

立法會
Legislative Council

LC Paper No. CB(2)431/07-08
(These minutes have been seen by
The English Schools Foundation)

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**Bills Committee on
The English Schools Foundation (Amendment) Bill 2007**

**Minutes of the third meeting
held on Monday, 5 November 2007, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Dr Hon YEUNG Sum, JP (Chairman)
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Dr Hon Fernando CHEUNG Chiu-hung
Hon Albert Jinghan CHENG, JP
- Member absent** : Hon TAM Heung-man
- Attendance by invitation** : Item II
The English Schools Foundation

Prof Felice LIEH MAK
Chairman

Mrs Heather Du Quesnay
Chief Executive

Mr John Barker
Special Educational Needs Adviser

Mr Jonothan Abbott
Barrister and Legislative Drafting Consultant

Mr Duncan Abate
Partner, Johnson Stokes & Master

Clerk in attendance : Miss Odelia LEUNG
Chief Council Secretary (2)6

Staff in attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mr Stanley MA
Senior Council Secretary (2)6

Miss Carmen HO
Legislative Assistant (2)6

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I. Confirmation of minutes
[LC Paper No. CB(2)202/07-08]

The minutes of the meeting held on 8 October 2007 were confirmed.

II. Meeting with The English Schools Foundation
[LC Paper Nos. CB(2)2797/06-07(01), CB(2)182/07-08(01),
CB(2)204/07-08(01) - (02), CB(2)235/07-08(01) - (03), CB(2)255/07-08
and LS10/07-08]

2. The Bills Committee deliberated (index of proceedings at **Annex**).

Objects and powers of English Schools Foundation (ESF)

3. Senior Assistant Legal Adviser 2 (SALA2) briefed members on his note on the proposed Committee Stage amendment (CSA) to the proposed section 4 of the Bill to include "without regard to disability" in the objects of ESF [LC Paper No. LS10/07-08]. He highlighted that in the Hong Kong case of *R v The English Schools Foundation* (HCAL 61/2004), which concerned the judicial review of the decision of ESF to expel a student, Hartmann J stated that ESF was not a private foundation which managed private schools. To the contrary, ESF was a product of statute, namely The English Schools Foundation Ordinance. In terms of section 3 of the Ordinance, ESF was established as a body corporate with perpetual succession, and was able to sue and be sued in its own name. ESF, and the schools which form part of it, were public bodies fulfilling public functions. Based on the case, it was likely that a decision of ESF which related to the implementation of its objects would be reviewable by the court.

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4. SALA2 then referred to the cases quoted in his note to explain target duties. His opinion was that the proposed objects of ESF in so far that they might be interpreted as target duty, unlike other statutory duty, provided a wide measure of tolerance with which ESF might operate. The court would not interfere in how they were to be implemented or achieved as long as ESF was not acting outside the tolerance. Financial and budgetary consideration, where relevant, were matters that the court would take into account if ESF was acting in any way under such objects as to be challenged on the ground of irrationality. However, it was not possible to say whether the proposed CSA to the objects of ESF would by itself attract applications for judicial review that would otherwise not be made. It might be possible that the CSA, if passed, might have some practical implications on ESF in formulating and implementing operational policies, including financial and resource implications.

5. Mr Duncan Abate explained his views on SALA2's advice as detailed in his submission [LC Paper No. CB(2)235/07-08(01)]. He highlighted that while agreeing that a decision of ESF relating to the implementation of its objects would be reviewable by the court, he disagreed with the interpretation of the proposed amendment to the objects of ESF as a target duty. In his view, the cases quoted by SALA2 did not apply to the ESF case. The proposed amendment was not permissive but restrictive. With specific wording, it set out concrete and absolute obligations on ESF that allowed no degree of elasticity in interpretation. The proposed amendment, if passed, would impose a substantial burden on ESF. The proposed amendment was also not necessary as the Disability Discrimination Ordinance (Cap. 487) had already provided protection of internationally accepted standards.

6. In response to Ms Audrey EU, Mr Duncan Abate supplemented that "objectives" and "objects" were different. "Objects" of a body would impose absolute obligations on it. Mr Jonothan Abbott said that the objects, in the context of a body created by statute, set out the basic powers and scope of the authority of the body. The existing section 4(2) set out the broad scope of ESF, whereas section 4(1) stipulated the means of implementing section 4(2). The objects of ESF were not target duties. The words "without regard to race or religion" in existing section 4(2) imposed limitations on the powers of ESF, and any action in breach of the limitations would be ultra vires. Although the existing section 4 of the Ordinance had been re-arranged in the Bill, there was no change of legal effect.

7. SALA2 said that it was a matter of interpretation as to whether the CSA would have the effect of being a target duty or otherwise. It was important to first work out the intent of the proposed section 4 and of the proposed amendment. Provided that it could be agreed, the real issue was to reflect or clarify accordingly that intent in the drafting of the relevant provisions.

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8. Professor LIEH MAK stressed that it would be unfair to impose an obligation upon ESF which was not imposed on any other schools in Hong Kong. There were also practical limitations on ESF to accept students of any kind of special educational needs (SEN) or disability. These included limitations on space, facilities and financial resources. The activity-oriented curriculum was also not suitable for certain kinds of SEN students.

9. Dr Fernando CHEUNG stated that the purpose of his proposed amendment was to lay down in law a mission of ESF to provide education for students with SEN. He had no intention of imposing a statutory duty on ESF beyond its ability or capacity to fulfill.

10. To reflect the intent of the proposed amendment and to allay the concern of ESF about an unbearable burden, Ms Audrey EU suggested that ESF might consider using the word "objectives" instead of "objects" for the proposed section 4(1). Alternatively, it might revise the provision to read "*The objects of the Foundation are (a) to own, manage, administer and operate within Hong Kong or elsewhere schools offering a modern liberal education through the medium of the English language to boys and girls who are able to benefit from such an education, aiming to do so without regard to race, religion or disability.*"

11. Given the clarification of the intent of the proposed amendment, the Chairman requested ESF to consider, in consultation with Dr Fernando CHEUNG and SALA2, if necessary, how this could be reflected in drafting terms.

Composition of the Board of Governors

12. Mr Tommy CHEUNG briefed members on his proposed CSAs to remove Legislative Council (LegCo) representation in the Board of Governors (the Board), and to fill the two vacated seats by adding a representative elected from parents of students with SEN and the Permanent Secretary for Education or his appointed representative. He highlighted that he did not go for the option to designate a seat for a parent representative of SEN students from the proposed six seats for parents to avoid division among parents. Given his proposed removal of LegCo representation in the Board, parents considered it necessary to retain the representation from the Administration.

13. Mrs Heather Du Quesnay said that ESF and parents supported the inclusion of a representative from the Education Bureau in the Board to keep good communication with the Administration. Nevertheless, ESF respected the view of the Administration to refrain from micro-managing individual schools. Parents had expressed strong view against the representation of a specific interest group in the Board. Should members consider it necessary to add a parent representative of SEN students, she would suggest that one of the six seats

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for parents be designated for such representation in order to maintain the balanced composition of the Board; otherwise decisions concerning internal interests might be difficult to be made. Professor LIEH MAK cited two examples concerning reduction of salaries and responsibility for extra-curricular activities to illustrate that parent representatives in the Board tended to side with teachers on matters affecting teachers' interests.

14. Mr Abraham SHEK expressed support for the proposed amendment to add a parent representative of SEN students in the Board. He did not share ESF's concern that parents and teachers would necessarily stand on the same side on different issues. He said that even if they did, their views should be respected. Mr Tommy CHEUNG shared Mr SHEK's view.

15. Dr Fernando CHEUNG expressed support for the CSAs proposed by Mr Tommy CHEUNG. The Chairman said that the Democratic Party supported the CSAs.

16. To further discuss the proposed CSAs to add a representative from the Administration in the Board, the Chairman suggested that the Administration be invited to attend the next meeting to explain its stance on the matter.

III. Any other business

Date of next meeting

17. Members agreed to schedule the next meeting on a Saturday morning.

[Post-meeting note : The next meeting was scheduled for Saturday, 1 December 2007, at 9:30 am.]

18. There being no other business, the meeting ended at 10:32 am.

**Proceedings of the third meeting of Bills Committee on
The English Schools Foundation (Amendment) Bill 2007
on Monday, 5 November 2007, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subjects	Action required
000000 - 000227	Chairman	Welcome to representatives of the English Schools Foundation (ESF).	
000228 - 000341	Chairman	Confirmation of minutes and introduction of the two papers prepared by the LegCo Secretariat.	
000342 - 001119	Chairman SALA2	Briefing by SALA2 on his note entitled "Proposed objects of the English Schools Foundation." [LC Paper No. LS10/07-08].	
001120 - 002351	Chairman Mr Duncan Abate	Briefing by Mr Abate on his response to the SALA2's note [LC Paper No. CB(2)235/07-08(01)].	
002352 - 003739	Chairman Ms Audrey EU Mr Duncan Abate SALA2	<p>Ms EU's expression of disagreement with Mr Abate's view, highlighting differences between "objects" and "duties". Her view that the proposed Committee Stage amendment (CSA) to include "without regard to disability or SEN" in the objects of ESF would not impose extra obligations beyond ESF's ability to fulfill. Ms EU's belief that the court would interpret ESF's objects in a reasonable and sensible manner. Her request for examples to illustrate the claim that the CSA would have substantial financial or resources implications.</p> <p>Mr Abate's explanation of the differences between "objectives" and "objects". His reiteration of view that the CSA would impose an absolute obligation on ESF and put it in a vulnerable position to be challenged in court for failure to provide education for students of any type of SEN.</p> <p>SALA2's explanation of his understanding of Dr Fernando CHEUNG's intention to specify in the objects of ESF its mission to provide education for students with disability, without causing unlimited expenditure. His suggestion that CSAs could be re-drafted to that effect.</p>	

Time marker	Speaker	Subjects	Action required
003740 - 005603	Mr Tommy CHEUNG Chairman SALA2 Mr Jonothan Abbott	<p>Mr CHEUNG's expression of concern about the legal implications of the CSA as advised by Mr Abate, and his request for SALA2 to respond to Mr Abate's views.</p> <p>SALA2's view that based on the present drafting of the proposed section 4, the proposed objects could be interpreted as a target duty which allowed a wide measure of tolerance in ESF's operation. Suggestion was made that the objects of ESF be drafted to put its policy intent beyond doubt.</p> <p>Mr Abbott's explanation of the existing section 4 of the Ordinance and the proposed section 4 of the Bill. His view that the objects, in the context of a body created by statute, set out the basic powers and scope of the authority of the body. The objects of ESF were not target duties. The words "without regard to race or religion" imposed limitations on the powers of ESF and any action in breach of the limitations would be ultra vires.</p>	
005604 - 010649	Ms Emily LAU Chairman Mr Duncan Abate Chairman of The English Schools Foundation	<p>Ms LAU's enquiry about the protection for students with SEN in schools under the existing law, and the CSA.</p> <p>Mr Abate's advice on the protection given under the Disability Discrimination Ordinance (DDO) and the role and functions of the Equal Opportunities Commission (EOC) in the enforcement of DDO. Currently, EOC received more than 1,000 complaints on discrimination-related matters in a year but legal actions taken under DDO were relatively few.</p> <p>ESF Chairman's response that it would be unfair to impose an obligation upon ESF which was not imposed on any other schools in Hong Kong, and her explanation of ESF's limitations in terms of physical space, finance and curriculum to cater for the needs of any type of SEN students.</p> <p>Ms LAU's view that the current legislation did not offer sufficient protection for students with SEN in education.</p>	

Time marker	Speaker	Subjects	Action required
010650 - 011345	Dr Fernando CHEUNG Chairman	<p>Dr CHEUNG's view that the protection for the disabled under DDO was limited, and there was no legislation to require schools to support students with SEN in learning. The Government should require all Direct Subsidy Scheme schools and international schools, in particular those in receipt of government subvention, to admit students with SEN.</p> <p>Dr CHEUNG's clarification that his CSA aimed to lay down in law a mission of ESF to provide education for students with SEN, without the effect of causing unlimited financial burden to ESF.</p>	
011346 - 011522	Mr Abraham SHEK Chairman	Mr SHEK's view that matters relating to the provision of education for students with SEN should be referred to the Panel for follow-up.	
011523 - 012354	Ms Audrey EU Chairman SALA2 Dr Fernando CHEUNG	<p>Ms EU's suggestion that ESF should consider how the proposed section 4 should be drafted to reflect its policy intent and the intent of Dr CHEUNG's CSA.</p> <p>The Chairman's suggestion that ESF should liaise with Dr CHEUNG and SALA2, if necessary, on drafting matters.</p> <p>Dr CHEUNG's clarification on the definition of "disability" and "SEN" in his proposed CSAs.</p>	See para 10 of the minutes
012355 - 014732	Mr Tommy CHEUNG Chairman Mr Abraham SHEK Chief Executive of The English Schools Foundation Chairman of The English Schools Foundation	<p>Mr CHEUNG's briefing on his CSAs to remove LegCo representation and add a representative from parents of students with SEN and a representative from the Education Bureau (EDB) in the Board of Governors (the Board).</p> <p>Mr SHEK's expression of support for Mr CHEUNG's CSAs concerning representation of SEN parents, and his concern about EDB's readiness to participate in the work of the Board.</p> <p>Mr CHEUNG's remark that parents would like to have an EDB representative in the Board as LegCo representation was proposed to be removed.</p> <p>The Chairman's suggestion that EDB should be invited to attend the next meeting of the Bills Committee.</p>	See para 16 of the minutes

Time marker	Speaker	Subjects	Action required
		<p>CE(ESF)'s response that ESF welcomed EDB representation in the Board but respected its views and stance on the matter. Her concern about the addition of a representative from parents of students with SEN on the overall balance of composition of the Board, and ESF's proposal to designate one of the six parent seats in the Board for parents of students with SEN.</p> <p>Mr CHEUNG's view that ESF's proposal would divide parents and that parents and teachers did not necessarily stand on the same side on different issues. Mr SHEK shared the view of Mr CHEUNG.</p> <p>ESF Chairman's response to Mr SHEK's enquiry that both ESF and parents welcomed EDB representation in the Board as it facilitated communication between ESF and EDB. She cited two examples to illustrate that parents tended to side with teachers on matters affecting teachers' interests</p>	
014733 - 015932	<p>Dr Fernando CHEUNG Chairman Mr Tommy CHEUNG Ms Emily LAU Chairman of The English Schools Foundation Mr Abraham SHEK</p>	<p>Dr CHEUNG's expression of support for Mr Tommy CHEUNG's CSAs.</p> <p>The Chairman's indication that the Democratic Party would support Mr Tommy CHEUNG's CSAs, and his appreciation of ESF's contribution to the provision of education for students with SEN.</p> <p>ESF Chairman's response to Ms LAU's enquiry that ESF was confident in securing the support of parents for designating one of the six seats for parents of students with SEN.</p> <p>Mr SHEK and Mr CHEUNG did not consider adding a SEN parent would affect the balanced composition of the Board</p>	
015933 - 020200	<p>Chairman Ms Emily LAU Mr Abraham SHEK Mr Tommy CHEUNG</p>	Date of next meeting	