school services for young people with additional support needs where appropriate.

• The relationships between the proposals and the policy aims regarding the development integrated planning and provision for education, care and health needs across all agencies within the frameworks of Community Planning, Getting it Right for Every Child and The Same As You.

Out of area placing requests – addressing the key issues

12. In support of the Bill it is argued that parents of children with additional support needs should have the same rights as others. However, parents of children with additional support needs already have different rights to other parents, not least in the right to make a placing request for an independent special school and, where appropriate, to mediation, to dispute resolution and to make references to the tribunal. Indeed the case for additional or different arrangements to meet needs lies at the heart of the Act itself and is central to ensuring that suitable provision is made to ensure that these needs are met.

13. The City of Edinburgh Council proposes therefore that in addition to the existing provision to make a placing request to the home authority, further provisions should be made for placing requests for children and young people with additional support needs. These arrangements should be designed to take into account the nature of the additional support needs and in particular the distinct circumstances when significant additional support is required.

Additional support needs that can be met within mainstream school resources

14. Something of the order of 25% of pupils may have an additional support need2. Most of these additional support needs – typically those of a marginal or transitory nature – can be wholly or mainly met within the resources of mainstream schools.

15. The City of Edinburgh Council agrees that provision should be made for placing requests to a host authority in circumstances where the additional support needs can be met within mainstream school resources, for example through day to day support for learning. The transitory nature of many additional support needs, and the fact that they can only be determined with reference to the provision generally made in the authority, mean that it would be impractical and unreasonable to prevent parents making placing requests for a school in another authority in these circumstances.

16. To support these provisions, regulations would be required to ensure that prospective host authorities have reasonable access to all relevant information from parents, children and young people, other agencies and

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2 The Warnock Report (1978) estimated that 1 in 5 of the pupil population had special educational needs on the basis of a narrower definition than made under the ASL Act
home authorities, so that requests could be properly considered with reference to any additional support needs and the relevant statutory grounds for refusal.

**Additional support needs requiring significant additional support**

17. Where an authority is responsible for the education of a child requiring significant additional support (either in mainstream school or where the presumption of mainstream does not apply) there are considerable disadvantages to amending the legislation to allow placing requests directly to the host authority. The shift in responsibility to the host, as proposed in the Bill, would result in a number of difficulties and dysfunctions. These include:

- A break in the continuity of responsibility for children and young people whose needs require the co-ordination of support – under the existing legislation, for example, the home authority is responsible for the additional support needs of children with a disability from birth throughout school and transition into adult services. Given the benefits of continuity in planning and provision the introduction of a breach in this continuity as proposed in the Bill is unwelcome.

- In the case of a child who requires support at home and/or in the community as well as at school, the proposals present an additional barrier to the integration of services. Effectively the Bill proposes a move to a less coherent approach, as it would require the responsibility for education to shift from the home to the host, whilst the home authority would continue to be responsible for support services at home. This applies mainly to children with more complex needs who require support in school, home and community settings. It is these very children and young people who benefit most from the effective integration of services. The proposals introduce an unwelcome split in accountability and would make communication and co-ordination more complex. The City of Edinburgh Council submits that this responsibility is best located with a single (home) authority as is currently the case.

- Under the current legislation an authority is bound by a legal duty to maintain a presumption to mainstream education unless certain exceptions apply. A potential conflict arises in circumstances where the home authority is fulfilling its duty in providing effective mainstream education and a placing request is made to another authority for a special school. Moreover, there is an added risk that any additional costs to the host authority for the provision of a special placement would be disproportionate for a pupil for whom the presumption of mainstream would apply had they remained the responsibility of their home authority.

- The proposals in the Bill introduce the danger of perverse incentives. By removing the home authority from any financial
obligation to fund a placement granted as a result of a parental request to the host authority, the Bill could unintentionally incentivise the ‘export’ of complex needs. This would undermine best value approaches to planning and resourcing by each authority to meet the needs of the population for its area. The result could be to the detriment of adequate and efficient provision in both authorities.

- Under the proposals in the Bill, where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, the 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. In these circumstances, were the parents to make a subsequent request, for example, for an independent residential school at a very substantial cost, the responsibility for that would fall to the host rather than the home authority. This could lead the host authority into a position where its capacity to meet the needs of its population is severely compromised by the request from parents who were neither resident nor paying council tax in its area.

- By breaking the home authority’s responsibility for its residents’ needs, the Bill undermines the constitutional status of school education as a local authority service. This introduces a significant and avoidable breach in the relationship and accountability of elected members for the provision of services for residents of their area.

18. In conclusion, children and young people who require significant additional support from an education authority will benefit from continuity and a coherent approach to planning. Where an authority is not able to meet those needs in its own provision, or where it would more appropriately meet those needs in a school managed by another authority, co-operation between authorities is necessary. The need for co-operation between authorities should be on the basis that the home authority continues to have responsibility for the education of its residents, including any additional costs.

19. The City of Edinburgh Council proposes that a far better approach would be to put placements in another authority for children and young people requiring significant support onto a similar footing as placements in independent special schools. This would mean that the home authority would be required to grant a placing request made on behalf of a child or young person with significant additional support needs for a school in another authority, unless it could demonstrate that all of the following apply:

- The authority is able to make provision for the additional support needs of the child in a school (whether or not a school under its

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3 In the experience of the City of Edinburgh Council, fees in the order of £150,000 are not uncommon and these may be in excess of £200,000 per annum per place.
management) other than the specified school.
- It is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision.
- The authority has offered to place the child in the school referred to above.


20. This approach ensures that parents of children with significant additional support needs have access to provision in other authorities, whilst avoiding the distorting side effects of the proposals as currently set out in the Bill. The approach favoured by the City of Edinburgh Council would successfully:

- maintain the responsibility for meeting the costs of this provision to a child resident in its area with the home authority
- provide greater coherence in the integration of services
- promote continuity and transparency
- reflect the authority’s responsibility for adequate and efficient provision for its area
- encourage best value and good stewardship of resources
- provide parents with access to means of redress in the event of dispute
- promote effective governance – maintaining accountability for needs, resources and services within the democratic processes of local government.

21. The City of Edinburgh Council submits that this represents a balanced approach providing parental rights to make placing requests in a manner in keeping with the statutory duties of education authorities and policy aims for service integration.

Changes to rights of appeal

22. The City of Edinburgh Council is concerned that the proposals to extend provision for appeals to transfer between the Education Authority Appeal Committee/Sheriff Court and the Tribunal will lead to confusion and less effective administration. It will be quite exceptional that a child or young person’s circumstances change so significantly whilst an appeal is in process as to warrant consideration of a CSP. If any such changes are to be introduced it should be clear that there has to be a significant change in circumstances to warrant consideration of a CSP at that stage. It should also exclude cases where there are multiple simultaneous appeals for the same school.

23. The Council is concerned that, in cases where there are simultaneous appeals for multiple children for over-subscribed schools, it would be quite unclear how the authority could ensure that all cases are treated fairly within the same timescale if individual cases ping-pong between the Tribunal and Education Authority Appeal Committee/Sheriff Court processes.
24. The proposal to extend the terms on which cases are automatically transferred to the ASNT introduces a number of risks to the integrity of the planning of provision, setting of school capacities and the criteria for assessing priorities for admission which underpin the placement process and thus the appeal process. Where a number of placing requests are made by different parents for the same school, a common case may be heard addressing the underlying circumstances. Where there are multiple appeals for the same school the outcome of one appeal requires the others to be reconsidered. If different appeals for the same school are being heard by different bodies this would present a significant obstacle. Over and above this, the child's additional support needs may not be material to the placing request (like other parents it may simply be a matter of preference) or the additional support needs may be one of a number of factors that are addressed in the round in the context of the admissions policy of the authority.

25. Where additional support needs are a consideration this may not be isolated to one case but affect a number of children whose parents have made placing requests for the same school. In such circumstances, this could result in cases where a CSP is newly ‘involved’ being seen to be singled out for preferential treatment mid process, leading to a sense of injustice amongst other parents. The sense of fair play and the integrity of the wider admission and appeals process would be undermined in the event or even suspicion that some parents may seek to gain advantage over others by ‘contriving’ to meet the grounds that ‘a CSP is involved or being considered’ whilst the matter is still in process.

26. In many instances, decisions about placing requests are taken within the context of the wider needs of the cohort or indeed the school population as a whole. These involve sensitive political matters that are properly addressed in a local democratic context.

27. The City of Edinburgh Council submits that if it is considered that, taking all of the above and other relevant factors into account, a change in provision for placing requests affecting multiple appeals for oversubscribed schools is justified, this would be better conducted as part of a wider review of the legislation for placing requests.

Out of authority appeals for children and young people requiring significant additional support, special school placement

28. Under the arrangements proposed by City of Edinburgh Council – i.e. the home authority retains responsibility for all pupils requiring significant additional support – the parents would presently have a right of appeal to an independent adjudicator. In addition, the parents would be entitled to raise their case and related policy matters through their elected member.

29. It is arguable that the adjudicator offers a means of remedy that is more cost effective, timely and proportionate as well as being less adversarial than a direct referral to a Tribunal. The City of Edinburgh Council suggests that this
approach is worthy of serious consideration with the introduction of additional power for the adjudicator to refer the matter to a Tribunal in circumstances where the adjudicator considered that the evidence was unclear or required to be tested in that way. In the Council’s view, this would be a better arrangement than merely extending the right of referral directly to the Tribunal.

Proposal to allow the Tribunal to review decisions

30. The City of Edinburgh Council suggests the grounds for review need to be very clearly defined, restricted to points of law and exclude presentation of new argument on essentially the same facts. If there is to be any provision for new evidence to be considered, it should not be accepted unless it is evident that its existence could not have been reasonably known of or foreseen at the time of the hearing, and provision should be made for such evidence to be tested and taken into account in revised submissions as appropriate. The review period should be strictly time limited (14 days), in order to avoid extending uncertainty concerning the resolution of a pupil’s education.

Consultation

31. The consultation leading up to the Bill was welcome and conducted in positive an efficient manner. The technical nature of the Bill made this challenging and this was presented well in those circumstances. However, some of the questions presented in the consultation document were phrased in a way that did not fully reflect the nature and complexities of the issues at hand.

32. In the analysis of the consultation returns it was not always clear how the quality of returns had been evaluated. Likewise, the quantitative analysis of the returns did not show how individual responses were weighed in relation to those of larger agencies and representative bodies.

Financial Memorandum

33. A number of the calculations in the Financial Memorandum assume that the population of pupils having additional support needs is equivalent to an estimate extrapolated from the pupils who have a CSP, an individualised educational programme and/or with provision levels set by a Record of Needs pre-dating the commencement of the 2004 Act. Whilst the figure presented in the memorandum includes those who are likely to have the more complex needs it excludes the majority of children and young people who fall within the definition within the Act:

“A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person”
Section 1, Education (Additional Support for Learning) (Scotland) Act 2004

34. As a result, the memorandum appears to have underestimated the proportion of out of area requests that would be attributable to children and young people with additional support needs. In addition the costs of placements in special schools for out of authority pupils appears low, especially given the likelihood that such placements are likely to be in more specialised facilities for children with complex needs, where costs may be in the order of £25k per pupil.

35. More generally, City of Edinburgh Council is concerned that the proposals do not address the cost implications of out of area placing requests in sufficient detail. An education authority would not be entitled to refuse an out of area placing request on grounds of cost. However, whilst Section 23 of the 1980 Act permits costs to be recovered, it does not impose any obligation for them to be met. For out of area requests to be managed in an orderly and efficient manner this requires to be addressed to provide a clear, reliable and proportionate means of cost recovery for authorities hosting children who live outside their area.

Martin Vallely
18 December 2008
SUBMISSION FROM GLASGOW CITY COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

General pointers

- The principal focus of this paper is a response to the proposal contained in the above Bill, to amend the Education (Additional Support for Learning) (Scotland) Act 2004 (hereafter referred to as the 'ASL Act') to provide among other things, the right of a parent and young person with additional support needs, to make a placing request directly to another authority.

- This Council as with all other Councils is a creature of statute and accordingly would wish at all times to uphold the law and will apply the law as is determined by the Scottish Parliament on this and other matters. It is this Council’s position however that the ASL Act as presently constructed already affords a right to a parent to make a placing request to the residential authority to have the child placed in a school in another authority and provide where the residential authority fails to comply with this request the parent has a route to redress this matter.

- This Council’s position is predicated upon the wish to ensure that the law is designed to ensure that the best needs of all children with support needs are being met. If any change in the law does not provide for this then it runs the risk of failing and not having the credibility with parents and professionals.

- This Council welcomes recognition by the Scottish Government, albeit belated, that the ASL Act as presently constructed, makes no provision for a parent to make a request directly to another education authority. This is a reaffirmation of the position adopted by this Council and it is a matter of public record that this was drawn to the attention of the Scottish Executive prior to the commencement of the ASL Act on 14 November 2005.

- This Council is of the view however that what is being proposed has the potential to add confusion and is avoidable and it is proposed that as an alternative, the ASL Act as presently constructed, should be subject to a more minor amendment than is proposed that would provide for parents and ensure that the best interests of children were being met and decisions regarding the child were not subject to delay or dispute between authorities and that this is best achieved by continuing to place responsibility for the child’s additional support needs on the residential authority.

- This Council is of the view there would be little value in arguing that the numbers of requests arising from the proposed change in the ASL Act be small and that this somehow minimises any concerns. Future numbers

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4 Paragraph 45, Explanatory Notes, Education (Additional Support for Learning)(Scotland) Bill 2008
simply cannot be predicted. At a time of financial stringency, some authorities may see a value in encouraging parents to make a placing request to another authority rather than the residential authority make a placement in a school in that authority and pay both a fee for this and indeed a further management fee. As a consequence of the complete lack of clarity in law on the monies that can be recovered for the provision of services (outlined below) this may become an increasingly attractive and financially cheaper option for some authorities. This will place authorities such as Glasgow City Council, who as a consequence of a high number of specialist schools and Units and staffs with a range of expertise are net importers of children with additional support needs, in a position whereby there could be a shortage of spaces for children with such needs resident in Glasgow. More important however, as was discovered in the WD v Glasgow City Council case it only takes one parent to challenge the frailty in legislation.

• Whatever was the original policy intent (and reference is made to that below), it is no longer relevant and the focus must be on looking forward. It may indeed have been the case that it was thought to be the intention but it was obvious from the construction of the ASL Act that no such right was provided for as the ASL Act was constructed in such a way to link the parent with the residential authority by making the residential authority responsible for the child’s education and duties within the terms of the ASL Act and the Policy Memorandum on the original Education (Additional Support for Learning) (Scotland) Bill reinforced this.

• Glasgow City Council can evidence a strong commitment over many years to working alongside and partnering parents, often in difficult and challenging situations and has an impressive record to that end. This commitment remains particularly important in relation to supporting children and in making provision for those children with additional support needs. It is recognised that only in working together both with parents and those other agencies that support a vulnerable child can the best needs of that child be met. There is concern that the Bill in breaking the link between the duties under the ASL Act and the residential authority serves to place more children at risk.

1.0 Making of a placing request directly to another authority

1.1 The catalyst for this Bill was a consequence of three of Scotland’s senior judges, including the Lord President, concluding on the basis of the evidence presented that,

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5 WD v Glasgow City Council 2007 SLT 1057
6 Section 1(3), Education (Additional Support for Learning)(Scotland) Act 2004
7 Paragraph 81, Policy Memorandum, Education (Additional Support for Learning)(Scotland) Bill introduced 28 October 2003
the 2004 Act does not make and should not be construed as making any provision, in respect of a child with additional support needs who requires a CSP, for the making of a placing request to any education authority who are not responsible for the child’s school education, or for a reference to the Tribunal of a refusal by such an authority of such a request.8

1.2 The important point however is that although the Inner House decision prohibited the making of a placing request to another authority that did not have responsibility for the child’s education, it did not prohibit a parent making a placing request to the home authority that did have responsibility requesting that the child be placed in an out-of-authority school. The Inner House in their deliberations indeed addressed this very point.

*It appears to us that there is nothing to prevent the child’s parent from making a placing request to the home authority that the child should be placed in an out-of-area school*.9

1.3 In consequence it is not correct that the parent has no right to make a request that the child be placed in a school out with the residential authority. This issue is whether this right as currently expressed is sufficient and best serves the needs of the child at the centre of such a request. It is suggested below how this could be better clarified and extended in the ASL Act without requiring the wholesale change to so many elements of the present ASL Act.

2.0 Present arrangements

2.1 Within the terms of the current ASL Act, a parent therefore can make such a request referred to above to the residential authority and the responsibility is thereafter on the residential authority to make a request of the out-of-area authority to accept the child into the school requested. The out-of-area authority is an ‘appropriate agency’ within the terms of the ASL Act10 and the residential authority has the power within the ASL Act to ask this authority to place the child in the school being requested by the parent11. This right has never been referred to in Guidance provided by the Scottish Executive or Government. Parents have therefore not been made aware of their rights with respect to this route of redress.

2.2 Upon receipt of that request the other authority must respond within a time set down by Regulations12 and crucially must comply with the request13

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8 Paragraph 72, WD v Glasgow City Council 2007 SLT 1057
9 Paragraph 69, WD v Glasgow City Council 2007 SLT 1057
10 Section 23(2)(a), Education (Additional Support for Learning)(Scotland) Act 2004
11 Section 23, Education (Additional Support for Learning)(Scotland) Act 2004
12 Regulation 2, The Additional Support for Learning (Appropriate Agency Request Period and Exceptions (Scotland) Regulations 2005 SSI 264
13 Section 23(3), Education (Additional Support for Learning)(Scotland) Act 2004
unless to do so is incompatible with its statutory duties or unduly prejudices the discharge of its own functions.\textsuperscript{14}

2.3 If however, the residential authority declines to make this request of the other authority as sought by the parent, it is a ‘specified matter’ in which the parent has the right to make an application for a review of that decision by an Independent Adjudicator in terms of the Dispute Resolution Regulations.\textsuperscript{15} This person is a specialist in additional support needs and the residential authority must furnish the Independent Adjudicator with the reasons to support such a decision and importantly the parent can provide reasons for wishing the child be placed in the school requested. The process of adjudication allows for the Independent Adjudicator to meet with the parent. The important point is that the main focus in resolving matters is that the needs of the child are paramount and a focus on these needs matching the provision being offered by the residential authority. This is in keeping with the original policy intention, which outlined that the process of dispute resolution was designed with the purpose of resolving matters \textit{“in the best interests of the child or young person”}.\textsuperscript{16}

2.4 The principal advantage of illustrating this right is that it ensures that the residential authority retains full responsibility for the child’s school education and consideration of reviewing the child’s needs to match the placement and has this determined by persons independent of the residential authority.

2.5 This takes place against a backdrop of seeking to resolve matters where possible by avoiding litigation. Indeed it was this that was the central basis of the policy wish of Parliament to encourage a constructive partnership to be fostered between parents or young persons and the education authority when addressing the individual’s needs for additional support\textsuperscript{17} and the introduction alternatives to litigation assist in resolving disagreements.\textsuperscript{18}

2.6 The Independent Adjudicator is then required to report to the home authority with recommendations as to how the matter should be resolved. The residential authority may on reviewing this report, seek to amend provision made available for the child, by placing the child in the school requested. This Council recognises however that there is no obligation in law on the authority implementing the recommendation of the Independent Adjudicator and accordingly there may be consideration given to having both the refusal to make a request to he other authority and the failure to implement the recommendation of the Independent Adjudicator as matters that are within the competence of the Additional Support Needs Tribunal to hear.

\textsuperscript{14} Section 23(3)(a) and (b), Education (Additional Support for Learning)(Scotland) Act 2004
\textsuperscript{15} Schedule 2(b), The Additional Support for Learning Dispute Resolution (Scotland) Regulations 2005 SSI No. 501
\textsuperscript{16} Paragraph 53, Policy Memorandum 2003
\textsuperscript{17} Paragraph 41, ASL Policy Memorandum 2003
\textsuperscript{18} Paragraph 44, ASL Policy Memorandum 2003
2.7 In seeking to extend the legal framework around which decisions are made it should be highlighted that when any matter is in dispute, the ASL Act places responsibilities on the residential authority and rights on the parent to have matters resolved both informally and formally without the need for litigation even through the use of a Tribunal. Indeed this was a central point made in the original Policy Memorandum in 2003.  

2.8 One obvious danger arising from the Bill is that this original policy aim will be ignored and a parent with a child with significant support needs can simply avoid all of the measures designed to resolve dispute, both formal and informal, and make a placing request to another authority or, alternatively, a residential authority, following protracted and fractious meetings seeks the easy resolution of this by alerting, what they may perceive as the ‘difficult parent’, of the right to make a placing request to a school in another authority. Either scenario would not best serve the needs of the child at the centre or the policy intention of the ASL Act but this is a possibility arising from the Bill.  

2.9 It should be noted that in addition to the use of an Independent Adjudicator, the parent also has the right to seek independent mediation where unhappy with the school provided for the child. It should further be remembered that in the case of a child with additional support needs who requires a CSP, the residential authority responsible for the child’s school education must in the CSP state the authority’s conclusions as to the assessment process and the parent has the right to make a reference to the Tribunal on almost all aspects of the contents of the CSP. The parent has correctly been part of this lengthy process in reaching a decision with the parent’s views being central to this decision. It is only after the authority has devoted their attention to all matters that the nomination of the school is made.  

2.10 Although not referred to in the ASL Act, it should be noted that for many children with additional support needs who don’t have a CSP, the residential authority is making a similar decision albeit ‘informally’ nominating what establishment best suits that child’s needs as assessed.  

3.0 The Bill  

3.1 It is the policy intent of the Bill to achieve the following:  

“the Bill amends the legislation to allow young people with additional support needs and parents of children with additional support needs (including those with a CSP) to make out of area placing requests thereby providing them with the same rights, in

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19 Paragraph 45, ASL Policy Memorandum 2003  
21 Section 12 Education (Additional Support for Learning)(Scotland) Act 2004
respect of making out of area placing requests, as parents of children without additional support needs."

3.2 This appears to bring, what might be thought of as a tidy solution to this matter. Unfortunately it is not so straightforward an undertaking as is being suggested and some of the concerns and confusions that may arise form this are highlighted below. All of these are predicated upon a desire in this Council to ensure that the best interests of all children with additional support needs are being met and that the law reflects this.

3.3 What has been missing both in the Consultation on the ASL Act and from this Bill has been any consideration that there may indeed be very good reasons why the rights of parents may be expressed differently in different contexts in relation to making placing requests. This should be no surprise as it is already the case.

3.4 One clue to this, found in the ASL Act, is whereby a parent whose child has additional support needs makes a placing request for an independent special school. The placing request is not made to the school concerned but to the residential authority with responsibility for the child’s additional support needs and it is that authority’s refusal that is the subject to the appeal. The independent school is not a party to the Hearing. It is the decision of the residential authority that is subject to the scrutiny of the Appeal Committee or Additional Support Needs Tribunal if the child has a CSP.

3.5 The terms of the grounds for refusing such a request above allow for consideration of the educational suitability of the placement in comparison with that being offered and / or provided by the residential authority. This approach of course makes sense as it serves to ensure that making provision for the needs of the child is paramount and further that the onus rests with the residential authority as they alone carry the duties under the ASL Act and are best placed to have knowledge of the needs of the child.

3.6 In addition, the grounds of refusal in the Education (Scotland) Act 1980 do not replicate in full what is contained in the ASL Act and in addition parents of children who do not have additional support needs and make a placing request under the Education (Scotland) Act 1980 can do so in the knowledge that if the Appeal Committee and/or the Sheriff determine that a decision to refuse a request to place another child at the same time and at the same stage of education and in the same school is inconsistent with any decision of the authority refusing a request the authority must review all decisions to refuse. Such a right is not expressed in the ASL Act.

3.7 Partly this difference is explained by the focus on the ASL Act being on the individual child but it illustrates further that there is no simple match

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22 Paragraph 21, Policy Memorandum accompanying Education (Additional Support for Learning)(Scotland) Bill 2008
23 Section 28E(5) and (6), Education (Scotland) Act 1980
24 Section 28F(6) and (7), Education (Scotland) Act 1980
between the right of parents and duties on authorities in relation to placing requests for children who have or do not have additional support needs.

4.0 Concerns arising from the Bill

4.1 This Council remains concerned that the changes as proposed have not been sufficiently thought through and may in consequence run the risk of adding confusion and possible between authorities and parents and more importantly not serve the best interests of the child at the centre of any request. A number of examples of these concerns are referred to below

4.2 The inadequacy of placing request legislation

4.2.1 The Committee may wish to consider if the present placing request legislation, that is the subject of this Bill, is fit for purpose. There are a number of factors that would call this into question:

No role for the child

4.2.3 The present arrangement for placing requests is now almost thirty years old. In the period since there has been a considerable change in the education landscape with, among other things, a greater legislative and policy emphasis on inclusion, importance of assessment and indeed the requirement now to consider the rights of the child in matters that significantly affect them. and the importance placed on the welfare of the child. This consideration of the best needs of the child was indeed referred to in the original Policy Memorandum 2003 which drew reference to, among other things, the adoption by the UK Parliament of the United Nations Convention on the Rights of the Child, acknowledging that children are entitled to participate in decisions affecting them, and provision of services to meet their needs.

4.2.4 The original Policy intent of the ASL Act also made provision for this:

“The Bill supports the right of all children and young persons, including those with complex needs, to be able and enabled to take part in the various decision-making processes that occur throughout their education.”

4.2.5 There is no place however for the child in the decision making process in the placing request legislation and it is further omitted from the Bill.

4.2.6 The importance of the child’s right is evidenced that in Scots law a child of 12 years presently, can, among other things,

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25 http://www.scotland.gov.uk/Publications/2005/06/2393450/34518
26 Section 2(2), Standards in Scotland’s Schools etc. Act 2000
27 Children (Scotland) Act 1995
28 Paragraph 10, Policy Memorandum (original Bill 2003)
29 Paragraph ASL Policy Memorandum 2003
• Instruct own solicitor
• Consent or otherwise to medical treatment
• Appeal own school exclusion
• Seek an order from the Court regarding discrimination matters

4.2.7 Despite this, the child over 12 or otherwise has no right to have his or her views considered or be included in placing request process.

4.2.8 Not including the views of the child in the placing request legislation is a serious omission and at is surprising given that the recent consultation by the Scottish Government on school closures included a recommendation that pupils in possible closing schools be consulted on any such proposal.

4.3 The inadequacy for the host authority of the present placing request legislation

4.3.1 In relation to current placing request law, there is a presumption that a placing request will be granted. This presumption can only be rebutted where there is a statutory ground of refusal. The ASL Act however requires that having a statutory ground should not prohibit the granting of the request and in addition to the identification of a ground for refusal there is a second stage to the test that “in all the circumstances” it is appropriate to refuse the request. The balance therefore favours the parent and that matched the policy intention of the change in the law at the time.

4.3.2 The difficulty for the potential host authority in making a determination regarding a placing request is that at the time of determining a placing request, they may not have at their disposal, the necessary information that would allow them to make a proper determination. The Appeal Hearings must be heard within a particular time limit. This calls into question if it is possible or practicable for a potential host authority to determine a placing request including a possible refusal on the following grounds?

• Be seriously detrimental to the continuity of the child's education
• Be likely to be seriously detrimental to order and discipline in the school.
• Be likely to be seriously detrimental to the educational well-being of pupils attending the school.
• If the education normally provided at the specified school is not suited to the age, ability or aptitude of the child.
• If, where the specified school is a school mentioned in paragraph 2(2)(a) or (b), the child does not have additional support needs.

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30 Safeguarding our rural schools and improving school consultation procedures: proposals for changes to legislation
31 Section 28 Education (Scotland) Act 1980
32 Paragraph 6(1)(b), Schedule 2, Educational (Additional Support for Learning)(Scotland) Act 2004
33 Schedule 3(1)(a)(iii), Education (Additional Support for Learning)(Scotland) Act 2004
34 Schedule 3(1)(a)(iv), Education (Additional Support for Learning)(Scotland) Act 2004
35 Schedule 3(1)(a)(v), Education (Additional Support for Learning)(Scotland) Act 2004
36 Schedule 3(1)(b), Education (Additional Support for Learning)(Scotland) Act 2004
requiring the education or special facilities normally provided at that school\textsuperscript{37}.

4.3.3 As referred to above, the ASL act provides a two-stage test for refusing a placing request. The difficulty with the possible host authority making a determination is that they are not in a position to satisfy the second part of the test as they have never assessed the child or hold any information on the child. They are simply unaware at that stage of “all the circumstances” and are therefore not in a position to apply the correct statutory test.

4.3.4 The statutory grounds of refusal are therefore rather limited for a host authority and where there is a space in a school it is often difficult for an authority to refuse such a request regardless of the child’s needs.

4.3.5 The Bill, if enacted, may it therefore provide the parent with the right but does little to guarantee that it serves the best interests of all children who are the subject of such requests. There is anecdotal evidence from this Council where the Appeal Committee in determining a placing request for a child with additional support needs (but not a CSP) have expressed concern about their lack of knowledge of the needs evidenced by a parent or the authority in the documentation that must be provided them and the risk therefore of making a determination that may not best serve the needs of the child\textsuperscript{38}. This concern regarding the needs of the child was a matter even referred to in Guidance accompanying the previous legislation where concern was expressed to guard against disruptions to their emotional security which can be caused by frequent changes of school\textsuperscript{39}.

4.3.6 If the Committee is not minded to consider the minor amendment to the Act being outlined in this submission this Council would urge that consideration should be given to amending the ASL Act to allow for a comparison of educational placements in relation to a placing request for any child with additional support needs. This would allow for the primacy of the consideration of the needs of the child. This is already reflected in a placing request for an independent school.

4.3.7 The presumption referred to above to grant a placing request can be rebutted for an independent school if all of the following conditions apply:

- The specified school is not a public school.
- The authority are able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school.
- It is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision.

\textsuperscript{37} Schedule 3(1)(d), Education (Additional Support for Learning)(Scotland) Act 2004
\textsuperscript{38} The Additional Support for Learning (Placing Requests and Deemed Decisions)(Scotland) Regulations 2005 SSI 515
\textsuperscript{39} Paragraph 164, Circular 4/96, Children with Special Educational Needs
• The authority have offered to place the child in the school referred to above.  

4.3.8 The use of these grounds of refusal allows, correctly, a discussion on the link between the child’s educational needs and the appropriateness of the nominated school and provides the residential authority with the opportunity to defend its decision when a placing request is made. That approach should be the yardstick for all placing request appeals for children and young people with additional support needs.

4.3.9 In addition, consideration should be given in furthering this comparator by reinstating the right previously provided for in the Record of Needs for the parent to appeal the nomination of the school referred to in the Record.  
This is not provided for in relation to a CSP. Under the previous legislation this right could only be exercised when accompanied by a placing request for an alternative school had been made. This would allow for the focus again being on the child’s educational placement. It should be noted however, with regard to the matter of out of authority placements, that the Inner House decision referred to above were of the view that:

“it is not clear to us that out-of-area placing requests could lawfully be made in terms of the 1980 Act.”

4.3.10 More often such requests became ‘placements’ made by the residential authority that thereafter retained, correctly, responsibility for the child.

4.3.11 It is also to be remembered that parent within the ASL Act is widely defined as in the Education (Scotland) Act 1980:

“Including guardian and any person who is liable to maintain or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, or has care of a child or young person”

4.3.12 In consequence, the unmarried father, who has no automatic parental rights within the terms of the Children (Scotland) Act 1995, is a parent within the terms of the ASL Act and can, accordingly, as any other parent, make a placing request for his child to attend any school even if this school is in an authority distant from his present school. There is no requirement for the parent to show that in educational terms this best serves the needs of the child.

4.3.13 Glasgow City Council encourages all parents to be participants in the process of determining the child’s education but anecdotal evidence can

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40 Schedule 2, 3(1)(f)(i)-(iv), Education (Additional Support for Learning)(Scotland) Act 2004
41 Section 63(1)(c ) Education (Scotland) act 1980
42 Paragraph 67, WD v Glasgow City Council 2007 SLT 1057
43 Section 29(2), Education (Additional Support for Learning)(Scotland) Act 2004
44 Section 135(1) Education (Scotland) Act 1980
indicate that on some occasions where there has been family break-up the child’s needs may not be best served by competing parents and this can be exacerbated when one parent is granted a request to have the child placed in a school in another part of the country.

4.3.14 The parent can make any number of requests for different schools in one authority but is made aware that these will be dealt with in order of priority attached to them by the parent. There is no limit however for a parent making requests to multiple education authorities. It is not evident that the parent is under any obligation to alert the residential authority of this and to afford the residential authority the opportunity to offer mediation and / or other means of resolving any differences.

5.0 Difficulties with coordination

5.1 There would be further concern that when a parent makes a successful placing request for a school in another authority the coordination of the support needs of the child would prove difficult to manage in the best interests of the child. The central importance of the residential authority in the ASL Act arises as it is the residential authority, who, among other things:

- Knows the child.
- Will have been working in collaboration with the parent.
- Will have assessed the child’s needs.
- Will have made provision for the child.
- Will be keeping under review the child’s support needs.

More importantly however:

- It is within the residential authority where the other supports from Social Work and an appropriate agency such as Health Board are placed.

5.2 This latter point highlights the importance regarding coordination and impacts directly on practice and exposes the gap between law and practice. The ASL Act outlines eligibility grounds for a CSP but it would be an error to consider that coordination is only necessary for a child with a CSP.

5.3 That of course may be correct in the ASL reference to coordination, but is far from correct in practice with de facto coordination being required for many, if not all children, with additional support needs who do not have a CSP. Even within Education Services a child may receive support from a range of sources within a school including, the teacher, support for learning staff but in addition, Council wide resources and services including the educational psychologist and other specialist authority resources such as sensory impairment teachers etc. Some such resources are not always available or easily accessed in each of the thirty two authorities. It is

45 Section 2, Education (Additional Support for Learning (Scotland) Act 2004
unquestionable, even in quantitative terms that this is significant for the child and as a matter of practice will require from agencies or departments external to Education.

5.4 When one considers the children with significant additional support needs, there would correctly be concern that a child is schooled in one authority are but whose supports from Social Work are from a different authority and that the school is in the area of a different Health Board. This may serve to act against the best needs of the child. This Council places particular importance in ensuring that an integrated, multi-agency approach is in place to best serve the needs of the most vulnerable children.

5.5 It serves as a reminder that there is very good reason why the onus rests with the residential authority and the coordination of such supports may prove more problematic when a child is placed in an authority outwith the residential authority. Even when in relation to the most vulnerable groups, such children are placed outwith a residential authority, concerns have been expressed about the availability of supports. In relation for example, to children looked after children Scottish Government advice on this made the telling point that:

   “Some children are then placed in areas without access to the specialist health services they need and the home health board is unable to provide an appropriate service at a distance.”

6.0 The omission of transition planning

6.1 Another factor to consider is the importance of transition planning. This has a statutory basis in terms of the ASL Act. It is assumed that such planning for a change in a child’s school education is necessary and serves the best interests of the child and among other things, provides continuity in the child’s educational experience. In short, that upon entering a new school environment, the child’s support needs will be in place from the outset without any delay or detriment to that child.

6.2 There will always be occasions when a change in the family set-up or employment requires a parent to move child to another school in another area, but the main concern in providing for a placing request in the terms as envisaged, is that there would be a risk that the granting of a placing request, which of course carries immediate effect, cuts across this important statutory process of planning for transition. It is to be remembered that presently there are statutory timescales for this transition planning between sectors or indeed any change in a child or young person’s school education. For example in the transition from primary to secondary for a child with additional support needs,

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46 Chapter 9, Children Looked After by Local Authorities: The Legal Framework
47 The Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005 No. 265
Parliament thought it necessary that there should be at least one year in planning for this transition. There is however provision within these Regulations for “other” circumstances in which an authority ceases to be responsible for a child’s school education and require to take action.

6.3 The action requested as necessary is the in-gathering advice and information of for the purpose of:

- establishing the additional support needs of the child or young person;
- determining what provision to make for such additional support as is required by the child or young person; or
- considering the adequacy of the additional support provided for the child or young person.

6.4 It is therefore an important and sizeable task. Granting a placing request out of an authority cuts across this planning and the delay may be to the detriment the child.

7.0 Increased Possibility of Dispute between Authorities

7.1 Two examples from the new Policy Memorandum accompanying the Bill evidence the apparent confusion regarding the extent of the duty on the host authority following accepting a child on an out of authority placing request.

“where a child is being educated outwith his or her home authority as a result of a successful out of area placing request, transfer responsibility for the child’s or young person’s education and carrying out all of the duties under the 2004 Act.”

and

“Conversely where a parent or young person makes an out of authority placing request directly to another education authority, they, if that placing request is accepted by them, assume responsibility for the child or young persons education.”

7.2 It is not clear therefore if the extent of the responsibility is limited to the duties under the ASL Act or all education duties in law. There is therefore the potential for dispute between authorities that again serves to work against the best interests of the child.

7.3 The Consultation on the Bill expressed the following position assuming a broader encompassing of all duties. The host authority will therefore

48 Regulation 3(a)-(c) The Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005 No. 265
49 Paragraph 3, Policy Memorandum 2008
50 Paragraph 30, Policy Memorandum 2008
assume all responsibility for the child’s education and its CSP decisions, failures etc can be referred to an ASNTS 51

7.4 This possible confusion and potential dispute between authorities is enhanced as it is to be remembered that definition of a child with additional support needs is so wide:

“A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person”52

7.5 Accordingly any reason can be valid one within the terms of the ASL Act. This wide definition means of course some of the factors giving rise to additional support needs will be for matters familial, social and environmental and may require the intervention of the residential authority. Examples could be where there is a family break up, requirement to decant from existing tenancy, need for new tenancy as a consequence of now looking after an ageing relative or where Social Work in the residential authority seek an order in relation to Child Protection or residential authority forming the view that a child requires to be looked after within the terms of the Children (Scotland) Act 1995.

7.6 None of this appears to have been addressed in the Bill and it provides for undoubted confusion and possible dispute between authorities without any means in the ASL Act to resolve this. More importantly it does not serve the best interests of the child.

7.7 Even if only limited to the duties under the ASL Act the duty with respect to the host authority at the point of assuming responsibility is extremely onerous. This is in particular reflected in the following duty:

Where it appears to an education authority that, by doing certain things in the exercise of any of their other functions (whether relating to education or not), they could help the exercise by them of their functions under this Act, the authority must do those things.

7.8 This is an extremely onerous duty and in essence requires the host authority to consider its full powers across all legislation available to it, both specific to one department such as education or social work, but also corporate including the power of well-being 53. As outlined above however, some of the matters that may need to be addressed may not be within the legislative power of the host authority.

51 Paragraph 58, page 14, Consultation on the Education (Additional Support for Learning) (Scotland) Act 2004 – Amendment Bill 2008
52 Section 1, Education (Additional Support for Learning) (Scotland) Act 1980
53 Section 20, Local Government in Scotland Act 2003
7.9 It is to be remembered also that as a local authority, the residential authority is an appropriate agency within the terms of the ASL Act and the host authority could therefore make a request of the residential authority for assistance in supporting the child.

7.10 If the host authority must accept all duties in relation to the child, among others, those arising from Education (Scotland) Act 1980 would be significant. Among these would include the following: For example:

- The provision of books, materials and special clothing free of charge\(^{54}\).
- The duty where a child with support needs is excluded to make provision for his or her school education\(^ {55}\).
- The provision of transport\(^ {56}\).

7.11 As a matter of law however, an attendance prosecution can only be raised by the residential authority\(^ {57}\). We therefore have the scenario whereby a child now schooled in a host authority may have additional support needs arising as a consequence of poor attendance but the residential authority only can raise a prosecution or consider referral to Social Work for example in support of the family.

7.12 It is not simply the financial issue although that will be important in relation to recovery of contributions. Some matters such as Education Maintenance Allowance are secured centrally, but the process of its administration may not in the opinion of a young person be handled correctly and he or she may seek redress from an education authority and it is not evident to which authority it would be directed.

7.13 A further confusion arises as a consequence of the scenario whereby a child moves to another authority on a placing request but within the terms of the Education (Scotland) Act 1980 and at a subsequent date is identified as possibly having additional support needs. The child would be within a school under the management of the host authority and accordingly under the terms of the ASL Act the host authority would be responsible for the child’s school education and additional support needs\(^ {58}\).

7.14 This issue has already been a matter of dispute between authorities. Part of the confusion arises as the parents would be entitled to make a request of the new host authority to identify if the child has additional support needs and/ or requires a CSP, but the host authority within the terms of the ASL Act may make a request of the residential authority as it would be an appropriate agency within the terms of the ASL Act. This was never referred to in the ASL Act and again is omitted from the Bill. It is also to be

\(^{54}\) Section 11, Education (Scotland) Act 1980
\(^{55}\) Section 14(3), Education (Scotland) Act 1980
\(^{56}\) Section 51, Education (Scotland) Act 1980
\(^{57}\) Section 36, Education (Scotland) Act 1980
\(^{58}\) Section 29(3) Education (Additional Support for Learning) (Scotland) Act 2004
remembered that a child or young person in this scenario would come within the terms of sections 5 and 7 of the ASL Act and in that situation the parent and or young person can make a request for the residential authority to establish if, the child has additional support needs or would, if the education authority were responsible for the school education of the child or young person, require a co-ordinated support plan. The residential authority has the power but not the duty to provide:

“such additional support as is appropriate for children ....... and young persons belonging to the area of the authority having additional support needs, but for whose school education the authority are not responsible.”

7.14 Further, it is also to be remembered that the residential authority is an ‘appropriate agency’ within the terms of the ASL Act and in consequence the host authority would at that or any subsequent stage be entitled to make a request of the residential authority:

Where it appears to an education authority that an appropriate agency could, by doing certain things, help in the exercise of any of the education authority’s functions under this Act, the authority may, specifying what those things are, request the help of that agency.

7.15 This potentially could involve a ‘request’ to, assess, make provision, provide staff, make payment, provide transport etc. and an appropriate agency “must comply with a request” unless it considers that the request is incompatible with its own statutory or other duties, or unduly prejudices the discharge of any of its functions. This could result in potential for dispute between authorities and in the stand off it is possible that the child could suffer. Confusion and dispute between authorities could arise without any means in the ASL Act to resolve this.

7.16 Taken together these factors referred to remain concerns that are simply not referred to in the Bill and indeed have never been the subject of any consultation. This remains a serious omission. It reinforces the hypothesis of this Council that with a minor adjustment to the ASL Act the

8.0 Financial responsibility

8.1 Related to the confusion regarding responsibilities are the financial matters arising from this. What is rather disingenuous about the documentation accompanying the Bill is that nowhere is it clarified for authorities that in accepting an out of authority placing request, the host authority may assume responsibility for all of a child’s school education

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59 Section 5(4) Education (Additional Support for Learning) (Scotland) Act 2004
60 Section 23(2) (a) Education (Additional Support for Learning) (Scotland) Act 2004
61 Section 23(1) Education (Additional Support for Learning) (Scotland) Act 2004
62 The Additional Support for Learning (Appropriate Agency Request Period and Exceptions) (Scotland) Regulations 2005
including the provision of additional supports and that this may carry financial responsibility.

8.2 The provisions of section 23 of the Education (Scotland) Act 1980 would provide that following a parent choosing to her his or her child’s additional needs met in another authority, the residential authority, despite carrying no responsibility for the child’s additional support needs or having any part thereafter in assessing or making provision for the child’s additional supports, will face a request from the host authority to make a contribution for such provision as may be agreed by the authorities concerned. There is concern that this cuts across the duty on this Council to secure best value and serves to heighten further the possibility of dispute between authorities.

8.3 The host authority may if the Bill is passed as proposed:

“recover from that other authority such contributions in respect of such provision as may be agreed by the authorities concerned, or, in default of such agreement, as may be determined by the Secretary of State, who shall have regard to the estimated cost of such provision.”

8.4 Section 23 referred to makes provision for the making of Regulations. Such Regulations have not however been made and it is anticipated that the changes proposed cannot be implemented without the need for consultation and clarity. As outlined above in relation to the extent of the responsibility for the child taken on by the host authority, there is simply no clarity on what this will entail and this should be subject to Regulation in the form of a Scottish Statutory Instrument, but reference should be made in the amendment to this. Only through this can authorities be confident that there is a level playing field.

8.5 An example of concern would be that when a host authority accepts a child with additional support needs on a placing request, the host authority’s Psychological Service would assume responsibility. In some authorities where there are a large number of placing requests accepted this may result in the need for that authority to recruit more educational psychologists or indeed other education staff. What is not clear in the absence of Regulations is if this would be something that could be recovered.

8.6 There is however a possible alternative solution to this confusion within the terms of section 23 as the Scottish Ministers may make regulations prescribing the areas to which particular classes of pupils receiving school education are to be deemed to belong for the purposes of this section and sections 50, and 51 of this Act and for the purposes of the 2004 Act and any such pupil to whom the regulations apply shall be deemed to belong to the area determined in accordance with the regulations.

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63 Section 1, Local Government in Scotland Act 2003
64 Section 23(2), Education (Additional Support for Learning)(Scotland) Act 2004
8.7 Consideration may be given to this. If Regulations deemed that a child who was the subject of a cross border placing request was 'deemed' to belong to the area of the new host authority there would be no requirement to recover monies from the residential authority as all funding including that covering additional support would already be with the host authority. That matter should be the subject of extensive consultation.

21 November 2008
SUBMISSION FROM ADES/ADSW

Education (Additional Support for Learning) (Scotland) Bill

1. This written evidence is offered to the Scottish Parliament's Education, Lifelong Learning and Culture Committee jointly on behalf of ADES and ADSW in relation to the above bill. ADES and ADSW represent Directors of Education and of Social Work services across Scotland; these are the professional stakeholder groups who have responsibility, in terms of the ASL Act, for its implementation on behalf of local authorities.

2. We begin by expressing appreciation for the quality of the consultation carried out by the Scottish Government prior to the introduction of the bill. It was extensive and thorough, it provided a good analysis and report of the responses and there was evidence that thoughtful consideration had been given to responses, not least to our own.

3. We also found both the policy memorandum and the financial memorandum helpful in setting out respectively the principal intentions of the proposed adjustments to the Act, and the estimated costs associated with these. We will respond specifically to the Finance Committee in relation to the financial memorandum as requested.

4. We are broadly sympathetic to the changes proposed within the bill, to strengthen the rights of parents and children with additional support needs in relation to placing requests, re-define the jurisdiction of the ASN Tribunal and rationalise aspects of procedure.

5. That said, we continue to have reservations about the complexity and costs of operating this legislation. As we indicated during the initial formulation of the ASL Act, we would prefer a more inclusive and comprehensive legislative approach that would be simpler to operate and would spend resource on service delivery rather than bureaucracy.

6. We welcome the removal of the proposed amendment to introduce a criminal offence for breaches of a restricted reporting order. We are supportive of all of the other proposed substantive adjustments to the legislation (specifically sections 1, 2, 3, 4, 5, 6 and 7).

7. There are significant cost implications for local authorities associated with section 1 and we will address these in response to the financial memorandum. In particular where an authority is a net importer of placing requests, specific financial provision will require to be made to account for costs of additional support.

8. In addition, we expect the right of parents to make placing requests to independent, fee paying schools will add a progressive burden to the budget for additional support within each authority as parents exercise such rights and as the market responds by developing further provision. Account requires to be taken of such costs in the context of finite and limited budgets within
local authorities, to ensure that the disproportionate per capita spend associated with such placements does not disadvantage pupils supported by local school provision within the authority.

9. We note that it is proposed that secondary legislation will set time limits for the new host authority to review the CSP following acceptance of an out of area placing request. We would wish to see such limits correspond to the timescales that apply to the duty of appropriate agencies to respond. As we indicated when the original Act was prepared, if the local authority is to be held to account for achieving a process that depends on the contributions of several agencies, then it must be able to exercise powers in order to successfully fulfil such responsibility.

10. I trust the above will be of value to the Committee in its deliberations and can confirm that ADES and ADSW will be prepared to present evidence to Committee in due course.

11. Finally, I should note that ADES is keen to contribute to the intended revision of the Code of Practice and would welcome information about when that process will begin.

Bryan Kirkaldy  Michelle Miller  
Senior Manager  Chief Social Work Officer  
Fife Council  City of Edinburgh Council  
(ADES)  (ADSW)
Responses were received from the following local authorities:

- Aberdeenshire Council
- Clackmannanshire Council
- East Lothian Council
- Fife Council
- Midlothian Council
- Perth and Kinross Council
- West Dunbartonshire Council
SUBMISSION FROM ABERDEENSHIRE COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. Aberdeenshire Council supports the general principles underpinning the legislative amendments contained in the Education (Additional Support for Learning) (Scotland) Bill.

2. It particularly welcomes the steps taken to extend the opportunity to make out of area placing requests to parents and young people who were previously prevented from doing so due to limitations in the legislation. However, it shares the concerns expressed by other authorities and agencies that the amended legislation will place the responsibility, and associated decision making, regarding a child/young person’s education on the host authority whilst the home authority will remain liable for the funding of additional provision under section 23 of the 1980 Act. This has the potential to create disagreement regarding the level and nature of provision required to meet a child’s/young person’s additional support needs.

3. Aberdeenshire Council also agrees with the view that the legal framework in which the ASN system is set is becoming extremely complex to the point where it is not readily accessible. The current amendments add to the overall complexity of the legal landscape relating to additional support needs. Aberdeenshire therefore supports the plea that steps should be taken to simplify the whole additional support for learning framework.

4. Finally, notwithstanding the comment in the above paragraph, the policy memorandum in which the amendments and their implications were outlined was helpful as was the financial memorandum in offering an explanation and rationale for the amendments.

5. The consultation carried out by the Scottish Government on the Bill appears to have captured the views of many of the main stakeholders and it was useful to be provided with a synopsis of the main points and themes stemming from the consultation. The true value of the consultation will emerge by the extent to which it influences the legislation that is finally passed.

18 December 2008
SUBMISSION FROM CLACKMANNANSHIRE COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. Your letters of 15 October and 4 December 2008 refer. They have been passed to me for my attention.

2. Before going on to offer some comments on key aspects of the above Bill I should like to apologise for the failure to reply to your original letter.

3. We are happy to support the provisions which the Bill makes for such placing requests with the significant exception that we think that it is very important that responsibility for a young person's education when such a placing request is successful should remain with the pupil's 'home' authority. This is a matter of particular concern in respect of the costs of that education. We remain concerned that the absence of such provision will inhibit the use of placing requests operating in the best interests of a young person but that they will risk becoming a device through the use of which attempts are made to secure dispute resolution. We fear also that it may lead education authorities into positions where they will have no alternative but to refuse many placing requests. The Bill does not incentivise, in this respect, the realisation of the objectives which it is intent on securing.

4. We think that the Bill should recognise more clearly the differences between mediation and dispute resolution. Where early, mediated agreement about a young person's needs is not arrived at between an education authority and a young person's parents/carers the identification of a consensus on how to best address a young person's needs is often very difficult to secure; in such situations one may find quite commonly that it is dispute resolution which is required. The Bill needs, perhaps, to recognise something more of the reality of the situations which education authorities have to face.

5. We do not find it possible to support any extension of the Tribunal process. We have said consistently that this process is excessively bureaucratic and quasi-legalistic and that it risks encouraging the development of adversarial positions much earlier than need be; there are circumstances obtaining currently which can incentivise the development of such positions. We think that the Bill should have taken the opportunity to revise the Tribunal process to render it less bureaucratic.

6. I hope that the above comments are helpful to the Member of the Education, Lifelong Learning and Culture Committee.

7. Please feel free to contact me if you require me to clarify any of the above comments.

Jim Goodall
Head of Education
16 December 2008
East Lothian Council welcomes the amendments outlined in the above Bill. They provide clarity in the following areas:

**Section 1: Placing requests**

1. The right of a parent or young person with additional support needs, including those with a Co-ordinated Support Plan, to make a placing request to another authority in line with the rights of all children.

2. The duty on the host authority to carry out a review of the Co-ordinated Support Plan as soon as possible after the date of the transfer of the Co-ordinated Support Plan.

3. Referral to the Additional Support Needs Tribunal is an option for parents or young people when the education authority have advised them that they will establish whether a Co-ordinated Support Plan is required. This is earlier in the process.

4. The right of referral to the Additional Support Needs Tribunal prior to EAC or Sheriff making a final decision is understood, but this may not be sufficiently clear for parents and young people.

**Section 2/3: Mediation services/dispute resolution**

1. Parents of children, or young people, being educated in an out of area authority should be able to access the mediation and dispute resolution services of the “host authority”.

**Section 4: Contributions not recoverable in respect of certain services**

1. The “host” authority is responsible for all costs incurred through providing mediation and/or dispute resolution services.

**Section 5: Arrangements between education authorities**

1. When the “home” authority makes an arrangement for the education of a child or young person with additional support needs to be provided by a “host” authority, the “home” authority retains overall responsibility. However, if the “host” authority is providing education through a successful placing request the “host” authority has responsibility.

**Section 6: References to Tribunal in relation to Co-ordinated Support Plans**

1. Where a parent or young person has requested that the authority establish whether a Co-ordinated Support Plan is required and the
authority does not respond within a specified time, the failure to respond is treated as if the education authority has decided that no Co-ordinated Support Plan is required. Decisions of an education authority that no Co-ordinated Support Plan is required can be referred to the Tribunal.

Section 7: Power to make rules in respect of Tribunal practice and procedure

1. The Convenor of a Tribunal can sit alone to consider references relating to failures of Education Authorities to comply with specified time scales.

I hope that the above comments are useful.

Alan J Blackie
Chief Executive
17 December 2008
SUBMISSION FROM FIFE COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. This written evidence is offered to the Scottish Parliament's Education, Lifelong Learning and Culture Committee on behalf of Fife Council in relation to the above bill.

2. We begin by expressing appreciation for the quality of the consultation carried out by the Scottish Government prior to the introduction of the bill. It was extensive and thorough, it provided a good analysis and report of the responses and there was evidence that thoughtful consideration had been given to responses.

3. We also found both the policy memorandum and the financial memorandum helpful in setting out respectively the principal intentions of the proposed adjustments to the Act, and the estimated costs associated with these. We will respond specifically to the Finance Committee in relation to the financial memorandum as requested.

4. We are broadly sympathetic to the changes proposed within the bill, to strengthen the rights of parents and children with additional support needs in relation to placing requests, re-define the jurisdiction of the ASN Tribunal and rationalise aspects of procedure.

5. That said, we continue to have reservations about the complexity and costs of operating this legislation. As we indicated during the initial formulation of the ASL Act, we would prefer a more inclusive and comprehensive legislative approach that would be simpler to operate and would spend resource on service delivery rather than bureaucracy.

6. We welcome the removal of the proposed amendment to introduce a criminal offence for breaches of a restricted reporting order. We are supportive of all of the other proposed substantive adjustments to the legislation (specifically sections 1, 2, 3, 4, 5, 6 and 7).

7. There are significant cost implications for local authorities associated with section 1 and we will address these in response to the financial memorandum. In particular where an authority is a net importer of placing requests, specific financial provision will require to be made to account for costs of additional support.

8. In addition, we expect the right of parents to make placing requests to independent, fee paying schools will add a progressive burden to the budget for additional support within each authority as parents exercise such rights and as the market responds by developing further provision. Account requires to be taken of such costs in the context of finite and limited budgets within local authorities, to ensure that the disproportionate per capita spend associated with such placements does not disadvantage pupils supported by local school provision within the authority.
9. We note that it is proposed that secondary legislation will set time limits for the new host authority to review the CSP following acceptance of an out of area placing request. We would wish to see such limits correspond to the timescales that apply to the duty of appropriate agencies to respond. As we indicated when the original Act was prepared, if the local authority is to be held to account for achieving a process that depends on the contributions of several agencies, then it must be able to exercise powers in order to successfully fulfill such responsibility.

10. I trust the above will be of value to the Committee in its deliberations.

Bryan Kirkaldy
Senior Manager
18 December 2008

Financial Memorandum

11. This written evidence is provided by Fife Council to the Scottish Parliament in relation to the financial memorandum of the Education (Additional Support for Learning) (Scotland) Bill. It complements the general evidence provided by Fife Council in relation to the Bill. This submission will expand upon points made in relation to costs in that general evidence.

12. These points relate to compliance rather than to administrative costs. We consider the estimate given in the Financial Memorandum (s.40) to be reasonable in relation to administrative costs. However Fife Council would certainly anticipate that compliance costs will arise from the Bill as stated. We believe that the assumptions made in the Financial Memorandum do not account for such compliance costs.

13. There are significant cost implications for local authorities associated with section 1 of the Bill. In particular where an authority is a net importer of placing requests, specific financial provision will require to be made to account for costs of additional support.

14. The pattern of placing requests between local authorities for pupils who have additional support needs is uneven and the per capita costs associated with specialised provision are very high. If the host authority is made financially responsible for making provision, as is proposed, this will distribute the burden of cost inequitably between authorities. Incidentally it will create a perverse incentive to building inclusive authorities. Authorities become inclusive by building local capacity, in particular by taking steps to meet previously unmet need and ensuring parental satisfaction with local provision. Placing requests to provision made by other local authorities, as proposed, will allow a no cost alternative to building such capacity.

15. In addition we would expect that the principal reform proposed in the Bill, to strengthen parents’ rights to make, and pursue appeal of placing requests,
will further stimulate placing requests for independent fee paying schools and
will lead to an increase in the rate of placements in such schools.

16. We would anticipate that this will add a progressive burden to the budget
for additional support within each authority as parents exercise such rights
and as the independent school market responds by developing further
provision.

17. Account requires to be taken of such costs in the context of finite and
limited budgets within local authorities, to ensure that the disproportionate per
capita spend associated with such placements does not disadvantage pupils
supported by local school provision within the authority.

18. We would estimate the cost of this compliance to be £200,000 per annum
for an authority of Fife’s size (50,000 pupils). Such costs may well rise and
should be subject to regular review between ADES, COSLA and Scottish
Government.

Bryan Kirkaldy
Senior Manager
18 December 2008
SUBMISSION FROM MIDLOTHIAN COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. Midlothian Council is generally supportive of the main thrusts of the Bill.

Placing requests

2. The amendments help to clarify the responsibility between the home and the host authority.

3. The shift to make the host authority responsible for all aspects of a placing request is viewed as helpful.

4. Clarity is required on the financial responsibility for placing requests to a specialist provision outwith a local authority. The financial impact of the Bill will not be proportionate on each council. National financial projections are not necessarily an accurate guide for an individual council.

5. It is in the interests of a child that on arrival to the authority a CSP is reviewed by the host authority.

Tribunals

6. Whilst recognising the potential cost savings which may result from appeals regarding placing requests going to Tribunals rather than to a Sheriff Court, the view is that the Tribunals should only consider cases where CSPs are involved.

7. A mechanism that allows Tribunals to review their own decisions could potentially lead to tensions. It is suggested that the review should be undertaken by a freshly constituted tribunal or convenor to ensure impartiality.

8. The existing dispute resolution and mediation processes can work well. It is important that these are not by-passed in favour of immediate appeals to the Tribunal.

Consultation

9. The opportunity to attend the Consultation Event and to submit a written response on the proposed amendments prior to the introduction of the Bill was welcomed.

Further issues

10. Some issues remain and they require to be clarified beyond the content of the Bill. In particular, there is a need to clearly define ‘significant adverse effect’ in relation to additional support needs.
11. There has been considerable development within authorities on the statutory framework of CSPs with a focus on school education and the non-statutory framework of GIRFEC focusing more broadly. There is a need to address issues around integrated working and the smooth joining up of ASfL and GIRFEC.

Pam Grandison
Principal Educational Psychologist
18 December 2008
SUBMISSION FROM PERTH AND KINROSS COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. Perth and Kinross Council’s response in the consultation phase of the Bill indicated general agreement with the proposed amendments, however, we would have welcomed greater opportunity to broaden the scope of amendments as detailed in our response.

Question: How helpful do you find the financial memorandum accompanying the bill?

2. In terms of the Financial Memorandum, we found this helpful in providing an indication of projected costs. However, given that Perth and Kinross Council has had relatively few cases referred to the EAC, Sheriff Court and ASN Tribunal we are unable to comment in more depth. We would comment that the greatest costs for the EA to date are for placements in the independent special sector.

Question: How helpful do you find the policy memorandum accompanying the bill?

3. In terms of the Policy Memorandum, Perth and Kinross Council attended the consultation event and responded to the consultation. We look forward to engaging in future opportunities to consider the Regulations and also the revision of the Code of Practice where we hope our key issues will be addressed e.g. defining ‘significant’.

Question: Do you have any comments on the consultation the Scottish Government carried out prior to the introduction of the bill?

4. We would like to see future consultation affording equitable input to the dialogue, rather than individuals having a disproportionate amount of time to focus on their individual circumstances. Should there be separate opportunities for professionals and parents to contribute to the process?

John Fyffe
Executive Director (Education & Children’s Services)
SUBMISSION FROM WEST DUNBARTONSHIRE COUNCIL

Education (Additional Support for Learning) (Scotland) Bill

1. West Dunbartonshire Council, Educational Services commented on the Bill during the Scottish Government Consultation phase and also made a contribution to the Association of Directors in Education Scotland (ADES) submission.

2. Our submission raised a number of concerns regarding the proposed amendments to the ASL Act and I attach a copy of the original response for the Committee’s information.

3. It is our general view that the Bill seeks to address specific aspects of the original legislation, in response to parental lobbying, without viewing these changes within the overall context of the legislation. When the original Act was out for consultation, there was a significant response from local authorities in particular outlining a range of concerns related to cross-border issues and parental wishes. The original Act did not address these issues and it is certainly our view that the new Bill similarly does not address the overarching questions but simply tinkers with the parental choice aspect and issues related to the Tribunal system.

4. The ruling by Lord McPhail relates to a former pupil of West Dunbartonshire Council and therefore we have first hand knowledge of the background factors which appear to have been instrumental in the Government seeking to amend the existing legislation. If the proposed change to the legislation goes ahead, then there would be a shift in the responsibility for providing education for an individual child from the residential authority to the host authority. As the consultation response from West Dunbartonshire Council indicates this raises considerable concern in relation to cross-border management and co-ordination of support, particularly in relation to Health and Social Work, transition planning and the additional resource burden which could be placed on local authorities for children living outwith their area.

5. Under the current legislation, parents of children with additional support needs can make placing request to mainstream schools outwith their local authority area. This can create practical difficulties in co-ordinating support, and providing additional support. Many local authorities currently struggle to deal with these cross border issues in relation to mainstream schools.

6. In terms of parents of children with additional support needs making placing requests to special schools, there will be additional difficulties. At a very basic resource level, special schools and provision are more expensive to provide per capita and as such these changes will have cost implications for either host or residential authority. Initial reading of the consultation information suggested that where a placing request was successful, the host authority would assume the financial responsibility for providing the special school place for the incoming child. Further clarification from the Scottish Government however suggests that while this placing request aspect of the
2004 Act will change, there would be no change to the Section 23 provision which allows the host authority to recharge the residential authority for a specialist placement.

7. If this is the case, the cost of the specialist placement would be borne by the residential authority even where they have had no part in the placement decision. Currently many local authorities make out of authority placements for children with additional support needs, where it is not possible for that pupil’s needs to be met within their own local authority provision. It is likely that if parents make a placing request to a specialist provision in another local authority area, it will be against the advice of the professionals who support the child within their own local authority area.

8. In such circumstances it will be the view of the residential authority that they are able to discharge their duty to provide effective and efficient education for the child within local resources and therefore would not support a placement outwith the authority area. Should the placing request be successful the residential authority would then be in a position of either paying the cross-border fee for the placement which they consider to be unnecessary, or refusing the request from the host authority to support the placement financially. Both of these scenarios have potential to have a negative impact on budget management and resource planning. Neither scenario appears to serve the needs of children.

9. In relation to the consultation exercise itself, our view was that the questions were poorly framed and in some cases weighted in such a way as to push respondents to make a positive response. For example, question 3 which asks respondents whether they consider that parents of children with additional support needs should have the same rights as parents of children without additional support needs. It is extremely difficult to answer with a negative but the implication of giving parents of children with additional support needs the same rights in respect of placing requests, is complicated by the fact that parents of children with additional support needs already have additional rights granted to them through the existing legislation.

10. With regard to question 1, it is our strong view that referrals to the Tribunal to consider placing requests should only be available where a CSP had been agreed, rather than is under consideration.

11. With regard to the Financial Memorandum which accompanied the Bill, it was difficult to understand or accept the assumptions which have clearly been made in order to come up with the figures presented.

12. There appeared to be an assumption on the part of Scottish Government officials that placing requests to the specialist placements in another authority area, could be equated to placing requests to mainstream schools in out of authority areas. There would appear to be no basis to support this assumption, nor any basis to assume that the likely numbers involved can simply be extrapolated from the existing placing request numbers, with the proportion of children with additional support needs factored in.
13. It is important to note from other aspects of the Financial Memorandum that previous estimates of cost in relation to the initial 2004 Act were grossly inaccurate. In particular, estimates of the number of cases likely to proceed to Tribunal were hugely inflated, in spite of very strong advice from local authority staff to the contrary. As a result the figures contained in the current Financial Memorandum show quite starkly the costs of setting up a Tribunal system in Scotland, based on the flawed English model, which has been used by very few parents. It seems difficult to justify setting up and running costs in the region of £3,460,000 for a system which has only had 141 references over the past 4 years.

14. A more appropriate way forward would be to review the 2004 Act in the round along with placing request legislation.

West Dunbartonshire Council
16 December 2008
Subordinate Legislation

The Edinburgh Napier University Order of Council 2008 (SSI 2008/388)

Background

1. The purpose of this instrument is to amend the governance of Napier University to reflect the change of name to Edinburgh Napier University. This involves amendments to the Napier University (Scotland) Order of Council 1993, and to the Napier College of Commerce and Technology (No. 2) Regulations 1985.

2. The change of name has effect, and the Order comes into force, on 25 January 2009.

3. The Education, Lifelong Learning and Culture Committee is the lead committee for this instrument and should report to the Parliament by 19 January 2009.

4. Copies of the SSI, an explanatory note (which is not part of the Regulations) and the Executive Note are attached.

5. A note on procedure for considering SSIs is attached overleaf. This is a negative instrument.

Subordinate Legislation Committee’s consideration

6. The Subordinate Legislation Committee considered the SSI at its meeting on 9 December 2008, and determined that it did not need to draw the attention of the Parliament to the instrument on any of the grounds set out within Rule 10.3.1.

Action

7. The Committee is invited to CONSIDER whether it wishes to make any recommendation in relation to the instrument. The instrument is not subject to amendment.

Nick Hawthorne
Senior Assistant Clerk
Education, Lifelong Learning and Culture Committee
Procedural Note

Standing Orders

1. The procedures for dealing with Scottish Statutory Instruments (SSIs) are covered by Chapter 10 of Standing Orders. SSIs are laid by being lodged with the chamber clerks, and are published in the Business Bulletin. They are referred to the Subordinate Legislation Committee, the appropriate subject committee (the ‘lead committee’), and, where relevant, any other committee.

SSIs subject to annulment: ‘negative instruments’

2. Where an SSI is subject to annulment, it comes into force on a specified date and then remains in force unless it is annulled by the Parliament. Any MSP may by motion propose to the lead committee that the committee recommends that nothing further is to be done under the instrument. Such motions are lodged with the chamber clerks.

3. The lead committee debates such a motion for no more than 90 minutes.

4. The lead committee reports to the Parliament, setting out its recommendations. If it recommends annulment, the Bureau will propose to the Parliament a motion that nothing further is to be done under the instrument.

5. All the above must take place within 40 days of the instrument being laid, excluding recesses of more than 4 days.

6. To date, no motion to annul SSI 2008/388 has been lodged with the chamber clerks.