



SCOTTISH EXECUTIVE

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Circular 5/2005

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Dear Sir/Madam

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

The purpose of this circular is to provide guidance on certain aspects of the legislative framework associated with the implementation of the Education (Additional Support for Learning) (Scotland) Act 2004 [referred to here as 'the 2004 Act']. In particular, the circular provides advice on:

- the transitional arrangements for those children and young people with a Record of Needs at commencement of the Act on 14 November 2005;
- the effect of the Transitional and Savings Provisions Order 2005¹, which covers appeals relating to Records of Needs which are extant at commencement of the Act, and to placing requests made in respect of recorded children;
- the effect of the Placing Requests and Deemed Decisions Regulations 2005²;
- school handbooks; and
- increased level of funding to education authorities for 2006-08.

Relevant Scottish Statutory Instruments can be found on the website: <http://www.opsi.gov.uk/legislation/scotland/s-200505.htm>. Copies of the Executive Notes that provide more detail about the policy underpinning the Order and Regulations can also be found on this web link. It should be noted that the Additional Support Needs Tribunal Rules will be superseded by a No 2 Instrument.

Reference should also be made to the code of practice which has been distributed widely and which is available on the website: <http://www.scotland.gov.uk/Publications/2005/08/15105817/58187>.

Please ensure that the clerk to the education authority appeal committee is aware of this circular and Schedule 2 of the 2004 Act.

Further advice will follow in respect of the arrangements for dispute resolution by independent adjudication and with regard to completing co-ordinated support plans.

¹ The Education (Additional Support for Learning) (Scotland) Act 2004 (Transitional and Savings Provisions) Order 2005 (SSI 516)

² The Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005 (SSI 515)



Status of guidance

This circular and accompanying annexes are intended to provide education authorities with further advice on the new legislative framework. However, they do not provide an interpretation of the law which is ultimately a matter for the courts. It is for education authorities to take advice from their own legal advisors as to the requirements of the legislation.

Transitional arrangements

Education authorities must, within 2 years of the date of commencement of the 2004 Act, 14 November, 2005, establish whether children and young people for whose school education they are responsible, and who, immediately before the commencement date had a Record of Needs, require a co-ordinated support plan (2004 Act, section 30(3)). Until the responsible education authority reach their decision, the 2004 Act requires the education authority to ensure that the provision being made for the recorded child or young person is no less than the provision which was made for the child or young person immediately prior to the commencement of the Act (2004 Act, section 30(4)). The 2004 Act also provides that a recorded child or young person is to be taken to have additional support needs for the purposes of the Act. These requirements of section 30 of the 2004 Act are explained in more detail in Annex A.

Transitional and Savings Provisions Order 2005

Provision has been made in the Education (Additional Support for Learning) (Scotland) Act 2004 (Transitional and Savings Provisions) Order 2005 to allow Records of Needs appeals and placing requests, in respect of recorded children or young people, made under the 1980 Act before commencement of the 2004 Act, to continue to be considered and determined by the Scottish Ministers, an appeal committee or a sheriff, as appropriate, depending on the nature of the appeal. Time limits apply to references that are made to the appropriate body after commencement. After these time limits, appeals made under the 1980 Act will no longer be competent and the provisions of the 2004 Act will apply instead.

The Order, which also commenced on the 14 November, will change the effect of decisions on Records of Needs and placing request appeals made before commencement or within the transitional period thereafter and will change how these decisions are implemented by education authorities. The effect of the Order is explained in more detail in Annex B.

For ease of reference, Annex C provides information about the purpose and content of parts of the Record of Needs that are most relevant to this circular and to Annexes A and B.

Placing Requests and Deemed Decision Regulations 2005

These Regulations relate to Schedule 2 of the 2004 Act. They make provision for deeming decisions to have been taken by education authorities or appeal committees, established under section 28D of the Education (Scotland) Act 1980, where those bodies have not reached a decision in relation to a placing request reference by the dates, or within the periods, prescribed in these Regulations. A deemed decision enables the person making the placing request to proceed to the next stage of the appeal process under the 2004 Act by making a reference to an appeal committee, or by an appeal to a sheriff.

School handbooks

Under paragraphs 1 and 2 of the Schedule to the Education (School and Placing Information) (Scotland) Amendment, Etc., Regulations 1993³ which amend the 1982 Regulations, schools are required to publish information in school handbooks about the types of special educational needs catered for, the school policy in relation to special educational needs and the numbers of pupils with Records of Needs. From the commencement of the 2004 Act, the term special educational needs will no longer be used and so these Regulations will require to be changed. However, it will not be possible to change them prior to 15 December when school handbooks require to be available. The intention is to bring forward amendments to the Regulations in time for the updated school handbooks in December 2006. In the meantime, schools may wish to consider using an addendum slip or other similar means to indicate in their school handbooks information on their policy and provision for additional support needs.

Funding for 2006-08

As you will be aware from my letter of 20 August 2004, Ministers allocated £8 million in 2004/05 and £9.5 million in 2005/06 to assist local authorities to prepare for implementation of the above Act. Ministers have now agreed to continue implementation funding for the next two financial years at an increased level of £12.5 million per year to local authorities. In line with the increased flexibility of the National Priorities Action Fund, it is for authorities to decide how the additional £3 million funding should be used in the light of local circumstances. It should be noted that the £3 million per annum which was made available to NHS Boards to prepare for implementing the Act over 2004/06 will not continue into 2006/07. Therefore, you are encouraged to consider how the additional funding can be used to promote collaborative working with local NHS Boards and to build on the implementation work carried out by the Boards so far. Further details are provided in Annex D.

Yours sincerely



MIKE GIBSON
Head of Additional Support Needs Division

³ The Education (School and Placing Information) (Scotland) Amendment, Etc., Regulations 1993 (S. 201)

TRANSITIONAL ARRANGEMENTS

This annex is intended to provide education authorities with further advice on transitional arrangements. However, it does not provide an interpretation of the law which is ultimately a matter for the courts. It is for education authorities to take their own legal advice on the effect of the provisions of the Act in particular cases.

Section 30 of the 2004 Act

1. When the 2004 Act commences, education authorities must, within 2 years, establish whether children and young people for whose school education they are responsible, and who, immediately before commencement had a Record of Needs, require a co-ordinated support plan (2004 Act, section 30(3)). Until the responsible education authority reaches their decision, the 2004 Act requires the education authority to ensure that the provision being made for the recorded child or young person is no less than the provision which was made for the child or young person immediately prior to the commencement of the Act (2004 Act, section 30(4)). The provision referred to is the provision that was made under section 62(3) of the 1980 Act for a recorded child or young person, prior to the commencement of the 2004 Act, and includes provision for special educational needs. In effect this means that, within this 2 year period, there will be no reduction in the provision being made for the child or young person who had a Record of Needs, until such time as the education authority establish (2004 Act, section 30(5)) that:

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

2. Under section 30(2) of the 2004 Act all children and young people who, at commencement of the Act, are recorded are deemed to have additional support needs. Consequently, all the provisions of the Act where they refer to children and young people with additional support needs, and their parents, apply. This means, for example, that parents of children and young people with a Record of Needs (and the young person) on commencement of the Act, have a right to request that the education authority provide them with free mediation services and dispute resolution arrangements; also in determining whether these children or young people require a co-ordinated support plan an education authority must have regard to the full requirements of the Act and the code of practice.

Scenario 1: Co-ordinated support plan required

3. Once an authority have established that a plan is required (subject to reference to a Tribunal as described below) then on the date on which requirement is established the duty to establish under section 30(3) will have been met. This will be an appropriate date in terms of section 30, subsections (4) and (5). That is, if the co-ordinated support plan is, at some point in the future, no longer required (subject to reference to a Tribunal) then the provisions of section 30(4) will not be re-applied.

4. Between the date of the decision that a child or young person requires a plan, (whether this is a result of a direction of an Additional Support Needs Tribunal or not), and the date the completed plan is given to the parents or young person, all education authorities must ensure that adequate and efficient provision for such additional support, as is required by the child or young person, is made as required by section 4 of the 2004 Act. Education authorities will need to consider the circumstances of each case but it would generally be good practice to ensure that this provision is no less than that which had been “preserved” under section 30(4) of the Act until the appropriate date, which in this case is assumed to be

the date on which the requirement for a co-ordinated support plan is established (2004 Act, section 30(5)(a)).

5. The decision of an education authority on whether a co-ordinated support plan is required can be referred to an Additional Support Needs Tribunal by a parent or young person. A Tribunal has the power, in circumstances specified in section 18 of the 2004 Act, to either confirm the decision of the authority, or overturn the decision and require the authority to take such action as the Tribunal considers appropriate by such time as the Tribunal may require.

Scenario 2: Co-ordinated support plan not required

6. In circumstances where an education authority establish that the child or young person does not require a co-ordinated support plan, sections 30(4) and 30(5)(b) of the 2004 Act provide that the provision being made for the child or young person must be preserved for a further 2 years from the date that the education authority establish that a co-ordinated support plan is not required. For some recorded children and young people this could require the provision to be made for up to 4 years from the date the 2004 Act is commenced.

7. Parents (or the young person) may refer to a Tribunal the authority's decision that a co-ordinated support plan is not required. Where the Tribunal upholds the authority's decision that a co-ordinated support plan is not required then the authority must continue to ensure that the provision being made is no less than the provision being made immediately prior to commencement. This requirement will continue to apply for a further 2 years from the date that the authority's decision was reached (or unless the child's or young person's additional support needs change significantly). Where the Tribunal does not uphold the authority's decision and a co-ordinated support plan is required, then, from the date of that decision, the duty to preserve the provision made under the Record of Needs ceases and is replaced by the requirements on the education authority under the 2004 Act.

Scenario 3: There is a significant change in the child's or young person's additional support needs

8. In meeting the requirements of section 30, education authorities must also have regard to their duty to make appropriate arrangements to keep under review the additional support needs and the adequacy of the support required to meet a child's or young person's additional support needs. If when doing so, it comes to the attention of the authority that there has been a significant change in the child's or young person's additional support needs, that requires a change in the provision to be made, the effect of section 30(4) and (5) is that the transitional requirement on the education authority under section 30(4), to ensure that the provision being made for the recorded child or young person is no less than the provision which was made for the child immediately prior to the commencement of the Act, is replaced by the other requirements on the education authority under the 2004 Act. This will be the duty on the education authority in section 4(1)(a) to make adequate and efficient provision for such additional support as is required by each child or young person for whose school education they are responsible.

9. Those who work with the child or young person, including their parents, will be best placed to know whether there has been a significant change in the child's or young person's additional support needs. In reaching a decision, education authorities should take account of the parents' (or young person's) views, the views of the child where appropriate, as well as assessment information and reports available. If an education authority conclude that the child's or young person's additional support needs have changed significantly, they should notify the parent or young person about the changes in needs, what the new additional support needs are, if any, and the provision to be made to support them. Parents and young people should also be advised of their right to access the free mediation and dispute resolution services, arranged by the education authority under the 2004 Act, if they do not agree with the changes to be made.

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

10. When a family moves from one authority to another and the first authority have not established whether the previously recorded child or young person requires a co-ordinated support plan, then it would generally be good practice if the first authority provide the parents (or the young person) and the authority to which the child or young person is transferring (if this is known) with a written statement of the provision being made by them immediately before the commencement date (under section 62(3) of the 1980 Act; provision that has been preserved under section 30 of the 2004 Act).

11. The authority into whose area the child or young person transfers are required to maintain this level of provision for 2 years from the date of commencement of the 2004 Act or until they establish (whichever is sooner) whether the child or young person requires a co-ordinated support plan (see paragraphs 3-5 above which apply), does not require a co-ordinated support plan (see paragraphs 6-7 which apply), or whether there is a significant change in the child's or young person's additional support needs (see paragraphs 8-9 which apply).

12. The Education (Additional Support for Learning) (Scotland) Act 2004 (Transitional and Savings Provisions) Order 2005 makes provision for Records of Needs to be preserved, for reference purposes only, for a period of five years from commencement on 14 November 2005 (see paragraphs 15-16 of Annex B).

13. The first authority will have to transfer the Record of Needs, being preserved for reference only, to the authority to which the child or young person is transferring and will have to comply with the relevant provisions in the Education (Record of Needs) (Scotland) Regulations 1982 for transferring Records of Needs. The receiving authority will have to comply with the provisions in those Regulations for the keeping, disclosing, transfer and the destruction of Records of Needs preserved for reference purposes during the five year retention period.

14. Where the child or young person does have a co-ordinated support plan then in accordance with the requirement of the 2004 Act and the Additional Support for Learning (Co-ordinated Support Plan) (Scotland) Amendment Regulations 2005, the plan transfers with them to the new authority, who can, if they wish, review the plan if the provision in the 2004 Act on review apply in the particular circumstances of the child or young person.

15. Paragraphs 6 and 8 of Chapter 4 of the code of practice provide more information about home/host authority responsibilities where a child or young person attends a school in another education authority's area as a result of a placing request.

TRANSITIONAL AND SAVINGS PROVISIONS ORDER 2005

This annex is intended to provide education authorities with advice on the Transitional and Savings Provisions Order 2005. However, it does not provide an interpretation of the law which is ultimately a matter for the courts. It is for education authorities to take their own legal advice on the effect of the provisions of the Act and secondary legislation in particular cases.

Records of Needs appeals

Appeal against an education authority's decision not to open a Record of Needs

1. If, following commencement of the 2004 Act, the Scottish Ministers overturn an education authority's decision made before commencement not to open a Record of Needs for a child or young person then that child or young person will be taken to have been a recorded child immediately prior to commencement. An education authority will not, however, be required in practice to prepare a Record.
2. Such a child or young person will be taken to have additional support needs under section 30(2) of the 2004 Act. An education authority must therefore ensure that adequate and efficient provision is made for the child's or young person's additional support needs, and that the additional support needs and the support provided are kept under consideration. The provisions of section 30, subsections (4) and (5), as outlined in Annex A, will not apply to children and young people for whom a Scottish Ministers' determination after commencement has been that a Record of Needs should be opened. This is because the education authority would not have been making provision as referred to in section 30(4).
3. If the Scottish Ministers uphold the education authority's decision that a Record of Needs is not required then no further action is required by the education authority in respect of a Record of Needs and the child or young person is not recorded for the purposes of the 2004 Act and section 30 in particular. Education authorities will wish to consider whether the child may have additional support needs in terms of section 1 of the 2004 Act.

Appeal against an education authority's decision to open a Record of Needs

4. After commencement on the 14 November, an appeal committee will not refer an appeal made by a parent or young person against an education authority's decision to open a Record of Needs to the Scottish Ministers. Instead, under the terms of the Order, the appeal committee will direct the education authority to discontinue the Record of the child or young person. The child or young person will not be taken to be a recorded child or young person for the purposes of section 30(1)(b) of the 2004 Act. The education authority will wish to consider whether the child may have additional support needs in terms of section 1 of the 2004 Act and what duties may be applicable under the 2004 Act.

Appeal against the terms of a Record of Needs

5. If the Scottish Ministers decide that the terms of the summary of impairments giving rise to special educational needs and/or the statement of special educational needs in a child's or young person's Record require to be amended, that decision will be taken to have amended the Record as at commencement in terms of regulation 6. An education authority will not have to amend the Record, but will be required to keep a copy of the decision with the Record as if it were part of it. The Order also requires an education authority to keep the Record, for reference purposes only, for a period of five years from commencement

on the 14 November i.e. until the 13 November 2010 in terms of regulation 9 of the Education (Record of Needs) Regulations 1982, as amended by regulation 9 of the Order.

6. As the child or young person had a Record of Needs and provision was being made for them under section 62(3) of the 1980 Act, prior to commencement, all the provisions of section 30 of the 2004 Act will apply to them as outlined in Annex A. Consideration will, however, have to be given to the Scottish Ministers' decision on the terms of the Record and the fact that this may indicate that there has been a significant change in the child's or young person's additional support needs affecting the appropriateness of the provision being 'preserved' (see Annex A). As a result, an education authority may wish to review the provision being made as a matter of good practice.

Appeal against the nominated school in the Record of Needs

7. If an appeal committee has received an appeal against the school nominated in a Record of Needs or has received one within 28 days of the decision of the education authority to refuse the placing request or, on good cause being shown after 28 days but, within the 60 days after commencement and considers that it cannot reach a decision without a determination by the Scottish Ministers on the terms of the Record, it will still be able to make a reference to the Scottish Ministers under the Order.

8. The effect of the Scottish Ministers' decision will be the same as that described under *Appeal against the terms of a Record of Needs*. The appeal committee should take account of the Scottish Ministers' determination on the terms of the Record of Needs when concluding their consideration of the nominated school appeal.

9. If the appeal committee refuse to confirm the education authority's decision as to the nominated school then the education authority will have to comply with the appeal committee's decision and place the child or young person accordingly. The school to be attended will be taken to have been the provision, or part of the provision, being made for the child or young person immediately before commencement. This provision will become part of the provision "preserved" under section 30(4) of the 2004 Act.

Records of Needs appeals currently awaiting determination by Scottish Ministers

10. The Scottish Executive will be writing to the parents who currently have Records of Needs appeals awaiting determination by the Scottish Ministers to advise them of the changes that will be brought about by the Order and what it will mean for them. The relevant education authorities and appeal committees will also be notified.

Time limits

11. The 60 day cut off for lodging an appeal applies to the above decisions apart from the Record of Needs appeals currently awaiting determination by the Scottish Ministers. The 60 days does not apply to placing requests made but not decided before commencement either.

Placing requests for children or young people with Record of Needs

12. Education authorities will still have to consider a placing request from the parent of a recorded child if the request is received prior to commencement of the 2004 Act. Similarly, appeal committees will continue to hear any appeals against an education authority's decision to refuse such a placing request. A parent or young person will continue to have the statutory right of appeal to a sheriff, if an appeal committee confirms the education authority's decision, that they would have under the pre-2004 Act legal framework.

13. Where an education authority agrees to a placing request, or an appeal committee or a sheriff refuses to confirm the education authority's decision following an appeal, the school referred to in the placing request will be taken to have been the provision, or part of the provision, being made for the child or young person immediately before commencement. This provision will become part of the provision "preserved" under section 30(4) of the 2004 Act.

14. Where the education authority has not made a decision regarding such a placing request until after commencement, the normal time limits for references to the appeal committee and sheriff will apply as applied before commencement.

Other provision in the Order

15. Provision has been made in the Order to preserve Records of Needs, for reference purposes only, for a period of five years from commencement on 14 November 2005 i.e. until 13 November 2010. Although these Records will be for reference only, they continue to be confidential documents. During this five year retention period, education authorities still have to comply with the relevant provisions in the Education (Record of Needs) (Scotland) Regulations 1982 for keeping, disclosing, transferring and destroying Records of Needs.

16. The relevant parts of the 1982 Regulations are saved for this purpose and the disclosure provisions will be amended from the 14 November to add mediators acting under section 15 of the 2004 Act, the Additional Support Needs Tribunals for Scotland, under section 17 of the Act, and independent adjudicators, appointed by education authorities under arrangements made under section 16 of the Act, to the list of people to whom a copy of a Record can be disclosed.

CONTENTS OF RECORD OF NEEDS (Parts III – VI)

The circular and Annexes A and B refer to Record of Needs in general rather than making reference to the specific parts of them. This annex is intended to provide information about the purpose and content of the parts of Records of Needs that are most relevant to the circular and Annexes A and B.

1. Parts III to VI of the Record should be seen as a series of logical steps leading from one to the other. Part III, which must include both an assessment profile and a summary of impairments, leads to the identification of special educational needs (Part IV) and the relevant aims and objectives of provision and the services to be provided. Those, in turn, suggest the contents of the statement of provision (Part V) and the recommendations for location leading usually to the nominated school (Part VI);

In summary, the different parts are:

- PART IIIA - an assessment profile;
- PART IIIB - a summary of the child's or young persons impairments;
- PART IV - a statement of the special educational needs arising from those impairments;
- PART V - a statement of the measures proposed by the education authority to be taken to meet those needs;
- PART VI - where appropriate the nomination of the school to be attended;

PART III the assessment profile and summary of impairments

2. Part III has 2 separate parts: Part IIIA - the assessment profile and Part IIIB - the summary of impairments giving rise to special educational needs.

PART IV - statement of special educational needs

3. Authorities should aim to refer in Part IV to all special educational needs arising from the impairments described in Part IIIB. Part IV should set out the broad developmental and educational aims for a child or young person under the terms of the Record.

PART V - measures proposed by the education authority to meet the special educational needs of the child or young person

4. Part V of the Record, contains information as to the measures proposed by education authorities to meet the special educational needs of the child or young person concerned. This enables a strategy to be set out for the provision of appropriate education for each recorded child or young person. Part V should, therefore, specify the educational approach which the authority considers necessary to fulfil its statutory obligations

PART VI - nomination of the school to be attended

5. The education authority must state in Part VI the school it considers the child or young person should attend, even if it has already made such a statement in Part IV (where it states the special educational needs of the child or young person concerned). Where appropriate, any special provision which may be needed to make that school suitable for the recorded pupil's education should also be noted in Part VI.

FUNDING ARRANGEMENTS 2006-08

1. Ministers allocated £8 million in 2004/05 and £9.5 million in 2005/06 to assist local authorities to prepare for implementation of the 2004 Act. Ministers have now agreed to continue implementation funding for the next two financial years at an **increased level of £12.5 million per year to local authorities**. However, funding to NHS Boards of £3 million per annum over 2004/06 will not continue into 2006/07.
2. This funding will remain a component of the gross allocation of the National Priorities Action Fund (NPAF) and the increase will be reflected in the Offer of Grant which will be sent out early next year. The flexibility which authorities now have in allocating NPAF funds means that final decisions on levels of funding between the various themes are made locally. While notional theme allocations for 2006-08 are not yet available, these will remain proportionately in line with 2005/06 levels. NPAF colleagues will provide such a breakdown of allocations in their forthcoming Offer of Grant.
3. In line with the increased flexibility of NPAF, it is for authorities to decide how the additional £3 million funding should be used in the light of local circumstances. However, authorities are encouraged to consider how it can be used to promote collaborative working with local NHS Boards and to build on the implementation work carried out by the Boards so far. In preparation for implementation, NHS Boards have worked with education authorities on a wide range of activities. This includes:
 - contributing to multi-agency training programmes to promote awareness of the new legislation;
 - promoting an integrated approach to assessment and service delivery;
 - providing dedicated support to teaching staff;
 - undertaking needs assessments to identify training gaps and programmes for educational staff;
 - contributing health input to in-service days;
 - developing information resources, including criteria for referrals, for parents, young people and professionals;
 - jointly compiling educational plans for children and young people;
 - planning joint health and education initiatives for co-ordination of children's services;
 - developing health and education service level agreements; and
 - developing jointly funded posts through children's services planning.
4. It is hoped that education authorities will be able to continue working closely on these and other initiatives with health colleagues to ensure successful implementation of the 2004 Act.
5. Enquiries about NPAF should be directed to Tom Wallace in New Educational Developments Division (Tel. 0131 244 0945).