

14 September 2007

Paper for Legco Bills Committee on the ESF (Amendment) Bill

1. Background

1.1 At its meeting on 29 June, the Bills Committee gave early consideration to three possible Committee Stage Amendments (CSAs). These were :

- to remove Legco members from the composition of the Board of Governors (proposed by Mr Tommy Cheung);
- to include representatives of parents of children with Special Educational Needs within the composition of the Board of Governors (proposed by Mr Tommy Cheung) and the School Councils (proposed by Mr Fernando Cheung);
- to insert within Section 4(1)(a) of the Ordinance, Objects and Powers of Foundation, the words 'without regard to disability or special educational need' (proposed by Mr Fernando Cheung).

1.2 This paper will offer ESF's observations on each of these points in turn.

2. Removal of Legco Members from the Composition of the Board of Governors

2.1 During the extensive consultation process on the revised Ordinance, parents expressed strong support for the inclusion of both Government officers and Legco members within the composition of the Board of Governors because :

- ESF is a public body, making a significant contribution to the local education system;
- the contribution of Legco members to the existing Foundation has been valued;
- there is a significant number (more than 75%) of children from families who are permanent residents, whose educational interests deserve the support of Legco and government.

2.2 If Legco members were to be removed, ESF suggests that one additional School Council Chairman, elected by the Committee of School Council Chairmen, should be added to the Board. This would bring the Board back to its original planned size of 25 voting members (plus the non-voting CEO), as supported by the majority of ESF stakeholders in the Foundation-wide consultation in 2005.

3. Representation of Parents of Children with Special Educational Needs

3.1 It is important to note that the ESF Amendment Bill makes provision for parent members of the Board of Governors and of schools, in a similar way to the Education Ordinance which requires individual schools to engage at least one parent to participate in the Incorporated Management Committee of a school through election among the general parent body. The ESF Amendment Bill takes a similar approach.

- 3.2 ESF took the view that it was inappropriate for the parents of children with Special Educational Needs to have dedicated representation on the Board or School Councils because :
- all parents should be treated equally;
 - separate representation for SEN parents would have a divisive effect on the parents' group;
 - other groups of parents could argue for special representation;
 - there is a stated requirement that Board and School Council members should act on a personal basis and not as the delegate of the group by which they were elected (Ordinance Section 17);
 - such representation would be disproportionate as an SEN parent would take one place out of 7 (14%) on the Board and one out of a maximum of 4 on a School Council (25%) when the proportion of students with Special Educational Needs is approximately 5-10%;
 - it would be administratively very difficult to identify a separate constituency of SEN parents as the needs of children (who may be placed in a mainstream school without designated SEN provision, a mainstream school with a learning support class or the special school) lie along a spectrum and change over time so they do not form a fixed group;
 - this requirement is not in line with the general practice applicable to local schools under the Education Ordinance.
- 3.3 ESF believes that a more appropriate approach would be to :
- formalise the work of the SEN Parents' Advisory Group by making reference to it in the Regulation;
 - encourage School Councils to make use of Section 22 (9) of the Regulation to invite the parents of children with Special Educational Needs regularly to attend School Council meetings.
- 3.4 If, despite ESF's views to the contrary, the Committee were to persist in its wish to give the parents of children with special educational needs dedicated representation on the Board, it would be important to include such representation within the current total of seven parents in order to preserve the balance of the Board's composition with approximately 25% of its places reserved for parents.
4. **Amendment of Section 4(1)(a) of the Ordinance, Objects and Powers of Foundation, to include the words 'irrespective of disability or special educational need'.**
- 4.1 ESF is subject to Hong Kong law and, in particular, to the Disability Discrimination Ordinance and the Education Ordinance. The Disability Discrimination Ordinance (S24 (1)) prohibits an educational establishment from discriminating against a person with a disability, but recognizes that this obligation would impose massive and impractical obligations on schools. It, therefore, sets out an exception where the provision of services "would impose unjustifiable hardship on the educational establishment". The Disability Discrimination Ordinance (DDO) Code of Practice on Education sets

out these provisions with great clarity and at some length (48 pages). ESF believes that the DDO sets out sensitively and in appropriate detail the steps to be taken to secure the education of children with Special Educational Needs : there is no need for a further provision in the ESF Ordinance which may appear to be less well thought through than the DDO. I attach at Annex A a letter from ESF's lawyers, Johnson Stokes and Master, setting out their views on this matter.

4.2 The proposed amendment does not recognise the very wide range of needs that would fall to be met by ESF schools and which would be unmanageable. Such cases are discussed in detail in the DDO Code of Practice on Education. Examples include :

- the needs of children who are non-ambulant and require wheel-chair provision : children in wheel-chairs are welcomed, wherever possible, in ESF schools but half of ESF schools do not have a lift and some schools have several separate, multi-storey blocks with specialist accommodation on the higher floors. Classrooms in many schools are full to capacity with 30 students and lack circulation space to accommodate wheel-chairs and additional adult helpers;
- children with mild sensory impairments such as partial loss of hearing or sight can be well provided for in ESF schools, but we have neither suitably adapted buildings, specialist equipment nor trained staff to educate children with significant sensory impairments;
- children with a severe psychiatric illness or extreme behaviour problems or a personality disorder present an enormous challenge in any educational context. We cannot provide for children with such needs in a mainstream school and to attempt to do so would put at risk the safety as well as the educational progress of both the child concerned and other children in the class.

4.3 Provision for children with Special Educational Needs is considerably more costly than that for children who do not need additional support, and increasing the number of such children without providing additional resources would be highly irresponsible. Illustrative figures are as follows :

- Jockey Club Sarah Roe (Special) School for children with severe learning difficulties costs HK\$18.1m per year, of which HK\$11.1m is covered by government subvention and HK\$3.4m comes from school fees. The deficit of HK\$3.6m is absorbed by ESF. The subvention of primary and secondary students in this school represents 10.5 and 9.3 times that of other ESF students respectively.
- The effective government subvention for each student in primary schools' Learning Support Classes is HK\$71.6k by comparison with HK\$15.5k for mainstream students (3.6 times more). The effective subvention for each student in secondary Learning Support Classes is HK\$120.9k as opposed to HK\$22.2k for mainstream students (4.4 times more).

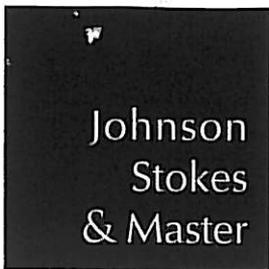
- 4.4 ESF has two main sources of income : Government subvention, which amounted to HK\$264.5m in 2006-07 or 23% of our income; and parents' fees, which raised HK\$864.2m in 2006-07.

It is impossible to estimate the additional numbers of children with Special Educational Needs that the proposed amendment might bring into our system or to guess what their needs might be. However, it is clear that if they were to be provided for properly, the costs would be substantial and would fall either to Government (which the Amendment Bill could not bind) or to an increase in the fees of all parents. An alternative would be to charge the parents of children with Special Educational Needs the full cost of their provision (net of subvention), but given the substantial sums of money involved, that would appear cynical and callous in the extreme.

- 4.5 ESF prides itself on being the leading provider in Hong Kong of education in the medium of English for children with Special Educational Needs. Indeed, ESF has in many ways filled a gap in the Hong Kong education system since the services for children with Special Educational Needs in the aided school sector are basically conducted in Chinese. ESF has, with the support of additional subvention from the Education Bureau and by committing \$1 million of capital expenditure from our own funds, increased our Learning Support Class provision by 20% in the past year. Our teachers and the pressure on our facilities are already close to breaking point. It is unfair and unreasonable that as a result of the proposed CSAs, ESF would effectively be penalised for the commitment and quality of provision we have made voluntarily to this group of students.
- 4.6 An alternative approach, which would avoid the amendment of the 'Objects and Powers' provision would be to revise the section of the Ordinance which sets out the functions of the Board of Governors. ESF would be willing to discuss this approach.

5. **The Way Forward**

- 5.1 The proposed CSAs, particularly that which affects ESF's Objects and Powers, are very far-reaching and do not tally with ESF's strategic role as an autonomous institution.
- 5.2 Such changes would require further consultation within the ESF community, which was closely involved in drawing up the framework for the ESF Amendment Bill. It is likely that the Foundation, which has its Annual General Meeting in December, will want to discuss these issues on that occasion.



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ANNEX A

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10 AUG 2007

BY:.....

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Attn: Heather du Quesnay

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Your Ref:
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Date: 9th August 2007

Dear Madam,

**The English Schools Foundation (Amendment)
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We refer to your earlier correspondence with Duncan Abate concerning the structure of the Amendment Bill.

As requested, we are writing to set out our formal view in relation to a proposal put forward at a Bills Committee meeting held at the end of June to consider the Amendment Ordinance. Such proposal was to introduce an express statutory obligation upon the English Schools Foundation ("the **Foundation**") to exercise its objectives and powers "irrespective of need or disability". This proposed amendment was, we understand, put forward as a result of certain presentations by parents of children with special education needs ("SEN").

1. Obligations of educational establishments under the Disability Discrimination Ordinance ("DDO")

Any school which is registered under the Education Ordinance is bound by section 24 DDO.

Section 24(1) DDO states that it is unlawful for such a school to discriminate against a person with a disability:-

- "(a) by refusing or failing to accept that person's application for admission as a student; or*
- (b) in the terms of conditions on which it is prepared to admit that person as a student."*

Section 24(2) of the DDO states that it is unlawful for any such school to discriminate against a student with a disability:-

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- "(a) by denying that student's access, or limiting that student's access, to any benefit, service or facility provided by the educational establishment;*
- (b) by expelling that student; or*
- (c) by subjecting that student to any other detriment."*

A "person with a disability" is very broadly defined in the DDO. We are confident that any child with SEN will fall within the definition of a person with a disability for the purposes of the DDO.

2. Exceptions to the DDO obligations

The broad obligations set out in section 24(1) and (2) are limited by certain exceptions set out in sections 24(3), (4) and (5).

Section 24(3) permits positive discrimination in favour of disabled persons. As such it is not relevant to your current concern. However, sections 24(4) and (5) are relevant.

Section 24(4) states that the obligations set out in section 24(1) and (2) shall not apply to a school which refuses to accept an individual as a student *"where that person, if admitted as a student by the [school], would require services or facilities that are not required by students who do not have a disability and the provision of which will involve unjustifiable hardship on the [school]"*.

Section 24(5) provides that the restrictions in section 24(1) and (2) shall not apply to a school where that school discriminates against a disabled person:-

- "(a) if that person is not reasonably capable of performing the actions or activities reasonably required by the educational establishment in relation to students at that educational establishment; or*
- (b) if the students who participate in or are to participate in those actions or activities are selected by a method which is reasonable on the basis of their skills and abilities relevant to those actions or activities and relative to each other."*

3. Conclusion

It is quite clear therefore that the issues concerning the obligations of educational establishments in Hong Kong to provide facilities for disabled persons have already been considered in detail by the

Legislative Council and legislation has been put in place in order to deal with such issues.

If the "irrespective of need or disability" wording is inserted into the Amendment Ordinance then this will impose an obligation upon schools administered by the Foundation which is not imposed on any other school in Hong Kong. It would also result in substantial confusion given the existing legislation in the DDO.

Should you have any questions please do not hesitate to contact Duncan Abate on 2843 2203.

Yours faithfully,



Johnson Stokes & Master